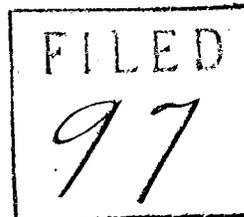


TAXATION: 10¢ tax levied under Sec.13763, R.S.Mo. 1939, was valid under  
INDEBTEDNESS: Const. of 1875, and in addition to maximum levy authorized by  
Sec.11, Art.X, Const. of 1875. Such tax levy for 1944, 1945 and  
1946 was a valid and subsisting levy, and taxpayer who refused to  
pay such taxes is liable for taxes and penalties. Repeal of Sec.  
13763 removed authority of county court to levy such tax in  
future. Mere irregularity in appointment of judges of election  
does not invalidate such election.

April 14, 1947



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Honorable David W. Wilson  
Prosecuting Attorney  
Lewis County  
La Belle, Missouri

Dear Sir:

This is in reply to your letter of recent date, request-  
ing an official opinion of this department, and reading as fol-  
lows:

"I am writing you in my capacity of Prose-  
cuting Attorney of Lewis County, and as fol-  
lows:

"(1) The attached inclosure is self-explana-  
tory, and reference to it will be made later  
on herein.

"(2) Referring to the files of your office  
you will find a former opinion on this same  
subject-matter addressed to Mr. W. E. Thomp-  
son, County Clerk, Lewis County, Mo., under  
date of March 23, 1943. However, I am par-  
ticularly interested in the constitutional  
question referred to in paragraph two thereof;  
that is to say, did our election voting this  
indebtedness, assuming the election was regu-  
larly held, legally fall within the provisions  
of section 12 of Article X, Missouri Constitu-  
tion, wherein increased indebtedness is per-  
mitted by a vote?

"(3) The election carried almost unanimously,  
and all tax payers have paid this tax each  
year, 1944, 1945, and 1946, except three tax  
payers who have refused to pay this particu-  
lar tax for each of the three years, supra,  
and have required our County Collector each

year to deduct this particular tax from their tax receipts. We now have from these deductions about \$5000.00 delinquent, and of course the same will increase each year.

"(4) We are unable to advise your office as to just what is these tax-payers position on the law to support their refusal to pay this tax. About all they ever say is at the time of paying the other taxes then due, that this particular tax is unconstitutional. Our county has no bonded indebtedness.

"(5) This tax, as per inclosure, was created by a vote of the qualified voters, over two thirds majority, in 1943; and of course under our former State Constitution, and in compliance with the provisions of section 13763, R. S. Mo., 1939.

"Queries: (a) Is this tax legally collectable under said section 13763, and section 12, of Article X, Missouri Constitution in effect at said date?

"(b) What effect, if any, did the adoption of our new constitution of February 27, 1945, and particularly sections 11(b), and 11 (c), of Article X, have on our tax as voted in 1943?

"(c) You will note, as per inclosure, that citizens of our county volunteered and served at the special election. Would such an irregularity invalidate the election?

"If you wish additional data before making an opinion answer to this letter, please so advise stating what desired."

Your further letter, in reply to our letter of inquiry, reads as follows:

"In reply to your letter of January 23, 1947, concerning the constitutionality of Lewis County's special road tax, Lewis County had a fifty cent levy at the time the ten cent special road tax was voted, and has had a fifty cent levy every year since the vote. The special road tax makes the total sixty cents.

"I was with the judges of the county court when we talked to Mr. W. Brady Duncan recently about this tax. It is my understanding that the utilities refuse to pay this tax on the grounds that the levy is void because of the fact that it makes a total levy in excess of that allowed under the constitution."

The questions to be answered in this opinion are:

(1) Is Section 13763, R. S. Mo. 1939, a statute which authorizes the incurring of indebtedness as authorized by Section 12 of Article X of the Constitution of 1875?

(2) Is the tax authorized by Section 13763, R. S. Mo. 1939, in addition to the fifty-cent limit on taxation in Article X, Section 11, of the Constitution of 1875, and Section 11046, R. S. Mo. 1939?

