Depositories—Counties—County Treasurer — Taxes—Insolvent Banks—Banks and Banking.

The County Treasurer is entitled to pro rate the loss of moneys deposited in an insolvent bank, a part of which belongs to the state.

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My dear Mr. Junod:

You have submitted to me the following statement of facts, and request an opinion as to the right of the County Treasurer to make deductions from his remittances of state taxes of the character disclosed in the statement:

> "A County Treasurer having collected taxes, as required by law, deposited the same in banks pursuant to the statute requiring this to be done. Prior to remittance to the state of its taxes one or more of the banks in which said taxes were deposited closed, and the funds on deposit in said closed banks are not available. The County Treasurer in making remittance to the State Treasurer of state taxes collected by him deducted therefrom an amount representing the state's proportion of the taxes on deposit in the closed banks."

It is the duty of the County Treasurer to collect state taxes with the other taxes which he is by law required to collect. Having collected these state taxes, it became the duty of the County Treasurer to pay the same over to the State Treasurer in accordance with the provisions of Section 2255, R. C. M. 1921:

> "The Treasurers of the respective counties must at any time, upon the order of the State Auditor and State Treasurer, settle with the State Auditor, and pay over to the State Treasurer all moneys in their possession belonging to the state, and must, without such order, settle and pay over the moneys on the first Mondays of January and July in each year."

Pending settlement with the state as provided in the statute, supra, the state taxes so collected by the County Treasurer were "public moneys in his possession and under his control," and, as such, he was required to deposit them in banks in accordance with the provisions of Chapter 89 of the Session Laws of the Eighteenth Legislative Assembly of Montana. This the County Treasurer apparently did. The deposit, if made in accordance with the terms of the above act, was legal, and the said act provides that when moneys have been so deposited the County Treasurer shall not be liable for loss on account of any deposit that may occur through damage by the elements, or for any other cause or reason occasioned through means other than his own neglect, fraud or dishonorable conduct. In the absence

of proof that loss resulted from the neglect, fraud or dishonorable conduct of the County Treasurer, he would not be liable for any funds belonging to the state that might be lost through the closing of these banks.

There is no provision in the law making the county liable, primarily or as insurer, for these state taxes. The County Treasurer in the collection and custody of these state taxes is the agent of the state.

> "It is true that the County Treasurer is a county officer, and that his bond is approved by the Board of Supervisors of the county. For some purposes, he is the agent of the county, but as to funds in his hands he is, in the same sense, an agent of any branch of the government whose funds he may have. He is rather the custodian of the funds which he may have officially, and the trustee for the benefit of whatever branch of the government may have funds with him."
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> Territory ex rel. Goodrich v. Bashford, Treas. (Ariz.), 12 Pac. 671.

The relationship of debtor and creditor does not exist between the county and state in the matter of state taxes. In some states, by virtue of statute, this relationship is created, and the county becomes primarily liable to the state for the full amount of the state tax levies. This is true in Oregon, Wyoming, Pennsylvania and possibly some others. Our statutes relating to tax matters plainly negative the existence of such a relation. Under Section 2255, R. C. M. 1921, the only moneys which must be paid to the State Treasurer by the County Treasurers is "all moneys in their possession belonging to the state," and under Section 2257, R. C. M. 1921, the County Clerk must make a report to the State Auditor "showing specifically the amount due the state from each particular source of revenue." These sections plainly indicate that the moneys held by the County Treasurer, as belonging to the state, came to his possession as state moneys, and that they came from various sources of revenue. If the county was the principal debtor, as is true in the states above mentioned, the state would have a debt against the county, payable by the county, instead of specific moneys in the hands of the County Treasurer arising from various sources of revenue.

In the case of Lancaster County v. State (Neb.), 149 N. W. 334, a depository bank failed in which the County Treasurer had on deposit state and other funds. After the failure, the County Treasurer being of the opinion that the state was entitled to all of its moneys, paid the state in full, using $10,348.27 of the county money for that purpose. The county brought suit against the state to recover that amount and prevailed, the Supreme Court of that state holding that: "There is nothing in the statute which makes the county an insurer of such funds."

