COUNTY COURTS: Contingent liability is not a debt within the meaning of the constitutional inhibition against county indebtedness. County Court may contract same regardless of constitutional provision.

March 17, 1936.

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Hon. John B. Pew,
County Counselor,
624 Rialto Bldg.,
Kansas City, Missouri.

Dear Sir:

This acknowledges your letter which is as follows:

> "The County Court asked me this morning to request an opinion from you on the following proposition:
>
> "A request has been made that the State Works Progress Administration build 100 miles of gravity type sanitary sewer, consisting of mains, sub-mains, laterals, manholes and appurtenances in the Intercity District between Kansas City, Missouri, city limits and Independence, Missouri, city limits, within the valleys of Sugar Creek and Rock Creek and bounded within the limits of the territory originally known as Jackson County Sewer District No. 1.
>
> "The Federal Works Progress Administration request that the County Court of Jackson County, Missouri, sponsor this work and that the court agree to maintain it in this language:
>
> > 'and if such project is approved and constructed by the Works Progress Administration, it thereafter, at its own cost and expense, will maintain the project in a manner satisfactory to the Works Progress Admin-

> istration, or its authorized representatives, and will make ample provision each year for such maintenance.'
>
> "The County Court of this county is now greatly overburdened with what appears to be worthy things, which it has undertaken, but the combined expense of all is such that it is next to impossible for the County Court to meet its annual commitments out of its revenues. The court must proceed with great caution and when this thing was presented today, it was my opinion that the court had no authority, under the present law, to go into the business of maintaining sewers. We have no idea what the expense would be, and, as before stated, are already trying to do so much that it is very difficult to do it right with the funds at hand.
>
> "The Works Administration people are waiting for our action and we would like to have your opinion as early as possible."

Section 12 of Article X of the Missouri Constitution, in part, provides as follows:

> "No county, city, town, township, school district or other political corporation or subdivision of the State shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the consent of two-thirds of the voters thereof voting on such proposition, at an election to be held for that purpose."

In the case of Holloway to use v. Howell County, 240 Mo. 601, the court, in discussing the authority of a county to go in debt, uses the following language, l. c. 613:

> "The theory of our present system of county government is that counties must run their business affairs on the 'cash system'. * * * Running in debt is easy and pleasant while it lasts. Paying is 'another story'. The

> pleasure of debt-making is denied by law to Missouri counties; they can anticipate their revenue, but only for the current year."

In the case of Watson v. Kerr, 279 S. W. 692, speaking on the same subject, the court said, l. c. 695:

> "But, in construing the constitutional provision just quoted, we have repeatedly held that an indebtedness is not invalid merely because it appears at the end of the year in which it was created that the aggregate indebtedness incurred by the county during that year exceeded the revenue actually collected. If, at the time of its creation, the indebtedness is within the income which may reasonably be anticipated, it is valid."

In the case of Hawkins v. Cox, 334 Mo. 640, the court, in speaking of this same constitutional provision, said, l. c. 649:

> "The plain meaning of this constitutional provision is that any such municipal corporation may spend or contract to spend (become indebted) 'in any (calendar) year the income and revenue provided for such year,' but beyond that it cannot go in creating a debt for any purpose or in any manner, except by consent of two-thirds of the voters. This was so held in Book v. Earl, 87 Mo. 246, where the court said: 'The contracting of a debt in the future by a county in any manner or for any purpose in any one year exceeding the revenue which the tax authorized to be imposed would bring into the treasury for county purposes for such year, unless expressly authorized to do so by the assent of two-thirds of the voters' is prohibited."

In the case of Trask v. Livingston County, 210 Mo. 582, l. c. 594, speaking about whether the indebtedness was

created for the building of a bridge at the time of the letting of the contract, the court said:

> "Hence, the indebtedness for these bridges was created, if at all, by a compliance with the law governing the letting and contracting for bridges already noted. When the county became indebted on these bridge contracts must be determined by the 'income and revenue provided for such year,' which under the Constitution must be looked to for the payment of such indebtedness and it was the 'income and revenue provided' for the year 1889, which the county court was authorized to appropriate for that purpose, and not the revenue for the year 1890, which at the date of the contract for the building of said bridges had never been assessed, levied or collected."

