COUNTIES:
MUNICIPAL CORPORATIONS:
TAXATION:
CITIES, TOWNS AND VILLAGES:

Mandamus will lie against a county to compel issuance of warrants in order to satisfy judgment obtained against county for tax bills for street improvements issued by city of fourth class if there is sufficient money in general fund of the county available to pay same. If not sufficient money in general fund, mandamus will lie to require levy within constitutional limits to provide funds for payment of judgment. Immaterial that county has not included payment of such tax bills in its budget.

February 28, 1955

Honorable C. B. Fitzgerald
Prosecuting Attorney
Putnam County
Unionville, Missouri

Dear Mr. Fitzgerald:

This is in response to your request for an opinion dated February 2, 1955, which reads as follows:

"I would greatly appreciate an opinion from your office regarding the following matter:

"Facts:

"A Missouri city, of the fourth class, by and through its mayor and board of aldermen, pass an ordinance providing for the construction of certain paving and curbing on and abutting certain of its streets including the area around the city square, under the authority of VAMS 1949, Secs. 88.700, 88.703, 88.693 and related statutes. The ordinance is in proper form, and the city fully complies with all the requirements of the statute regarding publication of declaration of necessity, notification of County Clerk and other formalities, and contracts for such work to be done. The work is properly done, and careful accounts are kept of the labor and material expended, after which the City issues tax bills against abutting and benefited property.

"In the center of the city square around which certain paving and curbing was constructed is a tract of land upon which is located the County Courthouse, all belonging to the County. The city issues tax bills against this land on account of said paving and curbing on all four sides of the square.

"Issues Upon Which An Opinion Is Requested:

"1. Under the provisions of 88.703 and 88.750, VAMS 1949, if the County does not pay such tax bills, and the City obtains a general judgment against the County for same, will mandamus thereafter lie against the County Court to compel it to issue warrants in payment thereof:

(a) If there is sufficient money in the general fund of the County to pay same.

(b) If there is not sufficient money in the general fund of the County with which to pay same and it is certain that the warrants, if issued, will be protested.

"2. Is it material if that portion of the paving and curbing for which the County is liable has never been included as an item of expense in the County budget."

The foundation of your inquiry is Section 88.703, RSMo 1949, which because of its length we shall not quote in full, but for sake of convenience shall set out the pertinent portion thereof:

" * * * and each lot or piece of ground abutting on such sidewalk, street, avenue, or alley, or part thereof, shall be liable for its part of the cost of any work or improvement provided for in this section, done or made along or in front of such lot or piece of ground as reported to the board of aldermen, and all lands, lots and public parks owned by any county or city, and all other public lands, all cemeteries, owned by public, private or municipal corporations; provided, that nothing in this section shall be construed to authorize any assessment against any cemetery lot, and all railroad right of ways fronting or abutting on any of said improvements, shall be liable for their

> proportionate part of the cost of such work and improvements, and tax bills shall be issued against said property as against other property, and any county or city that shall own any such property, shall out of the general revenue funds pay any such tax bill, and in any case where any county or city or railroad company shall fail to pay any such tax bill, the owner of the same may sue such county, city or railroad company on such tax bill and be entitled to recover a general judgment against such county, city or railroad company. * * *"

As background for the answers to your questions, we direct attention first to the case of City of Clinton to Use of Thornton v. Henry County, 115 Mo. 557, 22 S.W. 494. That case involved tax bills issued by the city of Clinton for the improvement of streets abutting the courthouse square. Suit was brought in the name of the city to the use of the contractors seeking a general judgment against the county. The court held that "As public property like that here in question cannot be sold on general or special execution, and as the legislature has provided no other remedy than that of enforcement of the lien, it is quite evident that the statute in question does not apply to or include property owned by a county and used for governmental purposes." (Mo. l.c. 570.)