In the case of Territory ex rel. Goodrich v. Bashford, supra, a County Treasurer defaulted in the sum of $8,481.88, and suit was brought against his successor to compel him to pay to the state the full amount of moneys it had on hand with the County Treasurer, claiming that it was entitled to receive its full amount of funds and that the county should bear all the loss occasioned by the shortage of the former Treasurer. The Supreme Court said:

> "The territory and county have each the right to recover on the official bond of a County Treasurer for money in his hands due either. In this case we have a gross sum in the hands of the present Treasurer. He can be compelled to account for no more than the funds in his possession. The amount so short is due from the late Treasurer. It is manifestly unjust that the whole of his shortage should fall upon either. Equity requires that each should bear its proportion of the loss, and each can enforce its rights against the late Treasurer for the balance due."

The Supreme Court of the State of Montana in the case of State v. McNamer, 62 Mont. 490, had before it the question here involved as applicable to city taxes deposited by the County Treasurer in a bank which subsequently failed. The City of Cut Bank had never provided for the collection of its taxes by the City Treasurer, and hence it became the duty of the County Treasurer to collect them. During the year 1920 the County Treasurer collected for and on behalf of the City of Cut Bank $24,405.20 being taxes levied and assessed by the city for the years 1919 and 1920. Of this amount the County Treasurer accounted to the city for the sum of $14,805.35, leaving a balance of $9,599.85 still in the county treasury belonging to the city. These city taxes were deposited by the County Treasurer, with other taxes, in certain designated depositories, which had qualified under the law relating to the deposit in banks by the County Treasurer of public moneys.

Subsequent to said deposits in said banks, and before the County Treasurer had accounted to said city for the balance belonging to it, to-wit, $9,599.85, one of the depositories suspended operations and became insolvent and passed into the hands of a receiver. There was on deposit in said depository at the time of its closing to the credit of the County Treasurer the sum of $78,332.78, representing 47 per cent of all moneys in his possession on that date and belonging to the various county, state and agency funds, which he, as County Treasurer, was required to handle. The various funds were not kept separate, and the city funds were intermingled with those of the county. The moneys in the defunct bank being unavailable, the County Treasurer charged off, as a loss, 47 per cent of the total amount of each fund as shown by his books to have been in his possession. By this method he determined that there was approximately the sum of $9,599.85 in the defunct depository belonging to the City of Cut Bank.

The amount so charged off was carried by him in an "escrow fund." There was on deposit in the other banks an amount sufficient to pay the City of Cut Bank the balance due it.

The City of Cut Bank demanded of the County Treasurer the balance due it, which demand was refused and the city sought a writ of mandamus to compel him to pay it the said balance. The writ was denied by the District Court, but upon appeal the Supreme Court held that the city was entitled to have the writ issued and so ordered. The opinion in the case serves to show a distinction between the legal status of city funds in the hands of a County Treasurer and state funds in his hands. With reference to the duty of the County Treasurer with regard to city funds collected by him, the Court says:

> "Now, conceding that it is the duty of the County Treasurer under the statute just quoted to deposit all moneys collected by him for the city, it goes without saying that he has not then discharged his full duty toward the city. There remains the further duty to account to the city for the moneys so collected. It is further perfectly apparent from a reading of the statutes that the City Treasurer, and not the County Treasurer, is the proper custodian of the city's funds. * * * Not being the custodian of the city's funds, but simply acting as a collector of city taxes, it is plain that, **as soon as he collects such taxes** it at once becomes incumbent upon the County Treasurer to turn them over to the proper custodian, namely, the City Treasurer. * * * As to moneys collected by the County Treasurer for the city, it is a mere matter of computation to determine the amount collected, **and when this has been ascertained,** it becomes his duty **immediately** to pay the same over to the City Treasurer. No reason has been assigned, nor do we believe there is any, why the County Treasurer should retain possession of such moneys longer than is necessary in the ordinary course of business to determine the amount collected.
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> "If he deposits the city's moneys in the designated depository or depositories, **and before he has had time to ascertain the amount that he has collected** for the city a loss occurs, such as in this case, he would no doubt be protected, but after the necessary time for making such computation elapses, to say that he would be relieved of the duty of paying over to the city such moneys so collected would in a sense be allowing him to take advantage of his own wrongful conduct. He makes the deposit of the city's money for one purpose and one purpose alone, namely, **for safekeeping until he can ascertain the amount he has collected,** and when this is done, he must immediately account therefor to the city.
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> "While the statute makes provision for the collection of city taxes by the County Treasurer, where the city has not provided by ordinance for the collection of the same by its

