Counties—Indebtedness—Expenditures.

A county may expend more than $10,000 for a single purpose out of cash on hand without submitting the question to a vote of the people.

H. R. Eickemeyer, Esq., May 3, 1926.
County Attorney,
Great Falls, Montana.

My dear Mr. Eickemeyer:

You have requested my opinion whether Cascade county can expend $15,000 for the purpose of purchasing a stock pavilion and the ground for state fair purposes.

I assume from your letter that the $15,000 which you state is now on hand in cash was raised under the provisions of section 4549 R. C. M. 1921. If this is the case, it is my opinion that these moneys can be expended only for the purpose designated in said section, namely, for "securing, equipping and maintaining a county fair, including the purchase of land for such purpose and the erection of such buildings and other appurtenances as may be necessary."

The above section, in my opinion, precludes the use of this money for the purpose of purchasing land for a state fair.

The question as to whether subdivision 5 of article XIII of our state constitution governs an expenditure of this sort is somewhat more difficult of determination. That section prohibits a county from incurring "any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000) without the approval of a majority of the electors thereof."

The question then is whether in determining the amount of indebtedness or liability of a county cash on hand should be taken into consideration. In the case of Jordan vs. Andrus, 27 Mont. 22 the court had this question under consideration insofar as the indebtedness of a city is concerned, but the court found it unnecessary under the facts in that case to decide the question. The court said:

> "It is not now necessary to determine whether the $815.02 cash on hand may be deducted, and we reserve the question."

It did hold, however, that "indebtedness" means what is owing, irrespective of any demands that may be held against others. In this connection the court said:

> "Notwithstanding the many decisions rendered by courts of great learning and high respectability to the contrary, we hold that within the purview of section 6 of article XIII, supra, 'indebtedness' means what the city owes, irrespective of the demands it may hold against others. Similar salutary provisions of organic law have often been frittered away, disregarded or perverted by means of strained and unnatural interpretations. We refuse to follow them. A private person who owes $10,000 and at the same time has assets of the value of $100,000, is indebted to the former amount. His net financial worth is $90,000; but the fact that his bills receivable are greater than his liabilities does not and cannot cancel the debt. So with the city."

In the case of Panchot vs. Leet, 50 Mont. 314 the supreme court used the following language:

> "Whether the obligations to be created by the construction of the high school would or would not be an indebtedness within the meaning of the restriction upon the amount of indebtedness, the fact remains that, if the building is to be constructed, a contract liability must be incurred for that purpose, and, if the funds sought by the levy are to be paid for such construction, there must be an expenditure of more than $40,000 for that purpose."

The inference to be drawn from this opinion is that an indebtedness is incurred when the contract is made, irrespective of whether the funds may be on hand with which to immediately discharge the obligation.

However, in the later case of State ex rel. Rankin vs. Board of Examiners, 59 Mont. 557 the court had before it this same question insofar as it relates to the debts and liabilities of the state, the constitutional provision being found in section 2 of article XIII. It provides in part:

> "No debt or liability shall be created which shall singly, or in the aggregate with any existing debt or liability, exceed the sum of

one hundred thousand dollars ($100,000) * * * unless the law authorizing the same shall have been submitted to the people."

The court in speaking of this provision said:

"In construing our constitutional provision applicable, we have under consideration the meaning of the words 'debt or liability,' and in our view, the prohibition intended by these words is the creation of a debt or obligation of the state in excess of cash on hand and revenue provided for for the years 1921 and 1922 between the regular meetings of the legislative assembly."

It further said:

"In our opinion, the debt or liability intended to be prohibited by section 2 of article XIII of our constitution is such as is in excess of revenues available or provided for for the appropriation years—that is, for the two years intervening between sessions of the legislative assembly; and not current obligations of the state arising during such period of time for which revenues are actually available or provided. The constitutional limitation has reference to such a liability as singly or in the aggregiate 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. The state, in conducting its business by such methods, is in no different position than the merchant doing business on an assured credit basis in anticipation of accounts due being paid to him at stated intervals. Revenue for which provision is already made may constructively be considered as cash on hand. (25 R. C. L. sec. 30.) Clearly, the character of debts prohibited by the constitution in excess of $100,000 without majority approval of the people at a general election are such as pass the limit of available cash on hand and revenue for which adequate provision has been made by law for the two-year period intervening between regular sessions of the legislative assembly."

There is no reason why the terms "indebtedness" and "liability," as used in the latter part of section 5, article XIII, should be given a different meaning than is ascribed to them in other sections of the constitution. The purpose of the several limitations on the amount of indebtedness and liability of a state, county, or other municipal body is to place the state, county, or other municipal government upon the basis of "pay as you go."

