COUNTY BUDGET ACT: Contracts made with an Engineer for determining data for roads and bridges, if the compensation is fixed according to the amount of data prepared and he is to be paid after completion of the work his compensation should be paid out of the revenue for the year in which the work is completed.

3-30

March 23,1937

FILED
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Honorable Joseph V. Willhite
Prosecuting Attorney
Worth County
Grant City, Missouri

Dear Sir:

This Department is in receipt of your letter of March 3, relative to a contract made by the County Court of your County in February, 1935, wherein G.A. Merckling was to receive five per cent of the amount for preparing an itemized bill of expenditures by the county for certain rights-of-way and materials. On February 26 you were forwarded an opinion to C. W. McKim, Clerk of the County Court, which, upon the facts it contained, apparently answered the question. However, the facts from which the McKim opinion was rendered appear somewhat different from the facts which you now present. The main paragraph of your last letter is as follows:

> "The County Court is convinced that there is no question on the correctness of that opinion, but it does not reach the question they had in mind, that is to say: Does this contract to pay 5% of such amount as Mr. Merckling may discover and put into the form of a bill to be presented to the State for repayment to the County constitute an indebtedness against the County in the year in which the contract was signed, the same as in the case of a contract to pay a specific sum of money, or is it a contract to be performed in the future, depending upon a

> condition precedent, which may never be performed, and the amount of which can not be determined until performed, and which can not ripen into a debt until performed, and therefore payable out of the funds of the year in which completed? For instance, in the case of Trask vs. Livingston County 210 Mo. 582, cited in the McKim opinion above mentioned, l. c. 595, quoting with approval from Saleno vs. the City of Neosho 127 Mo. 639, the Court says 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, depending upon a condition precedent, which may never be performed, and which can not ripen into a debt until performed.' "

In determining whether or not the revenue of 1935 or the revenue of 1937 is liable for the work as performed by Mr. Merckling, we must consider the nature of the contract. It appears to be executory in nature, that is, to be performed in the future, depending upon a condition precedent, and the same does not ripen into a debt until it is performed, hence, we are of the opinion that the decision in the case of Tate v. School Dist. No. 11 of Gentry County 23 S. W. (2d) l. c. 1023, is applicable to the question. The decision in the Tate v. School Dist. case reviews and distinguishes the various cases relating to the question including Trask v. Livingston County, which was cited in the original opinion to Mr. McKim:

> "The contract of employment of December 18, 1924, is one calling for the personal and professional services of plaintiff for a period of eight months, commencing on the 3rd day of August, 1925, and whereby the board of directors of the

school district contracted and agreed to pay plaintiff the sum of $90 per month, payable monthly, 'for services properly rendered.' It is clear to our minds that such contract is wholly executory, and that the pecuniary liability of the defendant school district thereunder is contingent upon the rendition of such personal services by plaintiff. If, and as, such personal services are properly rendered by plaintiff from month to month, during the term of the contract, the school district becomes indebted to plaintiff for the personal services actually rendered by plaintiff. In the event of the death or disability of plaintiff, either before or during the term of the employment, the contract is terminated and discharged. 'Contracts to perform personal acts are considered as made on the implied condition that the party shall be alive and shall be capable of performing the contract, so that death or disability will operate as a discharge.' 13 C.J.644, and cases there cited. Thus the contract here in controversy might never be performed by plaintiff; in which event, of course, there is no pecuniary liability of the school district, and consequently no debt on its part. That such contract of employment is wholly executory and contingent is clearly recognized by the school statute (section 11138, R.S.1919), which provides that, 'should the schoolhouse (which the teacher is employed to teach) be destroyed, the contract becomes void.' We are constrained to the view that the mere execution of the contract of employment did not create

a debt of the defendant school district on December 18, 1924, within the meaning or intent of section 12, art.10, of the Constitution, and that the defendant school district did not become indebted to plaintiff, under the terms of the contract of employment, until the time for the performance of such contract had expired.

"Speaking to the subject, Mr. James M. Gray, in his standard treatise on Constitutional Limitations of the Taxing Power and Public Indebtedness, sec.2162, p.1117, says: 'The time when the debt actually comes into existence, as a binding obligation on the municipality, is the time as to which all calculations as to its validity should be made.'

