D REVENUE: Section 9868 R. S. Mo. 1929 limited by Section 11, Article 10, Missouri Constitution.

6-5

May 29, 1934.

FILED 64

Hon. Morgan M. Moulder
Prosecuting Attorney
Camden County
Camdenton, Missouri

Dear Mr. Moulder:

Acknowledgment is herewith made of your letter of May 14, 1934, requesting an opinion of this office. Your letter reads as follows:

"The County Court of Camden County, under the provisions of Sec. 9868 R. S. Mo. 1929, requested me to present a petition to the Circuit Court in Vacation, setting forth the facts and reasons for an additional special tax for the purpose of paying a past indebtedness. I hereto attach a copy of the order of the County Court and a copy of the petition which I, as prosecuting attorney, prepared and which was presented to the judge of our Circuit Court in Vacation, which order and petition are self-explanatory.

I also send to you a copy of the opinion of C. H. Skinker, Judge of the 18th Judicial Circuit, wherein he holds that whereas the valuation of Camden County is about $7,000.000.00 and the Constitution and Sec. 9873 provides that the maximum levy is 40¢ on each $100 valuation, an additional levy as provided for by Sec. 9868, over and above the said 40¢ levy, would be in conflict with Sec. 9873 and also in conflict with the provisions of the Constitution.

I find several Supreme Court decisions which hold that the provisions of Sec. 9868 have no relation to the provisions of Sec. 9873. It is our theory that 9873, which limits the maximum levy to 40¢ on each $100 valuation, is a maximum levy for the purpose of paying the current and general expenses of the county for the year for which the levy is made, and that Sec. 9868 is not controlled by the limit placed by the Constitution and said Sec. 9873 because the additional levy, as provided in 9868, is for another and separate purpose, to-wit, for the purpose of paying a past indebtedness.

> I am informed by the Presiding Judge of our County Court that he has talked to the State Auditor and that the State Auditor has advised him to proceed under Sec. 9868, and if we are allowed to make the additional levy up to 50¢ which has always been the levy in Camden County but due to the increase in valuation the levy that can be placed by the County Court is now 40¢, which gives us less revenue than a 50¢ levy on a valuation of less than $6,000,000, it would be a great benefit to our county and would permit us to pay off the past indebtedness and the burden of outstanding warrants and would also permit us to come within the budget provisions of the statute and live within our revenue hereafter.
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> The County Court of Camden County, at its May Term, 1934, made the annual and maximum levy as provided for in Sec. 9873, of 40¢ on each $100 valuation, for current general expenses for the year 1934. Can the Circuit Judge order an additional and special levy of 10¢ on each $100 valuation for the purposes of paying past indebtedness, as provided for in Sec. 9868, even though the valuation of Camden County, is $7,000.000. "

Section 11 of Article X of the Constitution provides a limitation upon the power of the County and other subdivisions to levy taxes upon inhabitants and property of such subdivision, part of this provision provides:

> "Taxes for county* * *purposes may be levied upon all subjects and objects of taxation* * * *. For County purposes theannual rate on property* * * in counties having six million dollars and under ten million dollars, said rate shall not exceed 40¢ on the hundred dollars valuation* * * *. The rate herein allowed to each county shall be ascertained by the amount of taxable property therein, according to the last assessment for State and county purposes,* * * *said restrictions as to rates shall apply to taxes of every kind and description, whether general or special, except taxes to pay valid indebtedness now existing, or bonds which may be issued in renewal of such indebtedness:* * *"

This constitutional provision has been declared to be self-enforcing. State ex rel. vs. Weinrich, 291 Mo. 461. Section 9873 R. S. Mo. 1929 is simply declaratory of this constitutional provision:

> "For county purposes the annual tax on property not including taxes for the payment of valid bonded indebtedness or renewal bonds issued in lieu thereof shall not in any county in this state exceed the rates herein specified:* * *in counties having over six million dollars and less than ten million dollars said rate shall not exceed forty cents on the one hundred dollars valuation;* * * *"

