Counties—Indebtedness—Taxes—Warrants.

Where a county has reached the constitutional limit of indebtedness, it may, before the taxes levied for the year have been collected, but after the levy therefor has been made, issue warrants for current expenses for said year in anticipation of said taxes.

L. A. Brown, Esq.,
County Attorney,
Poplar, Montana.

My dear Mr. Brown:

You have submitted to me the question of whether a county that has reached its constitutional limit of indebtedness may, before the taxes levied for the year 1923 have been collected but after the levy for said year has been made, issue warrants for current expenses in anticipation of said taxes.

The general if not the universal rule seems to be that taxes levied and collectible in the manner prescribed by law are available for use immediately upon the levy being made, upon the theory that the revenues to arise therefrom have a potential existence and are constructively considered as cash in the treasury; that when a county has reached its limit of indebtedness the issuance of warrants against the taxes so levied does not increase the amount of the existing indebtedness and that the taxes so levied may be taken into consideration in computing the amount of indebtedness owing by the county.

In the case of State ex rel. Rankin v. State Board of Examiners, 59 Mont. 557, the validity of certain treasury notes was questioned upon the ground that the amount authorized to be issued by the law providing for their issuance was in excess of $100,000, being the limit fixed by Section 2 of Article XIII of the Constitution of Montana for which the state could become indebted without an authorization by the people voting at an election at which the matter was submitted to them. The court, in holding the treasury notes valid in its opinion, said:

> "The constitutional limitation has reference to such a liability as singly or in the aggregate will obligate the state to an amount in excess of $100,000 over and above cash on hand and revenues having a potential existence by virtue of existing revenue laws. In the case before us, the funds must be considered in esse for the payment of the treasury notes, provision having been made for their levy and collection. * * * Revenue for which provision is already made may constructively be considered as cash on hand."

The identical question submitted has never been passed upon by our Supreme Court, but I see no reason why the rule should not be applied in the case of a county when it has reached its constitutional limit of indebtedness. It has been applied in such cases by other courts.

In the case of Johnson v. Board of County Commissioners, 7 Okla. 686, 56 Pac. 701, the following Act of Congress applying to counties and other municipalities within the territories of the United States was considered by the Court in a case involving the right of

a county to issue warrants in anticipation of taxes levied but not collected, when such county had reached the limit of indebtedness specified in the act:

> "No political or municipal corporation, county, or other subdivision in any of the territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum of the value of the taxable property within such corporation, county, or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void."

A comparison of this enactment with Section 5, Article XIII of our Constitution and Section 4447, R. C. M. 1921, discloses that they are practically identical. The Court in its opinion in the case said:

> "We are of the opinion that notwithstanding the fact that the indebtedness of the county may have reached the federal limit, warrants issued for meeting the current expenses of the county, and in anticipation of the collection of the taxes already levied, are valid obligations, to the extent of the amount of the taxes so levied and collectible, and the issuance of such warrants does not increase the amount of the existing indebtedness of the county, within the meaning of the federal limitation; and to render such warrants invalid it must affirmatively appear that no taxes had been provided for their payment when the warrants were issued."

The same Act was considered by the Supreme Court of South Dakota, upon a similar question coming before the Court, in the case of Lot Co. v. Lane, 62 N. W. 982, and the Court said:

> "The fact that a municipality is indebted to the full constitutional limit does not prevent the same from levying such taxes as it is authorized to levy by law, and issue its warrants within the limits of such levy in anticipation of their collection; and so long as the warrants issued are within the amounts lawfully levied, they do not create an additional debt. To render such warrants invalid, it must affirmatively appear, therefore, that no tax had been provided for their payment when the warrants were issued."

And the same Court in the case of Shannon v. City of Huron, 69 N. W. 598, involving the same question, said:

> "The summary means provided by law and employed to enforce the collection of taxes renders almost certain the payment of all taxes lawfully levied; and in legal effect and for

> the time being, the sum total so levied for the fiscal year and unappropriated thereto, whether collected or in process of collection, is deducted from the prior indebtedness of the municipality, the aggregate of which has reached the constitutional limitation. In other words notwithstanding the limitation has been reached, warrants may be issued for the authorized current expenses of any fiscal year to the full amount levied for that year, and for that purpose, without incurring any indebtedness beyond such limitation. Again, consider, as we must, the indebtedness by which the limitation was reached as an existing liability at the beginning of the fiscal year 1889, augmented by the sum of all legal warrants drawn upon the city treasury during that year for current expenses; yet so long as such amounts do not in the aggregate exceed the limited sum plus the amount of the levy, no additional indebtedness has been incurred thereby, and the warrants thus drawn are payable in the order of presentment for registration."

The same Court in the case of Lawrence County v. Meade County, 72 N. W. 405, cited the above case as authority for holding that the same rule applied to counties.

Section 183 of the Constitution of North Dakota provides that the debt limit of a county "shall never exceed five per centum of the assessed value of the taxable property therein." In the case of Darling v. Taylor, 7 N. D. 538, 75 N. W. 766, the Supreme Court of that state cited and quoted from the above decisions of the South Dakota court, in its opinion in the case, holding that warrants issued for the current expenses of the county, such as sheriff's fees, after the constitutional limit of indebtedness had been reached, but in anticipation of the collection of the taxes already levied, are valid to the extent of the taxes levied, and that such warrants do not augment the existing indebtedness of the county within the meaning of the constitution.

In the case of Fenton v. Blair, 11 Utah 78, 39 Pac. 485, the Supreme Court of that state said:

> "We agree with counsel for the plaintiff that the allowance of claims against the county equal to the revenue for the current year is not a creation or incurring of any indebtedness or liability. While the taxes for the current year are not collected until the end of the year, they are undoubtedly, after they are levied, regarded as a legal certainty, and are to be treated as if already collected, and allowances may be made aganist such taxes to the extent of such levy."

In the case of State ex rel. Rankin v. State Board of Examiners, supra, the opinion contains numerous citations and quotations from other states holding to the same effect. Many other states have ren-

dered decisions in accordance with those mentioned above, among which are West Virginia, Oregon, Texas, Nebraska, Missouri, Kentucky, Indiana, Iowa, Georgia, Colorado and Alabama.

It is, therefore, my opinion that when a county has reached the constitutional limit of indebtedness it may, before the taxes levied for the year have been collected, but after the levy therefor has been made, issue warrants for current expenses for said year in anticipation of said taxes.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.