City Treasurer, **there is no specific provision as to when the money so collected shall be turned over to the city or its City Treasurer.** It is unfortunate that this matter should have been overlooked by the Legislature, but a careful reading of all of the provisions of the statutes dealing with the subject under consideration, leads us irresistibly to the conclusion that it was the intention of the Legislature to require the County Treasurer to account for city taxes collected by him as heretofore indicated."

The opinion then states as a matter of fact that an unreasonable time had elapsed for the performance of the duty to compute the amount of city taxes collected and to account therefor to the city prior to the insolvency of the bank, and therefore, in contemplation of law the city's money was in the county treasury at the time of the demand therefor and should have been paid out of the funds in the treasury.

It will be noted that this case was decided in favor of the city upon the ground that it was the duty of the County Treasurer to pay over to the City Treasurer moneys collected by him for the city, as soon as he was able to ascertain the amount thereof, and that his only authority to deposit the city funds in the bank was for safekeeping until he could ascertain the amount collected. If the bank closed while they were deposited, the city would be on the same footing as any other municipality of which the County Treasurer was the legal custodian of funds and which he had rightfully deposited in the bank,—it would have to bear its loss. But the court found as a matter of fact that the moneys were on deposit a longer time than was necessary for safekeeping until the County Treasurer could ascertain the amount collected for the city, and therefore, no authority existed to have the city's moneys on deposit in the bank at the time it closed to the credit of the County Treasurer.

A different situation is presented in the case of state taxes collected by the County Treasurer. A County Treasurer is only required to settle with the State Auditor and State Treasurer on the first Mondays of January and July of each year, unless ordered to do so by those officers at any other time. (Sec. 2255, R. C. M. 1921, supra.) Until settlement day arrives, the County Treasurer must keep the state's funds in his custody and possession. As such they are "public moneys" and are required to be deposited in banks in accordance with the law. If, before settlement day arrives, the bank should become insolvent, the state as to its funds is on the same footing as the county is as to its funds, and the state cannot require the County Treasurer to pay it in full, thereby making the whole loss fall upon the county.

In the case above cited, decided by our Supreme Court, the County Treasurer deducted from each fund of which he was custodian, as well as from the amount collected for the city, 47 per cent representing the amount on deposit in the defunct bank. The Court said:

"To our minds he had a perfect right to make such distribution as to funds of which he was the custodian," but denied his right to do so with reference to the city's funds, for the reason that he was not the lawful custodian of the said funds, and they should have been paid to the City Treasurer prior to the closing of the bank. In the case of state taxes, the County Treasurer is the lawful custodian of the said taxes until he is required to make settlement with the State Auditor and State Treasurer. Prorating the losses would, therefore, be proper in this case.

Of course, the state is entitled to its proportionate share of any moneys collected from the depository bonds which were no doubt furnished to the County Treasurer. If they are adequate, neither the state nor the county should lose any of their funds by reason of the closing of the bank.

It is, therefore, my opinion that the County Treasurer is justified in prorating between the state, county and other funds, of which he is the custodian, the amount upon deposit in the closed bank or banks, and that it is proper to withhold the state's proportion thereof in settlement with the State Auditor and State Treasurer until such time as it is recovered from the sureties on the bonds given by the bank or banks as a condition precedent to the making of deposits of public funds with said bank or banks.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.