

**New Counties—Counties—Taxes—Delinquent Taxes—Indebtedness Commission.**

On the creation of a new county by petition and election uncollected but non-delinquent taxes are not to be considered as county property within the meaning of section 3, article XVI of the constitution and section 4398, R. C. M. 1921, but should be adjusted between the counties as provided by section 4400, R. C. M. 1921.

Cash on hand at the date of the declaration of the result of an election on the creation of a new county is county property within the meaning of section 3, article XVI of the constitution and section 4398, R. C. M. 1921, and should be so considered upon the settlement between the counties.

E. K. Matson, Esq.,  
County Attorney,  
Lewistown, Montana.

April 30, 1925.

My dear Mr. Matson:

You have requested the opinion of this office on the two following questions:

1. On the creation of a new county by petition and election, shall uncollected but not delinquent taxes be considered as county property so as to be applied against the indebtedness of either county?

2. In such case shall cash on hand on the date when the result of the election on the creation of the new county was declared be considered as county property and applied on indebtedness?

The answer to these inquiries depends on the interpretation of the following constitutional and statutory provisions.

Section 3, article XVI of our constitution reads:

"In all cases of the establishment of a new county it shall be held to pay its ratable proportion of all then existing liabilities of the county or counties from which it is formed, less the ratable proportion of the value of the county buildings and property of the county or counties from which it is formed; provided, that nothing in this section shall prevent the re-adjustment of county lines between existing counties."

Section 4398, R. C. M. 1921, provides in part as follows:

"Said board of commissioners \* \* \* shall also ascertain the total value of all property at the time belonging to each of said counties from which territory was taken and situated within the limits of said old counties. \* \* \* They shall then find the difference between the amount of the indebtedness of the old county and the value of the property belonging to the old county \* \* \*

"In the determination of the value of county property all buildings and their furniture, real estate, road tools, and machinery, and all steel bridges which may have been constructed and in use for a less period than ten years, shall be taken into consideration by the said commissioners."

The question presented, then, is: Are uncollected taxes "property" within the meaning of the above quoted constitutional and statutory provisions? It is, of course, quite evident that in its ordinary usage the word "property" as defined by our code (section 6663) as "a thing of which there may be ownership," is broad enough to include unpaid taxes due a county. There are, however, other considerations which I believe are of controlling weight in deciding this question. When they wrote section 3 of article XVI, the framers of our constitution did not use the word "property" in the broad sense defined by section 6663. This was definitely decided by our supreme court in the case of *State vs. Poland*, 61 Mont. 600. The court stated its conclusions thus:

"From the creation of the territory to the present day every county has had express authority to sell any property belonging

to it, or in other words, the power to sell has at all times been a controlling consideration in determining whether particular property is county property."

In harmony with the rule stated the court held not only that a bridge on a public highway was not county property but that public record books kept by the officers of Cascade and Fergus counties were not county property for the reason that they are not subject to sale or other disposition and have no marketable value. Applying the above test I see no escape from the conclusion that uncollected taxes are not "county property" within the meaning of the above constitutional provision. Uncollected and non-delinquent taxes cannot be sold at public auction at the courthouse after thirty days public notice, as provided by subdivision 10 of section 4465, R. C. M. 1921, the section referred to in the Poland case, supra. They have no market value and no authority to sell them exists.

Consider now the statutory provisions. The rule of construction of *ejusdem generis* as applied to the last four lines of section 4398 seems to me to indicate no legislative intent to include so intangible a thing as a tax levy in the same class with buildings, furniture, real estate, road machinery and steel bridges. I am strengthened in the opinion that the legislature did not intend non-delinquent taxes to be considered, by section 4400, R. C. M. 1921, which provides as follows:

"After the creation of a new county, as herein provided, its officers shall proceed to complete all proceedings necessary for the assessment or collection of the state and county taxes for the then current year, and all acts and steps theretofore taken by the officers of the old county or counties prior to the creation of the new county shall be deemed and taken as having been performed by the officers of the new county for the benefit of the new county; and upon the creation of the new county it shall be the duty of the officers of the old county or counties to immediately execute and deliver to the board of county commissioners of such new counties copies of all assessments or other proceedings relative to the assessment and collection of the current state and county taxes of property in such new county. Such copies shall be filed with the respective officers of the new county who would have the custody of the same if the proceedings had been originally had in the new county, and such certified copies shall be taken and deemed as originals and original proceedings in the new county, and all proceedings therein recited shall be taken and deemed as original proceedings in the new county, and shall have the same effect as if the proceedings therein stated had been had at the proper time and in the proper manner by the respective officials of the new county; and the officials of the new county are hereby authorized and directed to proceed thenceforth with the assessment and collection of said taxes as if the proceedings originally had in the old county or counties had been originally had in the new county."

Here, then, we have the legislature making a specific provision for the collection and division between the counties of all taxes, both delinquent and non-delinquent, to-wit: that the old county should collect and keep all taxes assessed on property within the old county, and vice versa, and our supreme court in the case of County of Hill vs. County of Liberty, 62 Mont. 16, has held that taxes collected by the old county belong to the old county and taxes collected by the new county belong to the new county. Thus if these taxes were considered as property under section 4398 and each county given credit for its share as provided in section 4400 then the same result would be obtained as if the taxes had never been so considered at all. It is clear then that the legislature did not intend that a tax levy should be considered property in the same class with buildings, furniture, real estate, road machinery and steel bridges.

In regard to your second question, cash on hand at the date specified in your inquiry answers to all the tests of property hereinbefore mentioned. No other provision for the considering of cash in settlement between counties has been provided and it must be considered as property or not considered at all which would be grossly inequitable.

It is, therefore, my opinion that non-delinquent taxes do not belong to that class of property to be taken into consideration upon the settlement between counties, as provided in section 3, article XVI of our constitution and section 4398, R. C. M. 1921, and should be adjusted between the counties solely as provided in section 4400, R. C. M. 1921, but that cash on hand at the date specified in your inquiry does belong to that class of property and should be so considered.

Very truly yours,  
L. A. FOOT,  
Attorney General.