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St. Louis Procedure in Condemnation

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enrollment of last year. The first year of summer sessions at the School of Law was quite successful. It is planned to continue summer work, and a six weeks' session will be offered during the summer of 1938.

NOTES

ST. LOUIS PROCEDURE IN CONDEMNATION

A condemnation procedure under the Charter of the City of St. Louis[1] is instituted by ordinance of the Board of Aldermen upon recommendation of the Board of Public Service of the city.[2] The City Counselor is required to file the condemnation suit within six months after the ordinance becomes effective.[3] It would seem that the time limit for filing suits would be ample, yet, many proceedings have failed upon the enactment of the first ordinance by reason of the limited time in which to secure certificates of title and other data necessary for the filing of condemnation suits. However, the object of the time limit is to speed up the proceedings.

Without going into details as to who should be made parties defendant, suffice it to say that all parties interested in parcels of property sought to be taken or damaged are joined as defendants in each cause or proceeding. Upon the filing of the petition by the City Counselor, summons is issued and defendants are given ten-days' notice[4] of the hearing on the petition. However, there is seldom a hearing on the petition unless some defendant desires to raise a jurisdictional or constitutional question. Such questions should be raised then, but in actual practice they are often raised upon exceptions taken to the commissioners' reports. Also at the hearing on the petition the question as to whether or not the project proposed by the condemnation is for a public use should be raised and determined by the court as a matter of law at that time before the cause proceeds further.

When service of process upon all the defendants on the eminent domain side of the cause is completed, the case is ready for assignment to a division of the Circuit Court for reference to the Condemnation Commission to assess damages and benefits.

1. Charter of 1914 as amended April 4, 1933.
2. Charter, art. XXI, sec. 1. The charter may be found in Revised Code of St. Louis (1926) at page 1087. It is hereafter referred to as "Charter."
3. Charter, art. XXI, sec. 1. Ordinances are effective thirty days after approval by the mayor. Charter, art. IV, sec. 19.
4. Charter, art. XXI, sec. 2.

Under the St. Louis procedure, the assessment of damages and benefits is made by three commissioners and not by a common-law jury of twelve. The Charter does provide that "any party entitled to and desiring trial by jury" shall ask for it prior to the reference to commissioners.[5]

At common law a party was not entitled to trial by jury in condemnation proceedings.[6] But the Constitution of Missouri provides that the right of trial by a jury shall be held inviolate in eminent domain proceedings when "an incorporated company shall be interested for or against the exercise of said right."[7]

The courts of this state have held that a municipal corporation is not "an incorporated company" within the meaning of the constitutional provision.[8] Therefore, an individual owner and defendant in a condemnation proceeding in which the City of St. Louis is plaintiff is not entitled to trial by a jury. A private corporation, being "an incorporated company," would be entitled to a common-law jury if it made demand therefor prior to the time when the case was referred to the commissioners for the assessment of damages and benefits. The fact that some of the defendants in the cause are incorporated companies does not give defendants who are individuals the right to demand a common-law jury.[9] Incidentally, there is no requirement in the Constitution of Missouri or in the Charter of the City of St. Louis that special benefits shall be assessed by a jury.[10]

If and when a jury trial is allowed to an incorporated company, the verdict is certified by the Circuit Court to the condemnation commissioners who are to include that verdict as a part of the damages awarded in their report.[11]

The commissioners are authorized to fix the "benefit or taxing district," and to publish the same for a period of ten days before beginning their assessment of damages and benefits.[12] The purpose of the published notice is to give the time and place where the commissioners will meet and hear evidence on benefits and to prescribe the boundaries of the taxing district within which

