

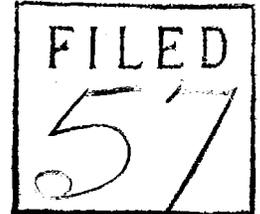
ROAD DISTRICT
TAXATION:

It is mandatory upon the county court to make a levy under Section 8526, R. S. Mo. 1939, and, upon the failure of the county court to make such a levy, mandamus will lie.

March 13, 1941

Honorable G. Logan Marr
Prosecuting Attorney
Morgan County
Versailles, Missouri

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Dear Sir:

This will acknowledge receipt of your request for an official opinion, under date of February 4, 1941, and also your letter of March 7, 1941, supplementing your request.

You inquire if there is any provision under Article X, Chapter 46, R. S. Mo. 1939, under which your special road district is organized, which allows the commission of said road district to levy as it does in Section 8716, R. S. Mo. 1939. You further inquire if it is mandatory that your county court make a levy under Section 8526, R. S. Mo. 1939, and if the court fails to make such a levy under this section, is there any way the special road district may compel the court to make the levy.

Under Section 8526, R. S. Mo. 1939, the county court shall make a levy. It is a mandatory duty upon the county court, and they have no discretion as to whether or not a levy shall be made. The only discretion they may exercise is as to the amount of the levy. This provision no longer provides for a minimum levy but restricts the county court from making a levy in excess of twenty cents on the one hundred dollars valuation of property. Section 8526, R. S. Mo. 1939, reads as follows:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal prop-

erty made taxable by law a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the 'county road and bridge fund.'"

(See State To Use of Covington v. Wabash Railway Co., 319 Mo. 302, 1. c. 306.)

Furthermore, the special road district is entitled to its proportionate share of the levy. (See two opinions of this department referred to in your original request.)

In support of the above statement that it is mandatory upon the county court to make a levy under Section 8526, R. S. Mo. 1939, we quote from State ex rel. Kersey v. Land & Cooperage Co., 317 Mo. 41, 1. c. 47:

"A consideration of the statutes above referred to forces the conclusion that the foundation of the finances for road purposes rests on these statutes authorized by Sections 1 and 10 as limited by Section 11 of Article 10 of the Constitution, for the reason the several counties must, since the enactment of Section 10595 (Laws 1911, p. 358), levy taxes for road purposes. Whereas, Section 22 of Article 10 of the Constitution expressly grants an absolute discretion to the county court to levy a tax or not to levy a tax for road purposes, as its judgment may suggest.
* * * * *

In State ex rel. Moberly Special Road District, Appellant, v. C. R. Burton, et al., Judges of the County Court, 283 Mo. 41, a writ of mandamus was filed against the County Court of Randolph County to require them to turn over to the Moberly Special Road District a ten per cent levy collected by the county court on all property

in Randolph County for road and bridge purposes which had been collected in the special road district. This levy was made in addition to a levy for special road and bridge purposes. The court held that under Section 36, Laws of 1917, page 457-458 (which is the same as Section 8526, R. S. Mo. 1939, except that there is no longer a provision relative to a minimum levy that the court shall make), that the county court shall place the ten per cent levy on property in the special road district made by the county court in the county treasury to the credit of the special road district. The court, as authority for this, quotes Section 37, Laws of 1917, which is the same as Section 8527, R. S. Mo. 1939, wherein it says, "All levies collected on property in a special road district shall be applied to credit of the road district." In so holding, the court said, l. c. 47:

"It will be observed from reading Section 36, in connection with the first proviso mentioned in Section 37 (placed in brackets by way of convenience), that all the tax which is collected from property lying within any road district, shall be paid into the county treasury, and placed to the credit of the said district, etc. That part of Section 37, contained in the above proviso, is valid to the extent of requiring all tax collected by virtue of Section 11 of Article 10 of the Constitution, under Section 36, supra, on property within the special road district, to be applied to the credit of the latter. Said proviso, however, cannot legally apply, to the special road district, to be applied to the credit of the latter. Said proviso, however, cannot legally apply, to the special road and bridge taxes, levied under Section 37, supra, and Section 22 of Article 10 of our Constitution, adopted in 1908, which reads as follows:

"Sec. 22. In addition to taxes authorized to be levied for county purposes under and by virtue of Section

11, Article 10 of the Constitution of this State, the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as state and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power.'

"Under this section of the Constitution, the county court had the right to levy, in addition to the ten cents described in Section 36, a special road and bridge tax of twenty-five cents on each \$100 valuation, under Section 37. Section 22 of the Constitution did not vest in the Legislature the power to compel the county court to levy said twenty-five cents or any part of same. On the contrary, the county court is given a discretionary power in respect to said matter. This, however, does not relieve the county court from levying a tax for road purposes, of not more than twenty cents, nor less than ten cents, on the \$100 valuation, which is to be collected from the property in the special road district, by virtue of Section 36 supra, under Section 11 of Article 10 of our Constitution." (Italics ours)

Also see Carthage Road District v. Ross, 270 Mo. 76, 192 S. W. 976.

