

other things, provides that in fixing the budget, the board of county commissioners shall not include any amount because of anticipated tax delinquency. Or, in other words, the levy may not be increased to cover the anticipated loss which will result from uncollected taxes. You state that no county can anticipate 100% payment of taxes; that the annual average tax delinquency in the several counties of the state runs from 2.08% in Mineral County to 56.58% in Sheridan County. You add:

"If the county must determine the levy 'for each fund' at 'no more' than enough to raise the exact amount required for that fund when the 'taxable value' of the county is multiplied by such fixed levy, no county will be able to meet its bond interest charges, fixed salaries or other fixed expenses in any one year.

"For example, a county whose taxes are regularly at least 25% delinquent (and there are many such) must provide an interest 'fund' on a bond issue of \$100,000, at 4%; under the above mentioned Act, the board must fix a rate of levy which would, for this purpose, produce \$4,000, based upon the 'taxable valuation' of the county 'without including any amount for anticipated tax delinquency'; the result will be the receipt of but \$3,000 from taxes for this fund and the county will be in default in payment of interest.

"The same applies to salaries earned and other fixed charges; there will be no possibility of the county meeting its contract obligations."

You have requested my opinion on the following:

"1. How can the several counties of the state meet their obligations by taxation, or otherwise, if they follow the requirements of Chapter 98?

"2. Is said provision of Chapter 98 constitutional?"

Chapter 98 of the Laws of 1937 directs the county commissioners to determine the amount of expenditures from each fund for the ensuing year. This must not exceed by more than 10 per cent the outlay from this fund for the preceding year, except for the elec-

Opinion No. 69.

Taxation—County Budget—Tax Levy —Anticipated Tax Delinquency— Constitutional Law.

HELD: That provision of Chapter 98, Laws 1937, which prevents the county commissioners in fixing the tax levy to include in the annual budget any amount for anticipated tax delinquency is unconstitutional in that it impairs the bond obligations contracted prior thereto and also violates Section 8 of Article XII of the Montana Constitution in that it prevents the levy of taxes for the payment of the obligations of the county.

May 19, 1939.

State Board of Equalization
The Capitol

Gentlemen:

You have called attention to Chapter 98, Laws of 1937, which, among

tion expenses, emergency warrants and capital outlay. The board of county commissioners is then directed to determine the amount of money unexpended in this fund for the preceding year and add to that sum the amount of anticipated revenue, exclusive of funds derived from taxation. This total is then deducted from the amount of the anticipated expenditures, and no more taxes can be levied, than an amount sufficient to raise the total sum necessary according to the formula above set forth.

It is apparent that the amount raised by taxation available for expenditure in each fund, will be less than the amount authorized to be expended by the budget by whatever amount the delinquency in taxes may be. Emergency warrants are not within the prohibitions of the Act, but they are defined as warrants issued for expenditures which could not reasonably have been foreseen at the time of the making of the budget. Such warrants may be issued only by the unanimous vote of the board of county commissioners. (Section 4613.6.) Hence, to the extent of the delinquency in the payment of taxes, warrants issued within the amounts authorized by the budget will have no funds available to pay them.

I find no provision in the law for the levying of taxes to pay these warrants which will be unpaid as a result of the delinquency in the payment of taxes. They cannot be paid until such a time as the delinquent taxes are collected, and if never collected these warrants will not be paid until such time as the Legislature provides a method for securing funds with which to pay them.

All of the counties in the state have bonded indebtedness. It is necessary each year to levy taxes to pay at least the interest on this bonded indebtedness; also to raise funds with which to pay the principal of the bonds outstanding. These bonds were sold in most, if not all, instances, prior to the enactment of Chapter 98, Laws of 1937. Thus, as you have pointed out, when a county levies a sufficient tax only to pay the interest on its bonded indebtedness, without taking into account anticipated delinquencies, a sum insufficient to pay the interest and the principal will be realized and accordingly the county will be unable to pay

the full amount of its interest and principal on its bonded indebtedness. At the time these bonds were sold, prior to the enactment of the law in question, the existing law then provided for the levy and collection of the tax and county commissioners were free to anticipate delinquency in tax collections and could levy an amount sufficient to collect the sum necessary to pay the interest and principal on the bonds. It is uniformly held that any law which interferes with the power to tax, existing at the time the obligations were incurred, in order to meet the obligations of a contract of a municipal corporation or a political subdivision of the state, is void as impairing the obligation of such contract and within the provisions of the federal and state constitutions prohibiting such impairment by the act of the state legislature.

We quote the principles gathered from the decided cases as stated in 12 Am. Juris. 50, Sec. 418:

"In accord with the general rule that existing laws become an integral part of the obligation of a contract, the laws relating to the rights of enforcement existing at the time of the issuance of municipal bonds under the authority of which they are issued enter into and become a part of the contract in such a way that the obligation of the contract cannot thereafter be in any way impaired or its fulfillment hampered or obstructed by a change in the law. As a result, when a contract is made with a municipal corporation on the faith that taxes will be levied, legislation repealing or modifying the taxing power of the corporation, so as to deprive the holder of the contract of all adequate and efficacious remedy, is within the constitutional inhibition as to the impairment of the obligation of contracts. Therefore, the remedies for the enforcement of such obligations assumed by a municipal corporation, which existed when the contract was made, must be left unimpaired by the legislature; or if they are changed, a substantial equivalent must be provided. Likewise, where the resources for the payment of the bonds of a municipal corporation is the power of taxation existing when the bonds were issued, any law which with-

draws or limits the taxing power and leaves no adequate means for the payment of the bonds is forbidden by the Constitution of the United States and is null and void. This rule is applicable regardless of whether the legislative action is taken by the municipality or by state legislation which repeals or limits the statute authorizing the municipality to levy taxes. The creditor of the municipality does not always have a right to have the taxes collected in the same manner as they were always collected, but he does have the right under his contract to have taxes collected in as prompt and efficacious a manner as provided at the time the contract was executed. Thus, any act which attempts to put off or retard the enforcement of a municipality's obligations by postponing the power of the city to levy taxes impairs the obligation of contract."