At l. c. 695, speaking of the right of a city to obligate itself over a period of years for an annual payment to a water company, the court said:

> "And it was ruled that it was not the creation of an indebtedness for the aggregate of the installments to be paid under the contract, this court saying: 'A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, depending upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. Here the hydrant rental depended upon the water supply to be furnished to the defendant, and if not furnished no payment could be required of it.' In Lamar Water & E.L. Co. v. Lamar, 128 Mo. l. c. 222, this court quoted with approval from Judge Dillon in his work on Municipal Corporations, as follows:

> 'Under the constitutional provisions in Iowa, Illinois, Indiana and Pennsylvania, referred to, it is held that a corporation may make a contract (at least, for necessaries) covering a series of years, upon which an obligation to pay may arise from year to year as the thing contracted for is furnished, and in such case, the whole amount which may ultimately become due does not constitute a debt within the constitutional prohibition. But in order to ascertain whether the corporation by such contract is transgressing the limit, regard is had only to the amount which may fall due within a certain year or other period; and if the revenues for that year or other period are sufficient, over and above the payment of the other expenses, to pay such amount, there is no debt incurred within the constitutional prohibition.'"

The Supreme Court in construing the above constitutional provision has, we think, clearly held that a county cannot in a given year create a debt against the county revenues in excess of the revenues on hand and the reasonably anticipated revenues for that year, and in the case of Barnard & Company v. Knox County, 105 Mo. 382, in holding a contract which went beyond this limit void, the court said, l. c. 390:

> "It is, of course, a hardship to the plaintiff to declare this warrant worthless, but we cannot dispose of the question on any such surface view of the matter. The Constitution seeks to protect the citizen and taxpayer, and their rights are not to be overlooked. It is the duty of persons dealing with counties and county officials, as well as of county officials themselves, to take notice of the limit prescribed by the Constitution. * * * Soliciting agents, contractors and others who deal with county officials must see to it that the limit of county indebtedness is not exceeded, and, if they fail to do this, they must suffer the consequences. Unless

> this is so, there is an end to all effort to bring about an economical and honest administration of county affairs."

However, those cases are not in point with reference to the question you raise. The constitutional prohibition against the counties is that they shall not "become indebted". A debt is variously defined, but not all obligations are debts within the meaning of the law. To become indebted means the same as to contract a debt.

17 C. J., page 1377, speaking of contingent liabilities, says:

> "Every debt must be either solvendum in praesenti, or solvendum in futuro--must be certainly, and in all events, payable; whenever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a 'debt'. While the sum of money may be payable upon a contingency, yet in such case it becomes a debt only when the contingency has happened, the term 'debt' being opposed to 'liability,' when used in the sense of an inchoate or contingent debt."

In the case of Appeal of City of Erie, 91 Pa. 398, 402, the term "debt" is defined as meaning

> "a fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future."

In the case of Saleno v. City of Neosho, 30 S. W. 190, 192, 127 Mo. 627, 27 L. R.A. 769, 48 Am. St. Rep. 655, the court holds that a debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, dependent upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed.

In 37 L. R. A. (N.S.) pages 1063, 1064, 1065 and 1066, is a discussion of when obligations payable in installments become due for the purpose of defining the amount of the debt. At page 1066 it is stated:

> "The weight of authority favors the view that obligations for public service under contracts calling for payment in installments as it is rendered do not create an indebtedness against the municipality until the service is performed, at which time the installments become due."

It will be observed that the quoted part of the agreement between the County Court of Jackson County and the Federal Works Progress Administration is that, provided such project is approved and constructed, the county will

> "thereafter, at its own cost and expense, maintain the project in a manner satisfactory to the Works Progress Administration, or its authorized representatives, and will make ample provision each year for such maintenance."

That provision does not specify that the County Court will expend any money, and for all that is now known the County Court may never be required to spend any money on this project in order to "maintain the project in a manner satisfactory to the Works Progress Administration", and if that be true, then the "ample provision each year for such maintenance" would not require the expenditure of any money by the County Court. This agreement, as set out in your letter, can at most be but a contingent liability and is not a debt within the meaning of that term as used in the Constitution hereabove referred to.

Your inquiry does not state that the County Court is incurring any expense or issuing any warrants, and we assume the fact to be that your County Court is not for the present year assuming any contractual obligation which is greater than the reasonably anticipated revenues of the county for the current year, and that this project will be constructed by the Works Progress Administration.

This opinion is limited to a discussion of whether entering into this proposed contract violates the law pertaining to the authority of the County Court to contract debts beyond the reasonably anticipated revenues of the

county for the current year, and we do not pass on the advisability of the proposed project, as this is a matter for the County Court to determine.

Since writing the above we have read the case of State ex rel. City of Hannibal v. Smith, 74 S. W. (2d) 732, which is further authority for the views herein expressed.

CONCLUSION

It is our opinion that, under the above state of facts, the law authorizes the County Court of Jackson County to enter into the agreement embodying the clause set forth in your letter and here inquired about.

Yours very truly,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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