(3) Does the Constitution of 1945 in any way affect this tax?

(4) Would the fact that citizens of the county volunteered and served at the election as judges invalidate the election?

While the question of whether or not Section 13763, R. S. Mo. 1939, authorizes the incurring of indebtedness under Section 12 of Article X of the Constitution of 1875 has never been directly ruled by our appellate courts, the validity of a similar statute, under similar constitutional provisions, has been ruled on in Kentucky, and the Court of Appeals there held the section valid and held that such a statute authorizes the incurring of indebtedness.

The Kentucky statute in question, which is now found as Section 178.210, Kentucky Revised Statutes, 1944, reads as follows:

"(1) The fiscal court of any county may submit to the voters at a special election to be held for that purpose, the question of voting a tax of any sum not exceeding twenty cents on the hundred dollars on all property subject by law to local taxation, for the construction of the public roads and bridges of the county, as the fiscal court directs. The order of the fiscal court calling the election shall specify the amount of the tax to be levied each year and the number of years for which the tax may be im-

posed, not exceeding ten years, and shall also provide that no money in excess of the amount that can be raised by the levy in any one year shall be expended in that year.

"(2) The fiscal court may borrow money and issue bonds therefor in advance of the collection of the tax for any year, but the amount borrowed shall not exceed eighty percent of the estimated tax for the year. The amount of the tax shall be estimated according to the assessment and collection of the preceding year. Any money so borrowed shall be paid out of the money raised from the tax in the year in which the money is borrowed."

The Court of Appeals of Kentucky said in *Collier v. Bourbon Fiscal Court*, 188 Ky. 491, l. c. 492:

" \* \* \* At another election regularly called and held on the same day, there was submitted to the voters the further question: 'Are you for a property tax of 20 cents on each \$100.00 worth of property in the county to be levied each year for ten years, for the purpose of improving or constructing, either or both, roads and bridges of the county?'"

The court further said, l. c. 493-494:

"Section 157a of the Constitution provides that: 'The credit of the Commonwealth may be given, pledged or loaned to any county of the Commonwealth for public road purposes, and any county may be permitted to incur an indebtedness in any amount fixed by the county, not in excess of five per centum of the value of the taxable property therein, for public road purposes in said county, provided said additional indebtedness is submitted to the voters of the county for their ratification or rejection at a special election held for said purpose, in such manner as may be provided by law and when any such indebtedness is incurred by any county said county may levy, in addition to the tax rate allowed under section 157 of the Constitution of Kentucky, an amount not exceeding twenty cents on the one

hundred dollars of the assessed valuation of said county for the purpose of paying the interest on said indebtedness and providing a sinking fund for the payment of said indebtedness.'

\* \* \* \* \*

"In 1917, the legislature, under the authority of section 157a, of the Constitution, further enacted (see sec. 4307b-1, vol. 3, Kentucky Statutes), that the fiscal court of any county of the state may submit to the voters at a special election to be held for that purpose, the question of voting a tax in any sum not exceeding 20 cents on the \$100.00 for the improvement or construction of the public roads and bridges of the county, and it was pursuant to this section that the voters of Bourbon county voted the 20 cent road tax mentioned in the orders of the fiscal court."

The court further said, l. c. 496-498:

"The remaining question is the validity of section 4307-b. In attacking the constitutionality of this section, which was enacted under the authority of section 157a, of the Constitution, the argument is made that the section of the Constitution only authorizes a levy of the 20 cent tax for the purpose of paying interest on and creating a sinking fund for the liquidation of the indebtedness authorized by the section, and, therefore, no part of the 20 cent tax can be used for any other purpose than the payment of such indebtedness and interest thereon. Assuming this to be true, the argument is further made that section 4307-b, does not contemplate the creation of an indebtedness in the meaning of this section of the Constitution, and so its enactment was not authorized by the section.

