

**Counties—New Counties—County Treasurer—Indebtedness
—Indebtedness Commission—Adjustment—Delinquent Taxes—
Insolvent Banks—Deposits—Contracts.**

It is not the duty of the county treasurer to furnish to the adjustment commission an itemized financial statement.

County funds deposited in an insolvent bank should be taken into account in adjusting the indebtedness between old and new counties and should be considered at the value thereof.

Delinquent taxes should be taken into account in adjusting indebtedness between old and new counties and should be considered as of the date when the new county is fully created.

John A. Wilson, Esq.,
Chairman, Indebtedness Commission,
Helena, Montana.

February 4, 1925.

My dear Mr. Wilson:

You have requested my opinion on several questions relating to the adjustment of indebtedness between Fergus and Petroleum counties.

Your first question is:

“Is it the duty of the county treasurer of Fergus county to furnish this commission with an itemized financial statement of the county funds as of November 20th?”

The statute (section 4398, R. C. M., 1921) requires the commissioners to ascertain the indebtedness and the total value of all property of the parent county as of the time when the result of the election was declared, which, I understand, was November 20th, 1924.

The statute does not indicate the manner or means by which this information may be obtained. It is clear, however, that the legislature contemplated that the commission should have free access to all the records of the parent county and the cooperation of its officers in gathering the data from which it should make its findings.

I do not believe, however, that it is the duty of the county treasurer to furnish an itemized financial statement unless he voluntarily consents to do so.

Your second question is as follows:

“Would the fact that funds belonging to the county in closed banks as of that date are carried by the county treasurer on his books as a cash item or cash on hand concern this commission or indicate our disposal of these funds as an asset of Fergus county?”

The statute contemplates that the commission shall ascertain the *value* of all property belonging to the parent county. In my opinion the fact that the county treasurer carries the funds in closed banks as cash on hand does not in any manner affect the duty of the commission to ascertain their value.

Your third question is as follows:

“Would the negligence of the county commissioners or the treasurer of Fergus county in obtaining proper security for county funds affect the report of this commission in any manner?”

The county commissioners of Fergus county at the time of accepting security for the county funds were acting as much for the territory now in Petroleum county as for Fergus county and it is my opinion that any negligence on their part is not a matter for the commission to take into consideration.

Your fourth question is:

“In the event that the county treasurer had on deposit with any one bank funds in excess of the amount of bonds furnished to secure county deposits would this have any bearing upon the disposal of these funds by this commission? In other words, what disposal by us in our report would you recommend for such excess fund?”

The fact that deposits of county funds were made in excess of the security furnished is important only as it affects the value of such assets or credits of the county.

Your attention is called to the case of *Yellowstone County vs. First Trust & Savings Bank*, 46 Mont. 439, where the court held that the county is a preferred creditor to the extent of such excess deposit. In my opinion, you are justified in taking this fact into consideration in arriving at the value of such assets or credits.

You are required under the statute to ascertain the value of the county property, and the value of such a credit must be ascertained by you from whatever information is available, the same as the value of other property is determined.

In the case of *Park County vs. Big Horn County*, 166 Pac. 674, the supreme court of Wyoming held that oral evidence was admissible to show the value of delinquent taxes. I believe the same reasoning is applicable to your question.

What has been said heretofore answers your fifth question.

You have also submitted the following statement and requested my opinion thereon:

"The county commissioners of Fergus county subsequent to the closing of certain banks in which were deposited county funds entered into contracts with the said banks whereby they agreed that in the event of certain periodical re-payments of the sums on deposit by the said banks after being opened no action should be taken by the county through its county commissioners, or otherwise, for the recovery of these funds either against the bank or the bondsmen. Providing that these contracts are illegal or are subsequently determined to be illegal should we take such illegality into consideration in our disposal of these funds?"

In my opinion you are required to assume that such contracts are valid until they have been judicially determined to be invalid.

I believe also that you are justified in assuming that the money will be paid in accordance with the contract until a contrary showing is made.

In the case of *In re Fremont County*, 54 Pac. 1073, the supreme court of Wyoming, in speaking of outstanding taxes, said:

"Prima facie, no doubt, all the taxes shown upon the rolls are valid and collectible, and should, in the absence of any showing to the contrary, be so presumed. The statute seems to contemplate that the value of the credits is the matter to be taken into account. Generally, then, the value of the delinquent taxes, subject to the exceptions above noted, stands as an asset for appropriate consideration in making the ultimate award."

I believe this same rule applies with reference to the funds of a county in a closed bank.

You have also asked:

"Is the treasurer of Fergus county entitled to collect and keep delinquent taxes on property located within Petroleum county, in the event that such delinquent taxes are paid between November 20, 1924, the date of the declaration of the result of the election, and the 23rd day of February, 1925, this being the date when the new county goes into being? If the county treasurer of Fergus county is entitled to collect and keep such delinquent taxes during such period, what disposal of the sum in-

volved in such payments shall this board make in our report? Are we required to take into consideration in our report any taxes which became delinquent after November 20, 1924? If we are required to take into consideration any such taxes, what disposal thereof shall we make in our report?

The first part of your question has been answered by our supreme court in the affirmative in the case of *County of Hill vs. County of Liberty*, 62 Mont. 15, 19, where the court said:

"It is true, as stated by the commissioners, that taxes delinquent at the time the new county is created and organized belong to the new county, and this statement includes all taxes still due and uncollected at the time the new county comes into being, not only for the year immediately prior to its creation, but for all previous years. Yet, since the authorities of the parent county have jurisdiction to discharge their duties until the expiration of the ninety days, any delinquent taxes which may be paid during that time are properly paid to the treasurer of the parent county, and belong to it."

It seems to me that in view of this holding by our supreme court the report of the commission, insofar as delinquent taxes are concerned, must reckon only with such as remains unpaid on February 23rd, 1925, regardless of the time when they become delinquent.

The statement made by the court in the case of *In re Fremont County* (supra) is what I regard as the correct rule. The court there said:

"The extent to which the delinquent taxes are to be computed as assets ought not, perhaps, to be determined by the aggregate amount upon the rolls. The collection of some of them may possibly have been enjoined by a court of competent jurisdiction. Others, especially for former years, may have become absolutely uncollectible by reason of removals of persons and property from the state. In *Forest Co. vs. Langlade Co.*, 91 Wis. 543, 63 N. W. 760, and 65 N. W. 182, the court said, in substance, that it was doubtless the legislative intention that all matters of property, debts, credits, assets, and liabilities of the parent county should be adjusted, upon principles of justice and equity, rather than by any technical rules of strict law. Strict rules of law are difficult of application to such matters, and often produce unfair results. That no relation of debtor or creditor, in any strict sense, existed between the old and new counties, and that what is just and fair is more to be regarded than the application of strict rules of law."

Very truly yours,

L. A. FOOT,

Attorney General.