The court recognized, however, that it was within the province of the Legislature to make this property subject to local assessment for public improvement. At Mo. l.c. 570, the court said:

> "It is true the cases last cited were all suits against private property owners; and as it is within the power of the legislature to make property devoted to public uses liable for local assessments, and as it is contrary to public policy to permit public property to be sold, we may and do concede that the legislature can provide for the payment of local assessments against public property out of the general treasury. Such a provision would doubtless be sufficient to show an intent to make such property liable for these assessments; but the legislature has made no such provision. The

> argument, therefore, that the courts can devise a remedy where there is a right does not meet the issue in this case; for the real question is, whether the city had the power or right to levy the assessments upon public property, and we are unable to find any evidence of such a legislative intent.
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> " * ** The property here in question is strictly public property, and on well settled principles of law cannot be held liable for these local improvement assessments until the legislature so says in clear terms or by necessary implication, and that it has not done by the statute relating to cities of the third class."

This case was decided in 1893. In 1923 the Legislature amended Section 88.703, supra, adding the provision applicable to counties, railroads, cemeteries, etc. (Laws of Missouri, 1923, page 264), which made the statute read as it does today.

In the next year, 1924, the Supreme Court decided the case of City of Edina to Use of Pioneer Trust Co. v. School District of City of Edina and Knox County, 305 Mo. 452, 267 S.W. 112, 36 A.L.R. 1532. The court held that a general judgment could be obtained against a county for special tax bills issued by a city of the fourth class for the improvement of streets. The basis of this decision was not Section 88.703, supra, as it had been amended in 1923, but rather Sections 8526, 8527 and 8528, R.S. Mo. 1919 (Secs. 88.743, 88.747, 88.750, RSMo 1949), which latter sections had been enacted by the Legislature in 1901.

In any event, the Legislature has made it clear, and the court has held, that the real estate of a county in cities of the fourth class is subject to special tax bills for improving streets and that if it does not pay same a general judgment can be obtained therefor. See also Harrison and Mercer County Drainage District v. Trail Creek Township, 317 Mo. 933, 297 S.W. 1.

Having established that a general judgment can be obtained against the county for such special tax bills, but that it cannot be collected by special or general execution against the property itself, the question remains as to how the judgment may be enforced. It has been definitely decided in many cases

that mandamus is the proper remedy to enforce payment of a general judgment against a public corporation. For instance, in State ex rel. Hentschel v. Cook, Mo. App., 201 S.W. 361, 364, the Springfield Court of Appeals said:

> "It is declared in 26 Cyc. 307, that mandamus is usually regarded as a proper remedy to enforce a judgment against a municipal or public corporation, and it has been generally used for such purpose in this state as every lawyer knows. When so used it is regarded as a mere ancillary proceeding to the main suit; when so employed the writ is not a new suit but simply process essential to jurisdiction - it is a means of enforcing collection of a judgment against a municipal corporation, the legal equivalent of an execution upon a judgment against an individual. Lafayette County v. Wonderly, 92 Fed. 313, 34 C.C.A. 360; Thompson v. Perris Irr. Dist. (C.C.) 116 Fed. 769; Howard v. Huron, 5 S.D. 539, 59 N.W. 833, 26 L.R.A. 493, 500; Kinney v. Eastern Trust & Banking Co., 123 Fed. loc. cit. 300, 59 C.C.A. 586; United States ex rel. Masslich v. Saunders, 124 Fed. 124, 59 C.C.A. 394; Carter County v. Schmalstig, 127 Fed. 126, 62 C.C.A 78. * * *"

See also State ex rel. Hufft v. Knight, Mo. App., 121 S.W. (2d) 762; Security State Bank v. Dent County, 345 Mo. 1050, 137 S.W. (2d) 960; and Burgess v. Kansas City, Mo. App., 259 S.W. (2d) 702.

Therefore, the answer to your first question is that mandamus will lie against the county to compel it to issue warrants in payment of the tax bills for street improvements issued by a city of the fourth class if there is sufficient money in the general fund of the county available to pay same.

