

TAXATION AND REVENUE - If county court levies the maximum of 40¢ and then attempt to proceed under Sec. 9868 R.S. 1929 to levy an additional 10¢, same would be in violation of Sec. 11, Art. X of Constitution.

February 6, 1935.



Hon. Lewis B. Hoff,
Prosecuting Attorney,
Cedar County,
Stockton, Missouri.

Dear Sir:

This department acknowledges receipt of your letter, presented in person February 4, in which you make the following inquiry:

"Does Section 9868, Revised Statutes of Missouri for 1929 authorize a judge of the circuit court to order a county court to levy a special or additional tax for the payment of outstanding warrants, when that levy would exceed the constitutional limits?"

In Section 9867 the legislature seems to have taken the position that 'county purposes' as was used in the language of the constitution means the funded or bonded debt of the county and the tax for current county expenses. If this be true, then a levy under section 9868 even in excess of the constitutional limits would be valid.

Cedar County has an assessed valuation of between six and ten million dollars (estimated eight million) that it has lived well within its means is shown by the fact that there is at present \$12,189.34 in outstanding and unpaid warrants as against delinquent taxes amounting to \$21,669.22. The estimated expense of the county for the year 1935 is \$50,000 and the estimated receipts from all sources are \$45,619.09 less 10 per centum or \$41,471.90.

An extra levy of 10 cents on the \$100, would in the opinion of the county court, provide ample

funds for the payment of all outstanding warrants if used with the probable savings in the current expense.

The only other alternative would be to raise the valuation and this would work an extreme hardship on the taxpayer for the reason that an increased valuation would carry with it larger road, school and state taxes, the former two of which are not needed in this county."

As this involves Section 11, Article X of the Constitution of Missouri, we quote the pertinent part:

"Taxes for county, city, town and school purposes may be levied on all subjects and objects of taxation; but the valuation of property therefor shall not exceed the valuation of the same property in such town, city or school district for State and county purposes. For county purposes the annual rate on property, in counties having six million dollars or less, shall not, in the aggregate, exceed fifty cents on the hundred dollars valuation; in counties having six million dollars and under ten million dollars, said rate shall not exceed forty cents on the hundred dollars valuation; in counties having ten million dollars and under thirty million dollars, said rate shall not exceed fifty cents on the hundred dollars valuation; and in counties having thirty million dollars or more, said rate shall not exceed thirty-five cents on the hundred dollars valuation."

Section 9867, R.S. Mo. 1929, mentioned in your letter, designates the taxes which shall be assessed, levied and collected, and is as follows:

"The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the Constitution and laws of this state, viz.: The state tax and the tax necessary 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."

Sec. 9868, R.S. Mo. 1929 was enacted a number of years later and we interpret the same to be a special section enacted in aid of Section 9867, supra. The pertinent part of Section 9868 is 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, and shall enforce such order by mandamus or otherwise. *****"

Referring to the statement in your letter, as to whether or not an extra levy of 10¢ on the \$100.00 valuation to take care of the outstanding warrants would be in excess of the constitutional limitation for the reason that Sec. 9867, supra, only includes county purposes and bonded indebtedness, we respectfully call your attention to the decision in the case of State ex rel. v. Wabash Railway Co., 169 Mo. 563, in which the Supreme Court said (l.c. 573-575):

"The vital question to be considered in this case is with respect to the validity of the levy in question. Ray county having more than six million

dollars and less than ten million dollars valuation, was limited to a levy (which was made) of forty cents on the one hundred dollars, by the express terms of section 11, article 10, of the Constitution of the State, and, unless the special levy of twenty cents in addition thereto was authorized by section 12 of the same article of the Constitution, or by section 7654, Revised Statutes 1889, it must be held invalid.

In *Lamar Water Company v. City of Lamar*, 128 Mo. l.c. 221, it was ruled that under section 11, supra, no higher rate of taxation than therein prescribed was permissible, but that a rate might be imposed under the conditions and restrictions of section 12, supra, even though in excess of the rates stated in section 11. The court said, 'The tax expressly authorized in the last lines of section 12, may be imposed in excess of the rates named in section 11, if the other limitations in section 12 are observed,' which are, the assent of two-thirds of the voters of the county voting at an election to be held for that purpose, and, that with such assent any county may be allowed to become indebted to a larger amount for the erection of a courthouse or jail.

It is not pretended, in the case at bar, that the requirements of section 12, supra, as indicated were complied with.

