

Opinion No. 96

County Commissioners — Powers — Indebtedness — Constitutional Law — Bridge Fund—Contracts Payable from Cash on Hand.

HELD: County Commissioners have the power to let a contract for the construction of a bridge to be paid out of cash on hand in the bridge fund, the construction of which will exceed \$10,000, without submitting the question to a vote of the people and without violating Section 5, Article XIII of the Constitution.

March 2, 1933.

You have submitted for my opinion the question whether the county commissioners of Cascade County have the power to let a contract for the construction of a bridge in Cascade County, to be paid out of cash on hand in the bridge fund, the cost of which will exceed \$10,000, without first submitting the question to a vote of the people and, if they do so, whether it would be in violation of Section 5, Article XIII of the Constitution, which reads:

"No county shall incur any indebtedness or liability for any single purpose to an amount exceeding \$10,000 without the approval of a majority of the electors thereof, voting at an election to be provided by law."

I am advised that on January 31, 1933, the cash in the bridge fund

amounted to \$18,786.42; that the warrants outstanding amounted to \$187.37, leaving a net amount in the bridge fund on that date of \$18,599.05; that the lowest bid for such contract was \$13,659.80, while the highest bid was \$17,194.80. I am further advised that the expenditures are not planned to reduce the cash balance in the said bridge fund, by June 1, 1933, and thereafter additional moneys will be credited to the fund from the second half of taxes collected.

Granting that the expenditure will be for a single purpose, the question arises whether it will be incurring an "indebtedness or liability" within the meaning of the Constitution when the money to be expended for this purpose is from cash on hand and from a fund already provided and known as a bridge fund. In a recent case, *State v. Board of Trustees et al.*, 91 Mont. 300, 7 Pac. (2nd) 543, our Supreme Court had before it a similar question, to-wit: Whether the county commissioners of Missoula County were empowered to expend for the erection of county high school buildings, the sum of \$248,743 in the hands of the county treasurer, without a vote of the people. This money was fire insurance money paid to the county treasurer as a result of the destruction of the county high by fire. The court held that no vote of the people was necessary and that the constitutional provision above referred to did not apply to expenditure of cash on hand raised for a definite purpose in excess of \$10,000. I quote from page 307, as follows:

"It seems plain that the constitutional limitation does not apply to the expenditure of cash on hand provided for a specific purpose; but rather to the creation of an obligation to be met and paid in the future by the taxpayers. (*Falls City Const. Co. v. Fiscal Court*, 160 Ky. 625, 170 S. W. 26; *Boettcher v. McDowall*, 43 N. D. 178, 174 N. W. 759.)

"In our opinion, a liability such as is here contemplated, payable solely from money in the treasury to the credit of a special fund which cannot be used for any other purpose than the construction of a high school building and equipment therefor, is not incurring an indebtedness or a

liability of the county within the meaning of this constitutional restriction. Limitations of the amount of a debt or liability of a county were never intended to prohibit the expenditure of cash on hand usable only for a designated purpose already approved by the people. Had the framers of the Constitution so intended, the word 'expenditure' would have been used as in Section 12 of Article XII. The county does not create a debt or liability within the meaning of this constitutional limit where the payment is to be made from funds already provided. (15 C. J., p. 578). It was the manifest intention of the framers of our Constitution that the people shall not be burdened by taxation with the payment of an indebtedness or obligation to be created over and above funds already provided without first being by them approved."

It will be observed from a reading of the above and the rest of the opinion that the court based its decision largely on the fact that the money to be expended was from cash on hand.

A similar question was before the Supreme Court in the case of *State ex. rel. Rankin v. State Board of Examiners*, 59 Mont. 557, 197 Pac. 988, where the construction of the words "debts and liabilities" as used in Section 2, Article XIII, was under consideration and where it was held that 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. The court said on page 566:

"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."

And again on page 568:

"The constitutional limitation has reference to such a liability as singly or in 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. 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."

The latter case was cited and the language of the court above quoted was quoted with approval in the case of *State v. Board of Trustees*, supra, the court adding the following on page 306:

"And there is no good reason why a different meaning should be placed upon the words 'indebtedness' or 'liability' as employed in Section 5 of Article XIII, placing limitations upon the creation of debts or obligations by the several counties of the state. No provision of law has been made for submitting to the electors the question of the **expenditure of cash on hand**, raised for a definite purpose, in excess of \$10,000; and by the lawmakers this constitutional restriction has been interpreted as a restriction upon the borrowing of money, as by statute a method is provided for the manner of submitting to the people the question of borrowing money in excess of \$10,000. (Secs. 4717 to 4722; also, Sec. 4712, Rev. Codes 1921.)"

In Section 4712, R. C. M. 1921, the legislature as stated in the above quotation from our court, provided for the submission to the people the question of borrowing money exceeding \$10,000. There is no provision for submitting to the vote of the people the question of expending money from cash on hand in excess of \$10,000. A similar question was considered by this office in an

opinion rendered to H. R. Eickemeyer, found in Volume 11, Opinions of the Attorney General, page 290. I am inclined to agree with this opinion where a number of authorities are cited and quoted. Since that opinion was given our Supreme Court has rendered its decision in the case of State v. Board of Trustees, *supra*. On the strength of the decisions of our Supreme Court above referred to, as well as other authorities, I am of the opinion that it is not necessary to submit this question to a vote of the people.

This being my opinion, it is not necessary to consider the further question as to whether it would make any difference if the bids on the bridge are let in several different units provided no unit exceeded the sum of \$10,000. In my opinion, however, that would not make any difference. *Hoffman v. Board of County Commissioners of Gallatin County*, 18 Mont. 224, 44 Pac. 973; *Hefferlin v. Chambers*, 16 Mont. 349, 40 Pac. 787; *Turner v. Patch*, 64 Mont. 565; *Jenkins v. Newman, et al.*, 39 Mont. 77, 101 Pac. 625; 15 C. J. 578, Section 280.