

Opinion No. 178.

Taxation—Per Capita County Road Tax—Per Capita City and Town Road Tax—Per Capita Poor Tax—Levy for Per Capita Taxes by County Commissioners—Time for Levy of Poll Taxes—Collection of Poll Taxes—Constitutional Law, Section 4, Article XII, Montana Constitution—Collection of Delinquent Poll Taxes.

HELD: 1. Section 1617, R. C. M., 1935, is contrary to Section 4, Article XII of the Montana Constitution in that the legislature, instead of granting power to the county commissioners to levy a road poll tax, assumed to make such a levy itself and such tax is therefore void.

Section 4465.4 vests discretion in the board of county commissioners to levy a poor per capita tax and hence does

not violate Section 4, Article XII of the Montana Constitution.

Although Section 5219 is unconstitutional in that it violates Section 4, Article XII of the Montana Constitution, Section 5039.48 remains and is valid because it vests discretionary power in the city or town council to levy and collect road poll taxes.

Delinquent poor poll taxes may not be collected when the current tax on automobiles is collected. See *State v. Fischl*, 106 Mont. 282.

Poor poll taxes cannot be collected when application for motor vehicle license is made since they have not at that time been levied by the county commissioners.

After poor poll taxes have been levied they may be collected when the current taxes on the automobile are paid, provided the taxpayer is not assessed with other personal property or real property.

When a taxpayer owns other property, either real or personal, besides a motor vehicle poor poll taxes should be paid when the taxes on the other real and personal property are paid.

December 18, 1939.

State Board of Equalization
The Capitol

Gentlemen:

You have submitted the following:

"As the time for the assessment of motor vehicles approaches we are being bombarded with questions relative to the adding of poll tax (road and poor) to the automobile assessment lists and, in order that we may correctly advise county officials, and to the end that our two departments may be in accord on the subject, we respectfully request your opinion, in the form of answers to questions propounded to us and herewith passed on to you, or such thereof as you deem it necessary to answer:

"1. In view of the declaration of the Supreme Court that a statute which declares that 'every male inhabitant (with certain restrictions) must annually pay a poll tax of * * * \$2.00' (Sec. 2692, Rev. Codes 1907, amended by Chap. 261, Laws of 1921) is a levy of a tax by the legislature and therefore void as in con-

travention of Sec. 4 of Art. XII of the Constitution, are Sections 1663 and 1617, R. C. M., 1935, valid enactments? (See *State v. Gowdy*, 62 Mont. 119.)

"2. If the last cited provisions are unconstitutional, have we any law authorizing a poll tax for road purposes within counties?

"3. If the provisions of the codes respecting county poll taxes for road purposes are unconstitutional, may the cities and towns of the state nevertheless levy such a tax for purposes within their limits, under Sections 5039.48 and 5219?

"4. With the provisions mentioned in the Gowdy case eliminated from the codes (as they are in the 1935 codes) is the provision defining the powers of county commissioners in regard to poor tax (Section 4465.4) sufficiently definite to render a levy of the poll tax mentioned valid?

"5. If the above mentioned sections providing for a poll tax for road purposes (Sections 1663 and 1617) do not constitute the levy of a tax by the legislature, is it not necessary that the county commissioners make the levy for this purpose, as in the case of other tax levies?

"6. If an annual levy is required, to what provision of the codes may we look for the authority of the commissioners to make such levy, and what, if any, discretion has the board of commissioners in the matter?

"7. If, as in other taxes, the levy must be made in August, and discretion is vested in the commissioners as to whether a levy will be made, can such action be anticipated by the county assessor and the tax added to the assessment list on motor vehicles in January?

"8. If, on the other hand, the quoted statutes are not invalid, are they not self executing and is not the tax due at any time, without action of the counties, and consequently, may they not be added to the assessment list on cars in January?

