COUNTY LITIGATION: Lawsuits of county may be compromised if they do not release or partially release established indebtedness, liability or obligation due state or county.

February 21, 1945

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Honorable W. Oliver Rasch
Prosecuting Attorney
Festus, Missouri

Dear Mr. Rasch:

The Attorney General acknowledges receipt of your letter of January 30, 1945, in which you request an opinion as follows:

> "Some time ago the county court of Jefferson County desired to change the location of a road in this county, because of a bad curve in the old road.
>
> "Condemnation proceedings were instituted under Section 8486 R. S. Mo. 1939. Upon failure of the owner of the land to file claim for damages the transcript of the record and the original files were transmitted to the circuit clerk. Upon a hearing in the circuit court, the jury allowed the property owner $60.00 in damages, which money and the costs of the proceedings were paid into court by the county. The circuit clerk is still holding the $60.00 as there were two mortgages against the property and no claim has been made for the amount of damages allowed by the jury.
>
> "The property owner has filed a suit in ejectment against the county. One of the contentions of the property owner is that Section 8486 is unconstitutional.
>
> "Please advise if the county court has authority to compromise and settle the

> suit in ejectment by paying the property owner an additional sum."

Before proceeding to a discussion of the question asked, it is thought advisable to call to your attention the case of State ex rel. Lashly vs. Wurdemann, 183 Mo. App. 28, in which it is held that the county court does not have control of the litigation of the county but is under the control of the prosecuting attorney, so that if it is possible to compromise the lawsuit mentioned by the payment of a sum of money to the plaintiff, it could only be done by the joint consent of the prosecuting attorney, as the officer who has control of the case, and the county court, which is the fiscal agent of the county.

The general rule regarding the compromise of lawsuits in which the county is a party, is that, where the necessary elements are present, suits are subject to compromise by the county court or board in the absence of fraud, bad faith, collusion or other vitiating elements. State ex rel. Campbell vs. Slavik, 14 N. W. (2d) 186, l. c. 188; Weaver et al. vs. Hampton et al, 167 S. E. 484, l. c. 485; Roberts v. Fiscal Court of McLean County, 51 S. W. (2d) 897; 20 C. J. S. page 1261, Sec. 303. And the Supreme Court of Missouri in one case has approved compromise of pending litigation in which the county was a party. The St. Louis, Iron Mt. & Southern Ry. Co. vs. Anthony, 73 Mo. 431. This case involved the collection of a tax upon which suit had been brought. Judgment had once been rendered and reversed by the Supreme Court, and while the case was pending, before a retrial, a compromise was made. The county collector ignored the compromise and undertook to collect the amount of the tax as shown by the tax books, upon the theory that no authority existed for the compromise and that it was void. The court in upholding the validity of the compromise used the following language (l. c. 434):

> "It is now contended that the county had no authority to make the compromise in question, or any compromise whatever. We are not of that opinion. The power to sue implies the power to accept satisfaction of the demand sued for, whether the precise amount demanded or less. The taxes were levied for the benefit of the county. The beneficial interest was in the county, and it is for the public interest that she should have the right to settle, by compromise,

> questionable demands which she may assert. Must the county prosecute doubtful claims at all hazards, regardless of costs and expenses, and is it for the public good that the right to settle such demands by compromise be denied her? As was said by the supreme court of New York in the case of the Board of Supervisors of Orleans Co. v. Bowen, 4 Lansing 31: 'It would be a most extraordinary doctrine to hold that because a county had become involved in a litigation, it must necessarily go through with it to the bitter end, and has no power to extricate itself by withdrawal or by agreement with its adversary.' The same doctrine was sanctioned in the Supervisors of Chenango County v. Birdsall, 4 Wend. 453."

This is the only case in which an appellate court of Missouri has directly passed upon the question and if there are no constitutional or statutory provisions which would prohibit a compromise, then this case would furnish authority for the making of the compromise.