If there is not sufficient money in the general fund of the county to pay the judgment, mandamus will lie to require the extension of a sufficient levy within the constitutional limits to provide funds for the payment of the judgment. We believe the reasoning in the case of State ex rel. Hufft v. Knight, supra, equally applicable in the case of counties, where the court said, 121 S.W. (2d) l.c. 764:

" * * * Since an execution may not be run against the property of a school district or other political sub-division of the State (State, to Use of Board of Education, v. Tiedemann, 69 Mo. 306, 33 Am. Rep. 498; City of Edina v. School District, 305 Mo. 452, 267 S.W. 112, 36 A.L.R. 1532; Sec. 1161, R.S. Mo. 1929, Mo. St. Ann. Sec. 1161, p. 1424) the only other procedure available to a judgment creditor to enable him to collect his judgment is for a court of competent jurisdiction to issue its writ of mandamus, requiring the extension of a sufficient levy within the constitutional limits, to provide funds for the payment of the judgment. State ex rel. Hentschel v. Cook, supra; State ex rel. Edwards v. Wilcox, supra.

"Mandamus, of course, cannot be employed to control the discretion of one authorized to determine the levy necessary to provide funds necessary for a district. Yet, a school district owes the duty to pay an obligation established by a judgment against it, and its officers are required to take such steps as the Constitution authorizes for the immediate discharge of the liability fixed by the judgment. Its duty to do so results from the plain moral as well as the legal obligation of a municipality or district to pay its debts and no discretion within the legal limitation of the performance of the duty can rightfully be claimed or exercised. However, a court cannot by mandamus proceedings compel a municipal sub-division of the state to levy a tax in excess of the maximum fixed by the Constitution. Bushnell et al. v. Drainage District, Mo. App., 111 S.W. 2d 946. The duty of a school district to discharge its obligations, if it can do so by a levy within the limits provided by law, is mandatory upon the district and its directors, and it is mandatory that they certify a levy within the legal limits, sufficient to retire the obligations of the district and mandamus does not interfere with any discretionary powers entrusted

> to the directors. State ex rel. R. E. Funsten Co. v. Becker et al., Judges of St. Louis Court of Appeals, 318 Mo. 516, 1 S.W. 2d 103; State ex rel. Kirkwood School District v. Herpel, Mo. App., 32 S.W. 2d 96."

We do not consider it material that the portion of the paving and curbing for which the county is liable has never been included as an item of expense in the county budget. In the case of Barber Asphalt Paving Co. v. St. Joseph, 183 Mo. 451, 459, 82 S.W. 64, the contention was made that, since no definite amount of money was first appropriated for the liquidation of the cost of paving the street prior to the letting of the contract, the tax bills were void. However, the court said:

> " * * * This contention is no more tenable than the preceding one. The limitations of section 5557 have no more to do with the provisions of section 5682 than have the constitutional provisions referred to in the preceding paragraph.
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> "Under the provisions of section 5682 the general revenue fund of the city may be charged for the benefits which the property of the city has received by a public improvement, not because of any liability therefor created by any contract or act of its officers, but because its property has been benefited, and the property itself can not be charged for such benefit. The remedy provided by this statute is not for a liability under a contract, or which could be created by the act of its officers, but for the value of benefits to the city's property for which in equity and good conscience it ought to pay, although it could not be made liable therefor by any contract and the same could not be charged against its property."

CONCLUSION

It is the opinion of this office that mandamus will lie against a county to compel it to issue warrants in payment of a general judgment obtained against it as the result of special

Honorable C. B. Fitzgerald

tax bills for street improvements issued by a city of the fourth class if there is sufficient money in the general fund of the county available to pay same.

If there is not sufficient money in the general fund of the county in order to pay the judgment, mandamus will lie to require the extension of a sufficient levy within the constitutional limits to provide funds for the payment of the judgment.

It is the further opinion of this office that it is no defense to the county and immaterial that it has not included the payment of such tax bills in its budget.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John W. Inglish.

Yours very truly,

JOHN M. DALTON
Attorney General

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