The foregoing are maximum rates which may be levied in said counties. This portion of this Section of the statutes has been on our books for over fifty years and although the law has been amended on numerous occasions it has never been changed with an intent to lessen the protection aforded by the constitutional provision. All amendments have in fact been aimed at strengthening this protection. One amendment to this Section added this proviso:

> "Provided, however, the county court shall not have power to order a rate of tax levy on real or personal property for the year 1921 which shall produce more than ten per cent in excess of the amount produced mathematically, by the rate of levy ordered in 1920, and in no subsequent year may any county court or any officer or officers acting therefor, order a rate of tax levy that will produce mathematically more than ten per cent in excess of the taxes levied for the previous year.* * * *"

We quote this foregoing proviso for the reason that it has a very definite place in explaining what portions of this Section are applicable and which are inapplicable to Section 9868. This section is the statutory authorization for a levy by the County Court to levy a tax for the specified purpose of paying past due indebtedness. Section 9867 authorizes the levy and collection of taxes for current expenditures and provides:

> "The following named taxes shall hereafter be assessed levied and collected in the several countiesin this state, and only in the manner, and not to ex-

> ceed the rates prescribed by the Constitution and laws of this state, viz: The state tax and the taxnecessary to pay the funded or bonded debt of the state, the funded or bonded debt of the county, the tax for current county expenditures, the taxes certified as necessary by cities, incorporated towns and villages, and for schools."

It is apparent that all that is authorized by the foregoing Section so far as it pertains to your inquiry is a levy for current county purposes, in other words, the levy of a tax to pay the operating expenditures of the County for the current year. There is no authorization in this Section for the levying of a tax to pay past indebtedness. Such a levy can only be made under the provisions of Section 9868. This Section provides in part as follows:

> "No other tax for any purpose shall be assessed, levied or collected, except under the following limitations and conditions, viz: The prosecuting attorney or county attorney of any county, upon the request of the county court of such county--which request shall be of record with the proceedings of said court, and such court being first satisfied that there exists a necessity for the assessment, levy and collection of other taxes than those enumerated and specified in the preceding section--shall present a petition to the circuit court of his county, or to the judge thereof in vacation, setting forth the facts and specifying the reasons why such other tax or taxes should be assessed, levied and collected; and such circuit court or judge thereof, upon being satisfied of the necessity for such other tax or taxes, and that the assessment, levy and collection thereof will not be in conflict with the Constitution and laws of this state, shall make an order directed to the county court of such county, commanding such court to have assessed, levied and collected such other tax or taxes,* * * *"

From a reading of the foregoing Section and an examination of the cases where it has been construed, it is well settled that the tax authorized by this Section is a special tax collected for a special purpose and may only be used for that purpose. It is in addition to the taxes which may be collected for the ordinary county purposes, which in the past have been divided into five specific classes.

We shall now consider the problem presented in your request as to whether or not the constitutional limitation of 40¢ on One Hundred valuation bars an additional levy for this purpose under this Section. This Section requires the circuit judge before making the order to find "that the assessment, levy and collection" of the additional tax "will not be in conflict with the constitution and laws of this State." This indicates a legislative intent to avoid any conflict with the constitutional provision respecting the assessment, levy and collection of taxes. This intent has been recognized and we find that the Supreme Court in the case of State ex rel. Hill vs. Wabash Railroad Company, 169 Mo. 583, has construed this Section and the constitutional provision herein considered. In this case the special levy for past indebtedness resulted in the assessment of a tax in excess of the constitutional limitation. Section 7654 R. S. Mo. 1889 considered in this opinion was the predecessor of the present Section 9868. The Court at page 576 considered the plaintiff's contention that the constitutional provision limiting the tax levy did not apply to a levy under this Section and stated:

> "* * *Plaintiff, however, contends that this may be done, as in this case, by proceeding under Section 7654, Revised Statutes 1889. That this section of the statute is not in conflict with the Constitution of the State is admitted, but its position is, that it does not, except as provided by section 12, supra, authorize the levy of a tax upon property exceeding forty cents on the one hundred dollars for any purpose.* * * * * *
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> that a proceeding in conformity with section 7654 supra, was the proper course to pursue inorder to require a county court to make a special levy for the purpose of paying outstanding and unpaid warrants, but it was not held in any of those cases that such a levy in excess of the constitutional limit would be valid, but it seems to have been taken for granted that it would be. Now, if under such circumstances, the county court had the power to make a special levy of twenty cents on the hundred dollars valuation of property in the county