No statute has been found which would prohibit a compromise but Section 51 of Article IV of the Constitution of Missouri, might stand in the way. This section is as follows:

> "The General Assembly shall have no power to release or extinguish, or authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State, or to any county or other municipal corporation therein."

The Supreme Court of Missouri in the case of Graham Paper Co. vs. Gehner et al., 59 S. W. (2d) 49, in discussing this provision of the Constitution, used the following language (l. c. 52):

> "* * * The language of this constitutional provision is very broad and

> comprehensive in protecting the state against legislative acts impairing obligations due to it, in that it prohibits the release or extinguishment, in whole or in part, not only of indebtedness to the state, county, or municipality, but liabilities or obligations of every kind. * * *"

The quoted passage refers to liabilities and obligations due the state. What is there said should be equally true with regard to liabilities and obligations due to the county. Then, while the constitutional provision prohibits the Legislature from passing any law releasing, in whole or in part, debts, liabilities or obligations due the state, counties or cities, it should follow that officers who receive their authority from the Legislature could not in the performance of their statutory duties do something which the Legislature could not authorize them to do.

The situation of the law seems to be that the Supreme Court has approved the compromise of a lawsuit by a county and the Constitution prohibits the release of any debt, liability or obligation due the county. We cannot ignore either the ruling of the Supreme Court or of the constitutional provision, but they must be read and construed together as both are rules of law applying to the question. It would follow that a compromise can be made of a lawsuit in which the county is a party, by the county, if the compromise does not release any definitely established indebtedness, liability or obligation due the county.

In connection with the above section of the Constitution, the following definitions of the words "liability" and "obligation" are cited:

> "The obligation to convey land under a contract is a 'liability' of a corporation within Civ. Code, Sec. 309, as amended by St. 1917, p. 658, Sec. 2, exempting directors from liability for distribution of assets to stockholders where all debts and liabilities have been paid, though person other than party to such contract to whom land

is conveyed assumes obligation of the contract." Talcott Land Co. v. Hershiser, 195 P. 653, 656, 184 Cal. 748.

"The word 'liability,' as used in section 3, art. 8, of the Constitution, is to be read, construed, and accepted in the usual and ordinary sense in which that term is commonly employed, and, when so used, means and signifies the state of being bound or obligated in law or justice to do, pay, or make good something." Feil v. City of Coeur d'Alene, 129 P. 643, 649, 23 Idaho, 32, 43 L. R. A., N.S., 1095.

"A 'liability' in its broader sense means any obligation one is bound in law or justice to perform and is synonymous with 'responsibility.' Murphy v. Chicago League Ball Club, 221 Ill. App. 120, 126.

"The term 'obligation' includes any duty imposed by law." Helvering v. British-American Tobacco Co., C.C.A., 69 F. 2d 528, 530.

"An 'obligation' is ordinarily defined as that which a person is bound to do or forbear; any duty imposed by law, promise or contract, by the relations of society, or by courtesy, kindness, etc." Goodwin v. Freadrich, Neb., 280 N. W. 917, 923.

"The word 'obligation' is defined to be 'the constraining power or authoritative character of a duty, a moral precept, a civil law, or a promise or contract voluntarily made; that to which one is bound; that which one is obliged or bound to do, especially by moral or legal

claims; a duty.'" Colter v. State, 39 S. W. 576, 577, 37 Tex. Cr. R. 284, quoting Cent. Dict.

Under the foregoing definitions and your statement of fact, there would be a definite liability or obligation upon the landowner and the land established by decree of a court of competent jurisdiction, which judgment cannot be attacked by a repeal or writ of error. While an attack is sought to be made upon this judgment by a separate suit in ejectment alleging unconstitutionality of the prescribed statutory procedure, we must consider the statute as constitutional until it is proven unconstitutional beyond a reasonable doubt.

Conclusion

Under the existing circumstances as stated in your letter, it is the opinion of this office that no compromise can be made of the ejectment suit at this time.

Respectfully submitted,

W. O. JACKSON
Assistant Attorney General

APPROVED:

HARRY H. KAY
(Acting) Attorney General

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