5. Charter, art. XXI, sec. 3.
6. Kansas City v. Smith (1911) 238 Mo. 323, 331; St. Joseph v. Geiwitz (1899) 148 Mo. 210, 216; City of St. Louis v. Smith (1930) 325 Mo. 471, 30 S. W. (2d) 729.
7. Const. of Mo., art. XII, sec. 4.
8. Kansas City v. Smart (1895) 128 Mo. 272; Kansas City v. Vineyard (1895) 128 Mo. 75, 30 S. W. 326; St. Louis v. Roe (1904) 184 Mo. 324.
9. Kansas City v. Vineyard (1895) 128 Mo. 75, 30 S. W. 326, cited in United States v. Hess (1934) 70 F. (2d) 142, 145.
10. City of St. Louis v. Buss (1900) 159 Mo. 9, 12, 59 S. W. 969, 970.
11. Charter, art. XXI, sec. 5.
12. Charter, art. XXI, sec. 5.

benefits are to be assessed. This notice, when published as required by the Charter, is service of process upon the land in said district for the purpose of assessing benefits. Benefits cannot be assessed without such publication. The commissioners, however, are not required to assess all the property within the published district.[13]

Incidental to the ascertainment of the damages the Charter prescribes two duties for commissioners, namely, to view the property and to hear evidence offered by the interested parties.[14]

The Charter requires that commissioners shall assess damages and benefits as of the effective date of the ordinance.[15] This date, known in condemnation circles as the date of valuation, has often been the bone of contention either in hearings before commissioners or in the trial of exceptions in the Circuit Court. The Supreme Court of Missouri has never passed upon the legality of the St. Louis date of valuation when the taking of property was involved, but it has dealt with the question of the assessment of benefits on the effective date of the ordinance in two cases[16] growing out of a street widening. The court held in effect that there was no constitutional provision governing the assessment of benefits.

A date of valuation for the taking of private property that would render complete justice under all circumstances would be rather difficult to fix. Objections may be made to any date. The ideal date of valuation would be the fictitious date as used by Lewis who refers to the illustration of a pie-powder court where with the ax in one hand you chop off the line of buildings and pay the money with the other.[17] Such an ideal cannot be reached. The ordinance must be passed, and the City Counselor must file the suit within six months from the effective date of the ordinance. After the suit is filed, time is required to secure personal service upon the defendants within the City and State, and thereafter publication must be had upon "not found" and unknown defendants. If a street widening is a project three to five miles in length, there may be 200 to 300 parcels of land involved, and there may be as many as 700 to 900 defendants. Very few of the

13. City of St. Louis v. Brown (1900) 155 Mo. 545, 559, 56 S. W. 298; Wabash Ry. Co. v. City of St. Louis (1933) 64 F. (2d) 921, 930.

14. Charter, art. XXI, sec. 5.

15. Charter, art. XXI, sec. 5. An ordinance of the City of St. Louis becomes effective thirty days after it is approved by the mayor unless it is an emergency measure. Art. IV, sec. 19.

16. City of St. Louis v. Senter Com. Co. (Mo. 1935) 84 S. W. (2d) 133, rehearing denied (Mo. 1935) 85 S. W. (2d) 21.

17. 2 Lewis, *Eminent Domain* (1909) 1221, sec. 705.

major street widening projects involve fewer parcels and fewer defendants than the number above suggested, and it is very seldom that a case of that size may be referred to commissioners within two years after the effective date of the ordinance.

It is often urged that the date of valuation should be the date of the filing of the commissioners' report. Such a date would be in the future with reference to the time that the commissioners would assess the damages and, therefore, such a date would be wholly speculative.

Dates of valuation have been fixed by statute in California, Utah and New Jersey and the appellate courts of those states have held such statutes valid.[18] It must be remembered that the federal and state constitutions guarantee to the property owner "just compensation" and that any statute attempting to fix a date of valuation for the taking of private property must comply with those constitutional requirements.

In paying compensation and damages, the measure of damages is the market value of the property. Expressed in another way, the damages are the difference in valuation before and after a part of the property is taken from the whole parcel.[19] The application of the market-value rule is very simple where the whole parcel is taken, but complications arise when only a part of the parcel is taken. The rule for "before and after taken" then applies.