"In Saleno v. City of Neosho, 127 Mo. 627, 639, 30 S.W. 190, 192, 27 L. R. A. 769, 48 Am. St. Rep. 653, wherein it was contended by the defendant municipality that a contract between defendant and plaintiff, whereby the defendant city agreed to pay plaintiff a fixed price annually for twenty years, by way of hydrant rental, for the use of water for the city and other purposes, created an illegal indebtedness of the city within the meaning of the aforesaid constitutional inhibition, this court en banc said: 'The only question that we have to deal with is as to whether the contract created an indebtedness upon the part of defendant, as contemplated by the constitution; and upon that question the authorities are not entirely in harmony. In construing words used in that instrument (i.e. the Constitution), in the absence of some restriction placed upon

their meaning, they must be given such meaning as is generally accorded to them. 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 defendant, and, if not furnished, no payment could be required of it.' The learned writer of the opinion, Judge Burgess, then proceeds to review the authorities, pro and con, bearing upon the question for decision, and concludes: 'Our conclusion is that the weight of authority is adverse to the contention of defendant, and is in accord with the spirit and meaning of our constitution as we understand it, and as we think also comports with better reason. '

"While the correctness of the conclusion reached by this court in the Saleno Case, supra, has been sought to be questioned in subsequent cases, this court en banc has consistently adhered to, and followed, the rule of construction announced in the Saleno Case, although conceding, as was done in the Saleno Case, that there is some contrariety of judicial opinion on the subject. Vide Water Co. v. City of Neosho, 136 Mo. 498, 507, 38 S. W. 89; Lamar Water & Light Co. v. City of Lamar, 140 Mo.145,156, 39 S.W. 768; State ex rel. v. City of Neosho, 203 Mo. 40, 75, 101 S. W. 99. In Mountain Grove Bank v.

Douglas County, 146 Mo. 42, 56, 47 S. W. 944, this division of our court ruled, in substance and effect, that a debt of a county is created when the services are rendered, or when the goods are sold and delivered to the county; in other words, when the contract is actually performed by the party with whom the county has contracted.

"Appellant cites Trask v.Livingston County, 210 Mo. 582, 109 S. W. 656, 37 L.R. A. (N.S.)1045, State ex rel. v. Gordon, 265 Mo. 181, 176 S. W. 1, and State ex rel. v. Hackmann, 280 Mo. 686, 218 S. W. 318, in support of its contention that the contract of employment herein violates the constitutional inhibition aforestated. In the Trask Case, the defendant county had contracted for the construction of two bridges in September, 1889, and an appropriation was made at that time for the purpose of paying the cost of the construction of such bridges, and the contract, by its terms, was to be wholly performed, and the bridges were to be constructed and completed, during the year 1889. The bridges were not accepted by the county, however, until May, 1890, and warrants were issued and delivered to the contractor by the county,in payment of the contract price of such bridge construction, in May, 1890,. It was held that the debt of the county was created in the year 1889, and not in the year 1890, when the bridges were accepted by the county and the warrants were issued to pay for the same; therefore the contract price for the construction of the bridges was held to be chargeable, as a debt of the county, against the

revenues of 1889, and not against the revenues of 1890. The gist of our rulings in the Gordon and Hackmann cases was that a county bond issue creates an immediate and binding debt of the county at the time the bonds are issued, sold, and delivered, although such bonds are payable in annual installments thereafter. Obviously the cases cited by appellant have no bearing or application upon the question for decision in the case at bar; namely, whether a wholly executory and contingent contract for personal services to be rendered at a future time, whereby a school district is obligated to pay for such personal services only when, and as, rendered by the opposite party to such contract, constitutes an indebtedness of the school district until such personal services have been actually rendered and the contract has been performed. Appellant has cited decisions from other and foreign jurisdictions which hold that similar contracts of employment are in derogation of like constitutional limitations upon the creation of municipal or quasi municipal indebtedness. We recognize that there is some contrariety of judicial opinion on the subject, as was recognized by this court en banc in the Saleno and kindred cases, supra,but the rule as announced by this court in the Saleno and kindred cases follows the weight of juristic authority, which is to the effect that executory and contingent contracts which are to be performed in futuro do not constitute an indebtedness against the municipal or quasi municipal corporation, in the sense of

the constitutional inhibition, until such contracts have been performed."

Without burdening the opinion with further decisions, we think that if the contract under which Mr. Merckling was hired has now been completed and if he is entitled to compensation according to the terms of the contract, that his compensation should be paid from the 1937 revenue.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

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