"9. Is it possible that the provision of the motor vehicle registration law, for computing the current year's tax on the basis of last year's levy, may be applied to the poll tax

as well, and thus the poll tax for the preceding year be added to the current list, with privilege of adjustment after the levy has been made in August?

"10. If a motor vehicle owner, who has no other property than his car for assessment, fails to pay his poll tax in one year, may this delinquent tax be added on his current assessment list and collected with his current tax on the car?

"11. In the last mentioned situation, is the method of collection provided in Section 2252.1, R. C. M., exclusive?

"12. In following the method mentioned may the assessor and treasurer, by following Sections 2238 and 2239, collect the delinquent poll taxes by seizure and sale of the automobile at the time of application for its registration?"

These questions relate primarily to the validity of road and poor per capita taxes, also termed road and poor poll taxes. The statutory provision concerning the per capita road tax for county purposes is Section 1617, R. C. M., 1935, reading:

"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 may in their discretion levy and cause to be collected a general tax upon the taxable property in the county of not more than five (5) 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 (\$2.00) per annum on each male person over the age of twenty-one (21) years, and under the age of fifty (50) years, inhabitant within the county, and payable by each person liable therefor at any time within the year. * * *

Section 1663 was repealed by Chapter 35, Laws of 1939.

In *State v. Gowdy*, 62 Mont. 119, 203 Pac. 1115, our Supreme Court considered the validity of Section 2692, R. C. M., 1907, which read:

"Every male inhabitant of this state over 21 and under 60 years of

age except paupers, insane persons and Indians not taxed, must annually pay a poll tax of two dollars (\$2.00). In addition to the foregoing poll tax of two dollars (\$2.00), every such male inhabitant of this state who is not the head of a family, as herein-after defined, must annually pay an additional poll tax of three dollars (\$3.00)."

In determining that this section was in violation of Section 4, Article XII of the Montana Constitution, reading,

"The legislative assembly shall not levy taxes upon the inhabitants or property in any county, city, town, or municipal corporation for county, town, or municipal purposes, but it may by law vest in the corporate authorities thereof powers to assess and collect taxes for such purposes",

the Court speaking by Justice Galen said (p. 129):

"We are of opinion that the object of Section 4 of Article XII of our Constitution was to relegate to the several counties the whole subject of taxes for county purposes, and that thereby the legislature is denied authority to impose any tax on the inhabitants of a county for county purposes. (*San Francisco v. Liverpool & L. & G. Ins. Co.*, 74 Cal. 113, 5 Am. St. Rep. 425, 15 Pac. 380.) In view of what has been said it is not necessary to give consideration to the uniformity requirement of the Constitution. (Sec. 11, Art. XII.) Attempt being made by the Act to levy a per capita tax in fixed amount, to be collected by the several counties for county purposes, we must hold it to be in excess of the legislative power, and therefore void."

Comparing Section 1617 with said Section 2692, held invalid in *State v. Gowdy*, we find that it is afflicted with the same infirmity. The first part of Section 1617 recites that the board of county commissioners "may in their discretion levy and cause to be levied a general tax upon the taxable property." No such discretion was given to the county commissioners in regard to the per capita tax for the words used are, "there is also established a general road tax of \$2.00 per annum on each male person over the age of

twenty-one (21) years, and under the age of fifty (50) years, inhabitant within the county. * * *” It will be noted that the statute does not say that the county commissioners may in their discretion establish such tax or make such levy. No discretion is given to the county commissioners either in making the levy, in fixing the amount of the tax or naming the persons upon whom the levy should be made.

While the word “established” may be used in various ways, as here used it can only mean to create, to originate, to found, to institute, to fix or settle, to enact, set up, ordain. See Words and Phrases, 1st to 5th Editions, and the cases there listed, also Bouvier’s and other law dictionaries. In Webster’s New International Dictionary the word is defined as:

“1. To make stable or firm; to fix immovably or firmly; to settle, confirm.