Limitations on the amount of indebtedness or liability were never intended to prohibit the expenditure of cash on hand. Had the framers of the constitution so intended, the word "expenditure" would have been used as in section 12, article XII.

The legislature has interpreted the constitutional limitation as a limitation against the borrowing of money, and has provided a method

by which the question of borrowing money in excess of $10.000 may be submitted to a vote of the people. (Secs. 4717 to 4722, R. C. M. 1921; also Sec. 4712, R. C. M. 1921.)

The legislature has made no provision for submitting the question of expending more than $10,000 for a single purpose out of available revenue already on hand.

The supreme court of Oregon has had occasion to discuss a constitutional limitation against incurring debts and liabilities in the case of Bowers vs. Neil, 128 Pac. 433. In that case the court quoted with approval the following language from a former case:

> "There are decisions holding that where, at the time a contract is made by a county, a fund is on hand and appropriated to its payment, or where one has been provided for, although not yet collected, or where an appropriation has been made of anticipated revenues, and the contract is payable out of such fund or revenue, it does not create an indebtedness within the meaning of the constitution."

In support of that statement the following cases are cited:

Law vs. People, 87 Ill. 385;
Koppikus vs. State Capitol Com'rs, 16 Cal. 248;
People vs. Pacheco, 27 Cal. 175;
People vs. May, 9 Colo. 404, 12 Pac. 838;
Swanson vs. City of Ottumwa, 118 Iowa, 161, 91 N. W. 1048, 59 L. R. A. 620;
Beard vs. City of Hopkinsville, 95 Ky. 239, 24 S. W. 872, 23 L. R. A. 402, 44 Am. St. Rep. 222, 237, note.

The supreme court of Colorado in People vs. May, 12 Pac. 838, supra, said:

> "The constitutional provision before us simply prohibits 'indebtedness' beyond a certain sum. It does not limit the amount of taxes the county authorities shall levy to defray county charges for a given year. The members of the constitutional convention were not dealing with the subject of county expenses or expenditures, provided the county 'pays as it goes.' Their purpose was to protect the municipal credit, and to relieve the people of the oppressive burdens that always result from a large corporate indebtedness. If the running expenses are necessarily heavy, or if the people are inclined to extravagance, and indulge in what might be termed municipal luxuries, still the credit remains good, and the evils against which the convention legislated do not exist, provided these expenses, whether necessary or unnecessary, economical or extravagant, are paid when incurred."

The supreme court of Texas discussed this question at length in the case of McNeill vs. City of Waco, 33 S. W. 322, and said:

> "Since the inhibition against the 'creation' or 'incurring' of a 'debt,' without the 'provision,' is universal, it is of vital importance to determine the meaning of the word 'debt,' as used

in the constitution. The word has no fixed, legal significance, as has the word 'contract,' but is used in different statutes and constitutions in senses varying from a very restricted to a very general one. Its meaning, therefore, in any particular statute or constitution, is to be determined by construction, and decisions upon one statute or constitution often tend to confuse rather than aid in ascertaining its significance in another relating to an entirely different subject. These constitutional provisions were intended as restraints upon the power of municipal corporations to contract that class of pecuniary liabilities not to be satisfied out of the current revenues, or other funds within their control lawfully applicable thereto, and which would therefore, at the date of the contract, be an unprovided-for liability, and properly included within the general meaning of the word 'debt.' They have no application, however, to that class of pecuniary obligations in good faith intended to be, and lawfully, payable out of either the current revenues for the year of the contract or any other fund within the immediate control of the corporation. Such obligations being provided for at the time of their creation, so that in the due course of the transactions they are to be satisfied by the provisions made, it would be an unreasonable construction of the constitution to hold them debts, within its meaning, so as to require the levy of a wholly unnecessary tax upon the citizen. * * *

"We conclude that the word 'debt,' as used in the constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation."

It is well settled that a county does not create a debt, within the meaning of constitutional limitations, when payment is to be made out of funds on hand. The general rule is stated in 15 C. J. 578 as follows:

"The county may anticipate the revenue of the current year, and it does not contract a debt within the meaning of constitutional or statutory limitations when payment is to be made from funds on hand or from the taxes or other revenues of the current year."

It is, therefore, my opinion that the constitutional limitation against incurring indebtedness or liability, found in the latter part of section 5, article XIII of our constitution, does not prohibit an expenditure of money on hand in excess of $10,000 without the approval of a majority of the electors.

Very truly yours,

L. A. FOOT,
Attorney General.