

**Bridges—Highway—Counties—Indebtedness.**

A steel bridge which has been in use for a less period of time than ten years is not county property in the sense that the county has a right to dispose of it, but it is a part of the public highway, and should not be taken into consideration in adjusting indebtedness.

Mark H. Derr, Esq.,  
County Attorney,  
Polson, Montana.

My dear Mr. Derr:

You have submitted to this office for my opinion the question of whether steel bridges which have been constructed and in use for a less period than ten years may be taken into consideration in figuring the assets in adjusting indebtedness on a division of a county.

Your question is answered in the cases of State ex rel. Judith Basin County vs. Poland et al., 61 Mont. 600, and State ex rel. Cascade County v. Poland, 213 Pac. 800. In the Judith Basin County case the supreme court had under consideration the question of whether two incomplete bridges, upon which a considerable sum of money had been expended, should be treated as county property in adjusting indebtedness on a county division. The court, in discussing this question, said:

"It is conceded, as it must be, that a complete bridge used by the public is a part of the public highway (State ex rel. Donlan v. Board, 49 Mont. 517, 143 Pac. 984), and, speaking generally, is not county property and cannot be considered in adjusting the indebtedness between the old county and the new one (State ex rel. Foster v. Ritch, 49 Mont. 155, 140 Pac. 731). We are not intimating an opinion as to the validity of Section 7, Chapter 226, Laws of 1919, as it is not involved in this proceeding." (This is now Section 4398, Revised Codes of 1921.)

It was contended in this case that neither of these incomplete structures was a bridge in the sense that it provides a passageway for travel and that, therefore, the public right had not attached and the two structures should have been considered property in Cascade county. The court, in answer to this, said:

"It is beyond controversy that these incomplete bridges constitute property, but whether they constitute county property within the meaning of the Constitution (Art. XVI, Sec. 3, above) is not to be determined by reference to the popular definition of the term 'bridge,' but by reference to the character of the property itself, and the property takes character from the character of the fund out of which payment is made and from the relation which the county sustains to the fund and the property acquired by its expenditure. Primarily the obligation to build and maintain public highways, including bridges, devolves upon the state, but, in the absence of constitutional restrictions, the state may either discharge the trust directly or impose the duty upon one or more of its agencies (Yocum v. City of Sheridan, 68 Or. 232, 137 Pac.

222), and in this state the duty is imposed upon the counties and municipalities. \* \* \* Whenever property is acquired by the state through the expenditure of funds impressed with a trust for that purpose only, even though the funds are raised by the county, the county acts in its governmental capacity as a trustee for the public and the agency through which the state acquires the property. In their incomplete state these structures merely represent so much of the trust fund as had been expended upon them, and the county could no more divert the incomplete structures from the purpose to which the funds are dedicated than it could divert the funds themselves. It could not sell or otherwise dispose of these structures, but can be compelled, as trustee for the public, to complete them and realize the purpose for which the funds were appropriated by the vote of the people. They are not county property, because the county has not that absolute control and disposition of them essential to ownership as understood at the time the Constitution was adopted. Expressions in conflict with these views will be found in *State ex rel. Furnish v. Mullendore*, 53 Mont. 109, 161 Pac. 949, but the most casual reading of the opinion will disclose that those expressions are obiter dicta, and upon further consideration we are satisfied they are erroneous."

It is, therefore, my opinion that a steel bridge which has been in use for a less period of time than ten years is not county property in the sense that the county has a right to dispose of it, but that it is a part of the public highway and should not be taken into consideration in adjusting indebtedness.

Very truly yours,

WELLINGTON D. RANKIN,  
Attorney General.