In your request, you state that the county court in recent years has failed to make any kind of a levy under Section 8526, R. S. Mo. 1929. In view of this

fact, it is the opinion of this department that mandamus will lie against the county court to compel them to make a levy under this statutory provision.

In State ex rel. Covington v. Wabash Railway Co., supra, the court indicated that it is still mandatory upon the county court to levy under Section 7890, R. S. Mo. 1929 (same as Section 8526, R. S. Mo. 1939), even though there is no longer a minimum levy as provided before same was amended in the Special Session, 1921. In so holding, the court said:

"This brings us to the constitutional questions. The first to be considered is this: To what particular constitutional provision is amended section 10682 referable? Let us first set out the statute:

"The county courts in the several counties of this state, having a population of less than two hundred and fifty thousand inhabitants, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law a tax of not more than twenty cents nor less than ten cents on the hundred dollars valuation as a road tax, which levy shall be collected and paid into the county treasury as other revenue, and shall be placed to the credit of the "county road and bridge fund."

"The prototype of this section was enacted by Laws Mo. 1899, p. 340 (section 9436, R. S. Mo. 1899) by which it was provided that county courts may levy a road tax of not less than five cents or more than twenty cents on the one hundred dollars valuation, to be deducted from the levy made for county purposes. The statute has come on down as section 19, p. 743, Laws Mo. 1909; section 10481, R. S. Mo. 1909; Laws Mo. 1913, p. 667; section 36, p. 457, Laws Mo. 1917; section 10682, R. S. Mo. 1919; and Laws Mo. 1921 (Extra Session), p. 172. The law of 1909 dropped

the 5 cent minimum imposed by the law of 1899, and also omitted the specific provision that the road tax be deducted from the levy made for county purposes. The 1913 law put back a minimum of 10 cents, which was carried in the statute until stricken out by the amendment of 1921. Now there is no minimum requirement, but the section during all this 20 years, nearly, has been regarded as a mandatory statute requiring the levy of a road tax within the limit (or limits) specified from time to time." (Italics ours)

Also, in *Rolla Special Road District v. Phelps County*, 342 Mo. 459, l. c. 464, the court said:

"It would also mean that the county court had ignored the mandate of Section 7890, supra, which section has always been considered mandatory."

In *State v. City of St. Louis*, 1 S. W. (2d) 1021, l. c. 1025, the court, in holding that a specific ministerial duty, mandatory in nature, imposed upon an officer, board or tribunal regarding the levy of taxes, will be enforced by mandamus, said:

"First, as to the legal propriety of mandamus to compel the performance of the duties here sought to be enjoined upon the respondents. The statute (sections 9009 to 9016, supra), hereinafter referred to as the 'Park Statute,' is in the nature of an enabling act. The power it confers and the duties it enjoins are clearly set forth therein; and a review of the same discloses that they are ministerial in their nature. Where a specific ministerial duty, which from its terms is mandatory in its nature,

is imposed upon an officer, a board, or a tribunal with respect to the levy, assessment, and appropriation of taxes or the expenditure of the same, mandamus will lie to compel its performance. The rule as to the application of the writ as above stated has been explicitly approved, in construing a similar statute (Laws 1907, p. 94) to that under review in the case of State ex rel. Bixby et al. v. City of St. Louis, 241 Mo. 231, 145 S. W. 801. This case, which involved the question as to the validity of an act providing for the levy and collection of a tax in the city of St. Louis for the establishment, maintenance, and extension of a museum of art, held that mandamus was the proper remedy to compel the performance of that duty. Earlier and later cases in this jurisdiction, while somewhat dissimilar in their facts to those in the instant case, give support to the rule as above stated. State ex rel. Haws v. Mason, 153 Mo. 23, 54 S. W. 524; Rutledge v. School Board, 131 Mo. 505, 33 S. W. 3; State ex rel. v. R. R., 86 Mo. 13; State ex rel. v. Nolte, 315 Mo. 84, 285 S. W. 501; Heather v. Palmyra, 311 Mo. 32, 276 S. W. 872."

Therefore, it is the opinion of this department that since the county court has failed to make a levy under Section 8526, R. S. Mo. 1939, and apparently has no intention whatever of making any such levy in the future, the writ of mandamus will lie against them to require them to make a levy in May, as provided by Section 8526, supra. However, this writ cannot be enforced against the county court to require them to levy any certain amount of money for the reason that the amount of levy the county court is required to make comes within their discretion, however not to exceed twenty per cent upon the one hundred dollars valuation of property in the special road district, and mandamus will not lie

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against an officer to exercise a discretionary duty.

It is the further opinion of this department that there is no statutory authority for the special road district commissioners of a road district organized under Article X, Chapter 46, R. S. Mo. 1939, to make such a levy as is provided in Section 8716, R. S. Mo. 1939.

Respectfully submitted,

AUBREY R. HAMMETT, JR.
Assistant Attorney General

APPROVED:

VANE C. THURLO
(Acting) Attorney General

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