"Looking again to section 157a of the Constitution I find that it authorizes counties to create, with the consent of the voters, an indebtedness for road purposes, and further provides that when such indebtedness is incurred, there shall be levied by the fiscal court of the

county, or the levying authority, in addition to the tax rate allowed under section 157 of the Constitution, a property tax not exceeding 20 cents for the purpose of paying the interest on said indebtedness and providing a sinking fund for the payment of the same.

"It will be observed that no where in this section is there any mention of bonds or a bond issue. The word 'indebtedness' is, however, used four times, and this word is broad enough to authorize a bond issue because that is an indebtedness. But a county may create an indebtedness under this section without issuing bonds in the form and manner provided in section 4307; and section 4307-b authorizes the creation of such indebtedness by providing that the county 'may also borrow money in any year in advance of the collection of the tax for that year not exceeding 80% of the estimated tax and issue bonds thereupon. . . . But any money so borrowed shall be paid out of the money raised from the tax in the year in which the money is borrowed. So that all indebtedness created in any one year shall be paid out of the fund raised in that year.'

"Now, I think it quite clear that while section 157a contemplates the creation of an indebtedness and the levy of a tax not exceeding 20 cents for the purpose of discharging the indebtedness, it is not important whether the indebtedness so created is in the form of a bond issue, extending over a number of years, or in the form of an indebtedness that must be paid in the year in which it is created. When the fiscal court, under section 4307-b, creates the indebtedness therein authorized, it is as much an indebtedness as would be bonded indebtedness that need not be paid for twenty-five years.

"The provision in this section that the indebtedness incurred shall not exceed 80% of the estimated tax was inserted for the purpose of making it sure that the county might be able each year to pay in full the indebtedness created under the section in that year. I am,

therefore, of the opinion that the enactment of this section was authorized by section 157a, of the Constitution.

"The legislature, by the enactment of sections 4307 and 4307-b, submitted to the people of each county the right to determine for themselves whether they would create what might be called a regular bonded indebtedness, under section 4307, or what might be called an annual indebtedness under section 4307-b; or they may, if they choose, create in the manner stated in these sections both characters of indebtedness, but the regular bonded indebtedness has priority over the annual indebtedness in the application of the money raised by the 20 cent tax, and if both classes of indebtedness are in effect at the same time, the annual indebtedness cannot exceed 80 per cent of what will remain after taking care of the bonded debt."

The Court of Appeals of Kentucky said in the case of Hughes v. Eison, 228 S. W. 676, l. c. 676-677:

"On April 6, 1918, the voters of Livingston county had submitted to them by the fiscal court of that county the following question:

"Will we vote a property tax in said county for the period of ten years at the rate of 20 cents on each one hundred dollars worth of property in said county subject to local taxation, the same to be used and applied for the improvement and construction of public roads and bridges of this county."

The court further said, l. c. 678:

"It will be observed that section 157a requires the vote to be taken on the amount of the indebtedness to be incurred and not on the rate of taxation to be levied, while section 4307b1 of the statutes enacted in pursuance thereof required both the rate of taxation and the incurring of the indebtedness to be submitted to the voters for their approval. This does not in any way affect the validity of the statute, for it does not conflict with the constitutional requirements, but only goes one

step farther, and requires the fiscal court to take the people into its full confidence, and let them know the maximum rate of taxation which will be fixed, and the number of years it shall run, to meet the proposed indebtedness, and is a wise provision.

"In the case of Collier v. Bourbon Fiscal Court, 188 Ky. 491, 223 S. W. 149, we held section 4307b constitutional and valid.

"The question submitted to the voters of Livingston county at the special election held April 6, 1918, embraced both the right of the county to incur the indebtedness and to lay a levy of 20 cents on the \$100 valuation for a period of 10 years, thus complying with the constitutional provision and the requirements of the statutes.