> in addition to the levy of forty cents, the constitutional limit, it could of course upon the same theory and by the same authority levy fifty or one hundred per cent and thus ignore those wholesome provisions of our Constitution which were intended to protect the property rights of the people, and to prevent its confiscation by an evasion of that instrument. That no such purpose was contemplated by the statute is indisputable, but what was meant thereby was that a special levy in addition to a general levy, when the latter does not come up to the constitutional limit, may be made for the purpose of paying past indebtedness of the county provided it, including the general levy, or the levy for general purposes, does not exceed the constitutional limit.* * * **

In view of this case it is the settled law of this State that no levy can be made under Section 9868 R. S. Mo. 1929 which, when taken with the rate of levy for general county purposes, will exceed the constitutional limitation setout in Section 11 of Article X of the Constitution.

So that there may be no confusion in your mind respecting the

> "Supreme Court decisions which hold that the provisions of Section 9868 have no relation to the provisions of Section 9873"

we take the privilege of calling your attention to the case of State ex rel. Philpott vs. St.Louis--San Francisco Ry. Co., reported at 247 S. W. 182. In this case the total assessed valuation in Webster County for 1920 was approximately $7,400.000.00. That year a 40¢ levy on a Hundred Dollar valuation was made for county purposes to produce $29,600 in revenue. In 1921 the assessed valuation rose to $11,500.000.00. The levy for county purposes at 30¢ on the Hundred Dollar valuation produced $34,600 in revenue. In that year an additional levy of 10¢ on the Hundred Dollar valuation was ordered by the Judge of the Circuit Court, who happened to be your own able jurist Judge Skinner. This increased the total revenue in 1921 to $46,000.00. The railroad defended with the proposition that the proviso of Section 9873 hereinbefore quoted (providing that no levy may be made which will produce more than 10% in excess of the revenue collected for the previous year) prohibits any levy either for current purposes or for the purpose of paying past indebtedness which will produce in excess 10% more than the previous years revenue. The Court in Banc determined that this proviso of Section 9873 had no application to the levy to pay past indebtedness provided for in Section 9868, and stated l. c. 184:

> "* * *Respondent contends that section 12865, as amended by the act of 1921, places the limit on the tax that may be levied by the county court for county purposes in any one year. This section as amended has no relation to the special additional levy that may be ordered by the circuit court or judge in vacation under the authority of section 12860. These sections have different objects and purposes; that of one is to raise revenue to pay current expenses, that of the other is to pay past indebtedness. One is a general, the other a special, statute ingrafting an exception on the former. 'To the extent of any necessary repugnancy between them, the special will prevail over the general statute.' Statutes in pari materia must be read together and, although seemingly in conflict, should be harmonized and force and effect given to each, as it will not be presumed the Legislature, in the enactment of a subsequent statute, intended to repeal an earlier one, unless it has done so in express terms or by necessary implication. 36 Cyc. 1149, 1151. The two sections are not in conflict. Judgment was properly rendered against the defendant for the sum produced by the additional levy of 10 cents.* * *"

While it is clear that the proviso of Section 9873 respecting the 10% increased levy has no application to the levy provided for in Section 9868, we are unable to find any decisions which indicate that the other provisos of Section 9873, which are simply declaratory of Section 11 of Article 10 of the Constitution, do not apply to and govern and control levies made by virtue of the provisions of Section 9868.

In accordance with your request I herewith return the copy of the order of the County Court, the copy of the petition presented by you as Prosecuting Attorney and the opinion of Judge Skinker.

Respectfully submitted,

HARRY G. WALTNER, JR.
Assistant Attorney General.

APPROVED:

ROY McKITTRICK,
Attorney General.

HGW.MM--Encls.