In *Herbert v. New Orleans*, 215 U. S. 170, 174, the United States Supreme Court said:

"A number of decisions in this court have settled the law to be that where a municipal corporation is authorized to contract and to exercise the power of local taxation to meet its contractual engagements this power must continue until the contracts are satisfied and it is an impairment of an obligation of the contract to destroy or lessen the means by which it can be enforced."

Likewise, in *State ex rel. Judd v. Cooney, et al.*, 97 Mont. 75, 80, 32 Pac. (2) 851, the Montana Supreme Court said:

"The state, through the board of examiners, in good faith offered for sale valid bonds pursuant to the Initiative Measure, and the purchasers bought them in good faith. It was beyond the power of the legislative assembly to change the law to the injury of the purchasers. So far as Section 11 of Chapter 158 may be said to conflict with the Initiative Measure, it is without effect."

And again in *State ex rel. Malott et al. v. Board of County Commissioners*, 89 Mont. 37, 59, 296 Pac. 1, said:

"In the brief of counsel for the relators it is said: 'A law in force when the bonds were issued became a part of the contract with the bondholders, the same as though incorporated in the bonds.' That this is a correct statement of the law may not be denied."

For other cases see:

State ex rel. Tipton v. Erickson, 93 Mont. 466, 19 Pac. (2) 227;

Nelson v. St. Martin's Parish, 111 U. S. 716, 28 L. Ed. 574, 4 Sup. Ct. Rep. 648;

Port of Mobile v. Watson, 116 U. S. 289, 29 L. Ed. 620, 6 Sup. Ct. Rep. 398;

Von Hoffman v. Quincy, 4 Wall. 535, 18 L. Ed. 403;

Re Assessment First National Bank, 58 Okla. 508, 160 Pac. 569;

Columbia County v. King, 13 Fla. 451;

Forsdick v. Board, 76 Miss. 859, 26 So. 637;

Smith v. Board of Road Commissioners, 182 N. C. 153, 108 S. E. 445; 12 C. J. 1013;

Note L. R. A. 1918 B. 887.

A law which makes it possible for a county to evade full payment of interest on its bonded indebtedness is an unconstitutional impairment of the obligation of its contract (*Freemont Railway Company v. Pennington County*, 20 S. D. 270, 105 N. W. 929), and it has been held that even changing the law to the extent that the bondholders must wait three months for the interest, after the interest-paying date, is an unconstitutional impairment of the obligation of the contract. (*Gibbons v. Hood River Irrigation District*, 66 Ore. 208, 133 Pac. 772.)

As to other expenditures such as the payment of the ordinary and necessary expenses of county government, certain of the warrants issued will not be paid as a result of the delinquency in the payment of taxes. Section 8 of Article XII of our State Constitution provides:

"Private property shall not be taken or sold for the corporate debts of public corporations, but the legislative assembly may provide by law

for the funding thereof, and shall provide by law for the payment thereof, including all funded debts and obligations, by assessment and taxation of all private property not exempt from taxation within the limits of the territory over which such corporations respectively have authority." (Emphasis ours.)

It is true that the Supreme Court, in a case dealing with funding of warrants, has said that this section is addressed to the legislature and that no power, other than the power of public opinion, can coerce it. (*Edwards v. Lewis and Clark County*, 53 Mont. 359, 165 Pac. 297.) While it may be true that the legislature may not be coerced into activity and be compelled to provide for the funding of outstanding warrants, that is all the more reason why the legislature cannot disobey the express command of the Constitution by enacting a law prohibiting the county commissioners from the levying of taxes to pay the anticipated ordinary and necessary obligations of the county. In so doing, it is not a case of sanctioned inaction, but one of action forbidden by the Constitution, which declares that the legislature "shall" provide by law for the payment of the obligation of a county by assessment and taxation of public property. Chapter 98 of the Laws of 1937, instead of providing for the payment of these obligations, as commanded by the Constitution, prohibits the assessment and taxation of private property to pay them. Instead of the legislature complying with the mandate of the Constitution, it has enacted a law which violates the letter and the spirit of the constitutional provision. A law which so clearly violates the mandate of the Constitution must be and is unconstitutional and void.

Therefore, Chapter 98 of the Laws of 1937 is unconstitutional, invalid and void in so far as it prohibits the boards of county commissioners in fixing county budgets to take into consideration and add to the budget the amount of reasonably anticipated delinquencies which will arise in the collection of taxes and adding such amount to the budget and levying a tax to raise this amount of money.

Naturally, we hesitate in declaring law unconstitutional, but there appears to be no alternative when, as here,

the law prevents the county from paying the obligations which the Constitution directs to be paid. These obligations, bond issues and the necessary and ordinary current obligations of the county, must be paid if a county is to function. Deferring payment by deferring the necessary tax levy only increases the tax burden; there is no economy in paying interest. Ultimately they must be paid or county government will not continue. Since the provision of the Act referred to violates the fundamental law of the state and nation, it must fall.