\* \* \* \* \*

" \* \* \* Thus, those who insist that a pre-existing indebtedness is necessary to give the right to lay such tax reason in a circle. We, therefore, conclude that the indebtedness contemplated by the Constitution and statute to authorize the levy and collection of the tax is such as the county or its fiscal agents may in good faith propose or contemplate and not an actual existing indebtedness. This construction of the statutes 4307b and its subsections appears well-nigh irresistible. To hold that the indebtedness must be existant at the time of the submission of the question of voting a special road tax would be to render the whole amendment to the Constitution and the statute a nullity, because self-destructive. As there can be no indebtedness under 157 in excess of the income of the county for the current year and the income cannot be increased except by a special road tax vote, it necessarily follows that no actual existing indebtedness is required, but only a good-faith purpose to undertake and accomplish specified road and bridge construction or improvement, in order to warrant the submission of the question of whether a tax shall be levied and the levying of the tax if approved by the

people. We so held, in effect, in the case of Collier v. Bourbon Fiscal Court, supra.  
\* \* \*

The reasoning in the above quoted cases, we believe, is applicable to Section 13763, R. S. Mo. 1939, and under such holding Section 13763 must be construed to be valid and is statutory authority for the incurring of indebtedness by a county.

The Supreme Court of Missouri En Banc said in the case of Kansas City Power & Light Co. v. Carrollton, 142 S. W. (2d) 849, l. c. 852-853:

"The tax authorized by Section 12, with the requisite assent of the voters, is in addition to the tax authorized by Section 11. Lamar Water & Lt. Co. v. City of Lamar, 128 Mo. 188, 26 S. W. 1025, 31 S. W. 756, 32 L.R.A. 157. Under Section 11 the tax limit for all purposes, without a vote, was 50 cents, but the evidence shows that a levy of more than 60 cents was necessary to pay for hydrant rentals and street lights alone. Therefore, the contracts for hydrant rentals and street lights created a yearly debt in excess of the yearly revenue and it was necessary to, and the Town did, obtain the assent of the voters to levy an additional tax under said Section 12. But under Section 12 the voters could not authorize the creation of such a debt or the levying of such an additional tax for a longer period than twenty years."

Therefore, the fact that the ten-cent tax voted at the election held under authority of Section 13763, R. S. Mo. 1939, results in a total tax levy in Lewis County of sixty cents, which is ten cents in excess of the fifty-cent levy authorized by Article X, Section 11, of the Constitution of 1875 and Section 11046, R. S. Mo. 1939, does not invalidate the ten-cent levy.

That part of Section 12 of Article X of the Constitution of 1875 providing that "any county may be allowed to become indebted to a larger amount for the erection of court house or jail, or for the grading, construction, paving, or maintaining of paved, graveled, macadamized or rock roads and necessary bridges and culverts therein" is omitted from the present Constitution.

Since the above quoted provision is not in the present Constitution, and since Section 13763, R. S. Mo. 1939, provides an increase within the limitation of Section 12 of Article X of the Constitution of 1875, said Section 13763 is inconsistent with the present Constitution.

Section 13763 was repealed by House Bill No. 731, which bill became effective July 1, 1946.

Section 2 of the Schedule of the Constitution of 1945 provides as follows:

"All laws in force at the time of the adoption of this Constitution and consistent therewith shall remain in full force and effect until amended or repealed by the general assembly. All laws inconsistent with this Constitution, unless sooner repealed or amended to conform with this Constitution, shall remain in full force and effect until July 1, 1946."

Since Section 13763 was not repealed before July 1, 1946, by virtue of Section 2 of the Schedule of the Constitution of 1945, it remained in effect until such date.

Since Section 13763 was in effect until July 1, 1946, and since the tax authorized by such section was in addition to the limitation of the tax rate in Section 11 of Article X of the Constitution of 1875, the levy of ten cents by virtue of the election held under authority of Section 13763, in addition to the fifty-cent levy authorized by Section 11 of Article X of the Constitution of 1875, was a valid and subsisting levy for the years 1944 and 1945, and those taxpayers who refused to pay such taxes are liable for the taxes for those years and penalties thereon.