“2. To appoint or constitute, for permanence, as officers, laws, regulations, etc.; to enact; ordain.

“3. To originate and secure the permanent existence of; to found; to institute; to create and regulate.”

The New Century Dictionary defines the word as:

“To make stable or firm; confirm; strengthen; also to appoint or ordain for permanence, as a law.”

In 21 C. I. 899, Section 7, it is said:

“When used in the governmental exercise of power, the term means to enact or decree by authority; to ordain; to pass; to prescribe, said of laws, regulations, and the like.”

As used here the word “establish” cannot mean to authorize. The legislature could hardly have chosen stronger words to indicate its will and determination to levy and impose a per capita road tax in fixed amount, and, when compared to the words used in the first part of the section where discretion is expressly given, to indicate that the county commissioners should have no discretion whatever either as to making the levy or the amount of the tax or the persons upon whom the levy should be made.

Tracing the history of Section 1617 we find that the levy and collection of

the millage tax, as well as the per capita tax have been compulsory from 1874 (see Eighth Session, Territory of Montana, Laws 1874) until the enactment of Section 1, Chapter 2, Laws of 1933 (long after the Gowdy caes) when the language of the statute was put in the form we now find it.

That the legislature intended the per capita tax to be compulsory is further indicated by the related Sections 1619 and 1629, R. C. M., 1935, providing for the collection of this tax from employees by employers, unconditioned by a levy to be made by the county commissioners. Again it is shown by Section 4465.3, which provides:

“The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law:

“To lay out, maintain, control and manage public highways, ferries and bridges, within the county, and levy such taxes therefor as required by law; * * *.”

The same wording may be traced to Section 4230, Political Code of 1895.

Compare this section to 4465.4 Id., which reads:

“The board of county commissioners has jurisdiction and power under such limitations and restrictions as are prescribed by law:

“To provide for the care and maintenance of the indigent sick, or the otherwise dependent poor of the county; erect and maintain hospitals therefor, or otherwise provide for the same, and to levy the necessary tax therefor per capita, not exceeding two (\$2.00) dollars * * *.”

The language of this section has been the same since 1895. See paragraph 5, Section 4230, Political Code, 1895. This section read the same as now in 1922, when the Supreme Court in *State v. Gowdy*, declared Section 2692, R. C. M., 1907, unconstitutional. The Court apparently did not consider that the authority to levy the poor per capita tax as contained in Section 4465.4 saved Section 2692, which commanded such levy. With Section 2692 out and Section 4465.4 remaining, the practice of some counties in levying a poor per capita tax has not been

challenged, since the authority to make such levy, if the county commissioners so desired and thought necessary, remained after the command to make such levy had been declared void. We think this is the correct view to take with reference to the county per capita poor tax.

The situation is not the same with reference to the county per capita road tax. The enactment in Section 1617, being beyond the power of the legislature since it is an attempt to levy a per capita tax in fixed amount to be collected by the several counties for county purposes, because forbidden by Section 4, Article XII of the Constitution, is void. Section 4465.3 merely authorizes the levy of such tax "as required by law." The requirement of Section 1617 being void, nothing remains upon which the county commissioners may authorize the levy of the per capita road tax for county purposes.

On the authority and for the reasons stated above, which we have based upon the reasoning of the Court in *State v. Gowdy*, we are compelled to say that in our opinion Section 1617, in so far as it relates to the per capita road tax, is contrary to Section 4, Article XII of the Montana Constitution, since it is an attempt by the legislature to make a levy upon certain inhabitants of counties for county purposes and is therefore void. Section 1617, being invalid, no authority is vested in the county commissioners under Section 4465.3 to make such levy. We find no other statute authorizing such levy.

We are of the opinion further that since Section 4465.4 vests discretionary power in the county commissioners to levy a per capita poor tax not exceeding \$2.00 for county purposes, such tax not in excess of such sum, if levied, is valid. We think this section is sufficiently definite. While it does not specify the persons upon whom the poor tax may be levied, since it contains no limitation, a tax upon males within certain ages of earning capacity is within the power granted and is a reasonable classification.

