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COUNTY FUNDS: Transfer under Sec. 7891, R.S. Mo. 1929 permissible if County Court has control over same; if not, transfer cannot be made.

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May 29, 1934.



Hon. Ralph W. Haselwood,
Clerk of County Court,
Edina, Missouri.

Dear Sir:

This department acknowledges receipt of your letter requesting an opinion on the following question:

"May the County Court transfer a balance derived from a levy under Sec. 7891, R.S. 1929 to another fund which is no longer needed for the purposes for which it was raised (Sec. 12167 & 12168, R.S. 1929)?"

The Section referred to in your letter, namely, Sec. 7891, R.S. Mo. 1929, is as follows:

"In addition to the levy authorized by the preceding section, the county courts of the counties of this state, other than those under township organization, in their discretion may levy and collect a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purposes whatever, and the same shall be known and designated as 'the special road and bridge fund' of the county: Provided, however, that all that part or portion of said tax which shall arise from and be collected and paid upon any property lying and being within any road district shall be paid into the county treasury and placed to the credit of the special road district, or other road district, from which it arose, and shall be paid out to the respective road districts upon warrants of the county court, in favor of the commissioners, treasurer or overseer of the district, as the case may be:

provided, further, that the part of said special road and bridge tax arising from and paid upon property not situated in any road district, special or otherwise, shall be placed to the credit of the 'county road and bridge fund' and be used in the construction and maintenance of roads, and may, in the discretion of the county court, be used in improving or repairing any street in any incorporated city or village in the county, if said street shall form a part of a continuous highway of said county leading through such city or village; but no part of said fund shall be used to pay the damages incident to, or costs of, establishing any road: Provided further, that no warrant shall be drawn in favor of any road overseer until an account for work done or materials furnished shall have been presented and audited by the county court."

The question arises as to whether or not any balance under the above section can be transferred as provided in Sec. 12167, R.S. Mo. 1929, which is as follows:

"Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance."

Section 12168, R.S. Mo. 1929 provides as follows:

"Nothing in the preceding section shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

Sections 12167 and 12168, supra, appear to be general in their scope; there are no restrictions on any balances in any fund except the condition "which is no longer needed for the

purpose for which it was raised" and "excepting balances of funds of which the objects of their creation are and have been fully satisfied". However, we must be guided in our ultimate conclusion by the decisions of our courts.

In the case of Carthage Special Road District v. Ross, 192 S.W., l.c. 978, the Court, speaking on this question, said:

"The respondent cites section 3786 of the revised statutes 1909 in support of its contention that the county court had the power to transfer this fund to other uses than those connected with roads and bridges. It provides that:

'Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance.'

The succeeding section limits this right of transfer to 'balances of funds of which the subject of their creation are and have been fully satisfied.' These sections have stood upon our statute books since their enactment in 1897, without change, except as modified by subsequent legislation, charging the road districts, agencies of the state expressly created for such purposes, with control and expenditure of this fund. In so far as these laws are inconsistent with the provisions we have mentioned they must yield to the last expression of the legislative will, which as we have already shown, is definite and unmistakable. These sections are still living laws in their application to all revenue of the county remaining within the control of the county court. The particular fund has plainly been removed from its control and intrusted to other hands to be expended by other agents, while leaving ample resources at its command for application to any road and bridge purpose which may still remain within the range of its duties. These old provisions cannot stand with these definite and inconsistent expressions of a later legislative

policy, and must therefore yield to them.

We are cited by the respondents to the cases of Holloway v. Howell County, 240 Mo. 601, 144 S.W. 860; and Decker v. Diemer, 229 Mo. 296, 129 S.W. 936, to sustain the right of the county to transfer this fund. The first of these cases was a suit for accounting to ascertain the balance in the county treasury of road funds collected by the county upon the property of the special road district for several years prior to 1909 and long before the bringing of the suit, for which no demand had been made. The case went off on that ground, and is consequently no authority in this case. The Decker Case was a suit for road taxes levied by the county court in 1905, 1906, 1907 and 1908, and appropriated to the road and bridge fund. The suit was brought May 11, 1909, more than three months before the act of 1909 upon which, with its amendment of 1913, the right to recover in this suit is principally founded. Neither the constitutional amendment of 1908 nor the acts passed in pursuance of it were involved. This case is one of first intention, and the controlling questions are now before us for the first time."

In the decision in the case of Holloway v. Howell County, 240 Mo., l.c. 612-614, the Court, in commenting on the power of the county court to transfer funds, said:

"The bill alleges that the share of the district is still in the county treasury, but the proof shows nothing of the sort. Whatever mere theory be indulged by way of inference, one way or the other, the actual fact is, as shown by the proof, the money levied for county purposes was used for county purposes, presumably for paupers, insane persons, the salaries of officials, the expenses of running the courts, jury fees, expenses of elections, criminal costs and roads and bridges elsewhere. (Vide, R.S. 1909, sec. 11423) It was not clear there was any 'county revenue' left at the end of any year after paying the indebtedness and obligations of the county for the current year. But if there was, then under certain statutory conditions, the county court had the right to transfer it to other proper funds and use it for county purposes for ensuing

years or existing deficits, if any, after all contracts entered into with reference to the current year creating present indebtedness had been complied with and all outstanding current county obligations had been satisfied. (State ex rel. v. Johnson, 162 Mo. 621; State ex rel. v. Appleby, 136 Mo. 408; Decker v. Diemer, 229 Mo. 296).