In *Aurora Water Company v. City of Aurora*, 129 Mo. 540, the ruling in the *Lamar* case upon the question now under consideration was approved.

The case of the *Lamar Water & Electric Light Company v. City of Lamar* was before this court on a second appeal (140 Mo. 145) and the rulings on the constitutional questions which were passed upon on the former appeal were adhered to by a majority of the court in banc, without further discussion of them.

Again in the recent case of State ex rel. Miller v. M., K. & T. Ry. Co., 164 Mo. 208, the same rule announced in the cases before referred to was adhered to but by a divided court.

The leading case in this State upon the power of a county court under the present Constitution to contract a debt for any purpose in excess of its revenue for the current year, is Book v. Earl, 87 Mo. 246, in which it was said: "The evident purpose of the framers of the Constitution and of the people who adopted it, was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected, and to be collected, for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it."

The answer to the question involved was stated by the court in the same case (l.c. 576-577) wherein the Court said:

"But plaintiff contends that as it is shown by the agreed statement of facts that the warrants were issued within the limit of the revenues receivable for the years of their issue respectively; that is to say, that had all the taxes assessed and levied for those years been collected, the amount of such taxes, together with the other revenue and income actually paid into the county treasury for the benefit of the contingent fund, would have exceeded the amount of warrants issued for said years, but that the full amount of said taxes were not so collected, but a portion each year returned delinquent to such an extent that there remained at the end of each of the above fiscal

years a surplus of unpaid and outstanding warrants, and that, therefore, the warrants are valid. That the warrants were valid may be conceded, but as to whether or not they can be paid otherwise than from the surplus after the revenues for any one year have been applied to payment of the current expenses of the county for that year, is another and entirely different question. 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.

It was held in the cases relied upon by plaintiff, viz., *State ex rel. Brown v. Mo. Pac. Ry. Co.*, 92 Mo. 137; *State ex rel. Givens v. Wabash St. L. P. Ry. Co.*, 97 Mo. 296; *State ex rel. Hamilton v. H. & St. Joe Ry. Co.*, 113 Mo. 297; *State ex rel. v. St. L. K. & N.W. Ry. Co.*, 130 Mo. 243; *State ex rel. v. Bridge Co.*, 134 Mo. 339, and *Andrew County ex rel. v. Schell*, 135 Mo. 38, that a proceeding in conformity with section 7654, *supra*, was the proper course to pursue in order 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."

We believe the question is further answered by the decision in the case of State ex rel. Philpott v. Railway Co., 296 Mo., l.c. 524-525, in the following language:

"The foregoing provisions, except the amendment of 1921, were originally enacted in 1879. (Laws 1879, pp. 185 and 193). Ever since their enactment the levy authorized by Section 12860 has been regarded as a special tax for county indebtedness in addition to the general levy for county purposes. In State ex rel. v. Wabash Ry. Co., 169 Mo. 563, it was held (syl. 6):

'A proceeding in conformity with Section 7654, Revised Statutes 1889' (now Sec. 12860, R.S. 1919), 'is the proper course to pursue in order to require a county court to make a special levy for the purpose of paying outstanding and unpaid warrants, but a proceeding under that section does not make valid a levy in excess of the constitutional limit. What is meant by that section is 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.'

See State ex rel. v. Ry. Co., 130 Mo. 243, 248; State ex rel. v. Miss. River Bridge Co., 134 Mo. 321, 338.

The revenue collected to pay past indebtedness must be applied to that purpose and may not be apportioned under Section 12866 for current county expenditures. (State ex rel. v. Hortsman, 149 Mo. 290, 297). Current county expenditures mean expenditures for the year for which the taxes were levied. (State ex rel. v. Payne, 151 Mo. 663, 673.) The only tax that a county court may levy on its own initiative is that for the payment of county current expendi-

tures as authorized by Section 12859, R.S. 1919. No other tax for any purpose shall be assessed, levied or collected except as authorized by Section 12860. In this case the additional ten-cent levy was made by the order of the circuit judge in vacation."

CONCLUSION

In view of the above decisions, it is the opinion of this department that if the county court levies the maximum 40 cents on the \$100 valuation, as contained in Section 11, Article X heretofore quoted, and should then attempt to proceed under the provisions of Section 9868, thereby levying an additional 10 cents, the same would be in violation of Section 11, Article X of the Constitution of Missouri for the reason that it would not be within the limits prescribed by said section, and it would therefore be invalid.

Respectfully submitted,

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APPROVED:

ROY MCKITTRICK,
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