A road poll tax for cities and towns is provided for in the following sections:

"5219. All able-bodied male inhabitants of a city or town, between the ages of twenty-one and forty-

five years, must pay an annual road poll-tax not exceeding three dollars."

"5039.48. The city or town council has power: To levy and collect annually from each able-bodied male resident of the city or town, between the ages of twenty-one and forty-five years, a poll-tax not exceeding three dollars per capita; * * *."

For the reasons stated herein, we think Section 5219 is unconstitutional and void. Like Section 4465.4, relating to the county per capita poor tax, Section 5039.48 places discretionary power in a city or town council to levy such tax. So even though Section 5219 is invalid, Section 5039.48, which is also a later enactment, still stands and a levy by a city or town council would be a valid tax.

The foregoing answers most of the questions submitted by you.

Question No. 10 has been answered by the Supreme Court in *State v. Fischl et al.*, 106 Mont. 282, 77 Pac. (2) 392, where the Court had under consideration the question of the collection of delinquent taxes on motor vehicles by virtue of Chapter 72, Laws of 1937, as a condition precedent to its registration. The Court, speaking by Justice Angstman, said (pp. 384-385):

"These provisions of the Act, taken either singly or collectively and when considered with the provisions of the Act as a whole, do not support the conclusion that the officers are empowered to collect delinquent taxes assessed against an automobile as a condition precedent to its registration and to the issuance of license plates. The only provision commanding the payment of taxes is limited to taxes assessed against the motor vehicle 'for the current year of registration.' * * *

"* * * If the legislature intended by Chapter 72 to accomplish a collection of all delinquent taxes on the vehicle for which registration is applied, it would certainly have so indicated by some definite expression. The language used by the legislature does not indicate any such purpose, but, on the contrary evidences an intention merely to require payment of the current taxes and thus to reduce the number of delinquencies arising from and after the passage of Chapter 72."

Section 2252.1 reads:

"These taxes (poor and road taxes) shall be added upon the assessment lists to other taxes of person liable therefor, paying taxes upon real and personal property and paid to the county treasurer at the time of payment of other taxes. And all personal property assessed against a person shall be liable for the payment of such taxes."

As we have pointed out in the MacCormick opinion (No. 171 in this volume), the per capita poor tax cannot be collected until the levy is made. After the levy is made such tax shall be collected at the time of payment of other taxes as provided by the last above quoted section. If a taxpayer is assessed with no property except a motor vehicle, and Chapter 72, Laws of 1937, requires the payment of current taxes when it is registered, in order to give effect to Section 2252.1, the per capita poor tax, after levy has been made, should be collected at the same time. While such collection is not a condition precedent to obtaining the motor vehicle license, for all practical purposes it amounts to that, if the per capita tax is collected when the current tax is paid. In such a situation Section 2252.1 is applicable even though it was enacted prior to Chapter 72, Laws of 1937. The rule is stated in 59 C. J. 1105, Section 655:

"Statutes framed in general terms ordinarily apply to cases and subjects within their terms subsequently arising. So, it is a general rule of statutory construction that legislative enactments in general and comprehensive terms, prospective in operation, apply alike to all persons, subjects, and business within their general purview and scope coming into existence subsequent to their passage. Where a statute is expressed in general terms and in words of the present tense it will as a general rule be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation, by which it will apply to such as come into existence thereafter."

Since the collection of current taxes on motor vehicles in advance is an exception to the statutory procedure

for collecting taxes, when there is either personal or real property, besides the motor vehicle, the per capita poor tax should be collected when the other taxes are paid and thus full effect can be given to Section 2252.1. In such cases there is no need to collect such tax when the current tax on the motor vehicle is paid and we do not think the legislature so intended.