This view of the law but establishes a sensible and practical working plan for transacting the business affairs of the county. In the Decker case the legality of a court house fund made up in part of the odds and ends of unused funds was sustained. There is in that case an extensive discussion of the statutes relating to the administrative details in handling county funds. We will not repeat what is there said.

The theory of our present system of county government is that counties must run their business affairs on the 'cash system'. (Decker v. Diemer, supra, l.c. 330). Running in debt is easy and pleasant while it lasts. Paying is 'another story'. The pleasure of debt making is denied by law to Missouri counties; they can anticipate their revenue, but only for the current year. (State ex rel v. Railroad, 169 Mo. l.c. 574-5). The road fund claimed in this case, as said, was levied as county revenue. It was county revenue; any part of it not called for, for current year purposes, became, under the facts of this case, an unexpended and unused part of the county revenue, subject to be disposed of as indicated in the Decker, Johnson and Appleby cases, supra. As near as we can make out it was so used. It would throw into needless confusion the whole cash scheme of county government to permit a special road district long after events it apparently acquiesced in to hark back to past years and recover judgment against a county for alleged past deficiencies, which, under the cash system, presumably the county has no present ability to pay. Especially so where no timely and statutory application was made for the fund as here. Something is made of the fact that in September, 1908 (at the time of the trial), there were several thousand dollars in the county

treasury to the credit of the county revenue fund. We see no logical connection between that fact and defendant's liability.

We are cited to many interesting cases in other States, of which *The Village of Oneida v. Madison County*, 136 N.Y. 269, and *Spidell v. Johnson*, 128 Ind. 235, are samples. There actions for money had and received were allowed against counties that had used funds collected for a specific purpose and belonging to other public corporate bodies to pay their debts. But the facts in those cases are dissimilar to those here in obvious particulars, and we are not familiar with the statutes of those States which may have lent color to those decisions."

In the case of *Deckör v. Diemer*, 229 Mo., l.c. 336, a portion is herein quoted as it bears upon a different situation:

"We shall not write the law so that county courts may make excessive levies for county purposes for the very purpose of evading the statutes and creating a surplus to build a courthouse, thereby, under the seeming forms of law, evading the spirit and intent of the law. We have already disposed of the features of this case in that particular, and shall proceed to determine the question now up by assuming that the levies were honestly made from year to year, and that the surpluses were honestly accumulated as indicated.

The bald question then is: May a county court transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer the question in the affirmative. We are of the opinion that the force of the Cottey Act is spent in another direction, as the history of the times of its enactment well shows, and that it ought not to be construed as prohibiting such transfer of funds. We are further of the opinion that the various statutes providing for the transfer of funds, when practically construed, lend substance and countenance to the view we have expressed. We are further

of the opinion that sections 6723 to 6729 inclusive, supra, now a part of article 2 of chapter 97, entitled 'counties', is a live law though old. The chapter and article have been revised and amended from time to time and brought down for every day use. The Cottey Act was not intended to repeal it and the provisions of the two are not antagonistic or inconsistent. Repeals by implication are not favored. It is our duty to harmonize and preserve the whole body of the law, when we can. We are further of the opinion that when all warrants and debts properly chargeable to a fund in any one year are paid and provided for, the residue of such fund is a 'surplus' within the purview of the transfer sections. Is not the building of a courthouse as legitimate as any other county purpose? Are bonds so desirable that the people of a Missouri county must bond themselves when bonds are not necessary, or go without a courthouse? Must they levy special taxes when they have the means in the treasury to avoid such special levy? Running like a thread through the statutes is the idea of as low a rate of taxation as is compatible with the welfare of the people, and the other idea that the county's business must be done for cash. All these ideas are conserved by the holding made."

An early decision bearing on the right of a county to transfer funds is the case of *State ex rel. v. Appleby*, 136 Mo. l.c. 412. The Court said:

"We do not think section 7663 can be given such a construction. We must assume that the legislature intended that all just and proper liabilities of the county, created in one year, should be paid out of the revenues and income of that year. The provisions for dividing and apportioning the revenues to be collected for the year into the various funds does not contemplate that a just demand against the county should go unpaid because the revenue appropriated to the particular fund, out of which it is primarily payable, may have been exhausted, if there be money in the treasury unappropriated, or not needed for the purposes for which it was appropriated, from which it can be paid. When it is found that there is a surplus in one fund, and a deficiency in another, there is nothing in the law, or

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other reason, why the court may not transfer the surplus in order to make up the deficiency. Indeed sections 3189 and 3190 expressly provide for such transfer."

CONCLUSION

It is the opinion of this department that the transfer of funds under Sec. 7891, R.S. Mo. 1929 is permissible in the event the county court still has control over the funds mentioned in said section, but if the county court no longer has possession of the funds and the same are no longer in its control, as stated in the decision in the case of Carthage Special Road District v. Ross, then, in that event, the transfer cannot be made.

Respectfully submitted,

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APPROVED:

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