Section 13763 provides, in part, "provided, that if the county court deems it advisable they may issue warrants against said tax in advance of its collection." Under this provision of Section 13763, the county court of Lewis County had the power, during the period of January 1, 1946, to June 30, 1946, to issue warrants against the special ten-cent tax voted in 1943. If the county court of Lewis County did, during such period in 1946, issue warrants against such tax, such warrants became contracts between the county and those to whom the warrants were issued.

The Supreme Court of Missouri said in the case of State ex rel. Clark County v. Hackmann, 280 Mo. 686, 1. c. 696:

" \* \* \* The counties of the State, in anticipation of their yearly revenue, issue warrants against such revenue. The county authorities know from the assessed values and the tax rates just what revenue should come in for the year. They often issue warrants up to the very limit of the anticipated revenue, and these warrants we have held to be valid obligations of the county. This, on the theory that the warrants represent valid contracts made during the year.  
\* \* \* (Emphasis ours.)

Under this holding of the Supreme Court, and since the contracts were valid when made by the county, the power to levy a tax to pay such valid claims of those to whom the warrants were issued was vested in the county court.

If it were held that a valid contract could be entered into by the county, but that the county could not levy a tax to pay such contracts because of the repeal of a taxing statute after such contracts were entered into, such a holding would sanction the impairment of contracts, which is specifically prohibited by Section 10 of Article I of the Constitution of the United States, which provides, in part:

"No State shall \* \* \* pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, \* \* \*."

Therefore, if the county court did, between January 1 and June 30, 1946, issue warrants in anticipation of the ten-cent tax authorized in the election of 1943, the levy of such tax for 1946 was a valid and subsisting levy for such year, and those taxpayers who refused to pay such tax are liable for the tax for such year and penalties thereon.

The repeal of Section 13763 in 1946 takes away the power of the county court to levy the ten-cent tax in 1947 and subsequent years. By the repeal of Section 13763 in 1946, the power to issue warrants in anticipation of the tax, as well as the power to levy the tax, was rendered null and void, as Section 13763 was the only authority the county court had for such action.

The fact that the judges at the election held in 1943 volunteered for the election will not in any way invalidate the tax levied as a result of such election. It is provided in Section 13763, R. S. No. 1939, that the election shall be held in the same manner that elections are held for state and

county officers. Section 11502, R. S. Mo. 1939, provides that political parties shall submit the names of judges to serve at elections, and that the county court shall select the judges therefrom, but if such names are not presented, the county court shall select such judges.

In this case, an order of record of the county court was made March 1, 1943, which order listed the judges of the special election. This was a sufficient compliance with the statute, and the election cannot be held invalid because of any alleged irregularity in the method of selecting the judges of the election.

The Supreme Court of Missouri, in discussing irregularities that will invalidate an election, in the case of *Breuninger v. Hill*, 277 Mo. 239, l. c. 252, said:

" \* \* \* the law governing the appointment of judges and clerks is clearly directory, and courts will not nullify the result of votes honestly cast and counted, although the statute has not been strictly complied with, (*Sanders v. Lacks*, 142 Mo. 255.)"

#### CONCLUSION

It is the opinion of this department that the tax of ten cents on the one hundred dollars assessed valuation voted in Lewis County in 1943, under the authority of Section 13763, R. S. Mo. 1939, is a valid tax under the Constitution of 1875 and the Constitution of 1945.

It is further the opinion of this department that such ten-cent levy, in addition to the fifty-cent levy authorized by Section 11 of Article X of the Constitution of 1875, was a valid tax for the years 1944, 1945 and 1946, and any taxpayer who refused to pay such taxes is liable for both the taxes and penalties thereon.

The power of the county court to levy the ten-cent tax, authorized by the election held under Section 13763, has been taken away by the repeal of Section 13763, and such tax cannot be levied in any future year.

It is further the opinion of this department that the manner of selecting the judges for the election held in Lewis

Honorable David W. Wilson - 13

County in 1943 would not invalidate the tax levied under such election.

Respectfully submitted,

C. B. BURNS, Jr.  
Assistant Attorney General

APPROVED:

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J. E. TAYLOR  
Attorney General

CBB:HR