After the commissioners ascertain the damages of a project, it then becomes their duty to take up the matter of the assessment of benefits. The Charter provides that for the payment of all such damages the commissioners shall assess benefits to help pay the cost of the project. More specifically, the commissioners "shall assess against the lots or parcels of property * * * especially benefited by the proposed improvement * * * the amount that each such lot or parcel of property * * * shall be especially benefited."[20]

Special benefits, as assessed pursuant to the provisions of the City Charter, have been defined by the United States Circuit Court of Appeals, Eighth Circuit, as follows: "Lands in such a benefit district whose market value has been increased by reason

18. City of Los Angeles v. Pomroy (1899) 124 Cal. 597, 57 Pac. 585; Santa Anna v. Bruner (1909) 132 Cal. 234, 64 Pac. 287; City of Los Angeles v. Gager (1909) 10 Cal. App. 378, 102 Pac. 17; See also Sanitary District v. Chapin (1907) 226 Ill. 449, 503, 80 N. E. 1017.

19. City Water Co. v. Hunter (1928) 319 Mo. 1240, 1245, 6 S. W. (2d) 565, 566; Railroad Co. v. Carton Real Estate Co. (1907) 204 Mo. 565, 575, 103 S. W. 519.

20. Charter, art. XXI, sec. 4.

of improvement are especially benefited."[21] Whether or not a tract of land is benefited by reason of a street opening or widening, and, if so, to what extent, are questions of fact to be determined by the commissioners. In the ascertainment of damages, the matter before the commissioners is the determination of the values. In the assessment of benefits the matter before the commissioners is the determination of the increment of value.

There are certain limitations on assessments. If a parcel of land is not benefited, of course, it is not to be assessed. The Charter limitation is that the gross assessment of benefits cannot exceed the gross amount of damages.[22] However, the gross assessment of benefits, generally, is less than the gross amount of damages, and the balance of the cost of the project is, of course, assessed against the City of St. Louis. It is very rare that damages and benefits are equal except in an alley opening where the Charter requires that the assessment of benefits against the lots or parcels in the block shall equal all the damages assessed.[23]

Another limitation on the assessment of benefits is the extent of the increase in the market value of the property.[24] Any assessment higher than the increase in market value would be arbitrary and without any basis.

The question is often asked, What is the real basis for the assessment of benefits? Some say that it is all guesswork; that it is wholly speculative. Others say that there is no such thing as benefits. The writer does not assume to give the answer or to solve the problem. By way of suggestion, reference is made to a subdivision in which streets and alleys are dedicated. These streets and alleys make the lots and parcels accessible. The subdivider has to provide streets and alleys in order to sell the lots, but he adds the cost price of the dedicated areas to the selling price of the lots. Hence the abutting lot owners actually, although unknowingly, pay for the streets and alleys.

A street widening could be perfected by dedication by the numerous abutting property owners, but this is rarely done. The city could not demand such a dedication from the property owners, for under the Constitution of Missouri they must be compensated. Therefore, condemnation proceedings are instituted

21. Wabash Railroad Co. v. City of St. Louis (C. C. A. 8, 1933) 64 F. (2d) 921, 928.
22. Charter, art. XXI, sec. 4.
23. Ibid.
24. Schwab v. City of St. Louis (1925) 310 Mo. 116, 130, 274 S. W. 1058; Ranney v. Cape Girardeau (1914) 255 Mo. 514, 164 S. W. 582; City of St. Louis v. Ranken (1888) 96 Mo. 497, 500, 504, 9 S. W. 910.

to widen the streets and special benefits are assessed on property which the commissioners find is benefited. The difference is that these assessments cannot be hidden. While the example of a subdivision may not be an exact comparison, it serves well to illustrate the principle.

When the commissioners' report is filed, the city or the owners have twenty days within which to file exceptions and objections to the report.

> Within twenty days from the filing of the commissioners' report, exceptions, in writing, thereto may be filed by any party interested, and upon such exceptions the court shall review the report and may order, on cause shown, a new assessment by other commissioners, or make such other orders thereon as justice may require. The court shall hear and dispose of such exceptions with all reasonable speed and may itself assess benefits anew.[25]

If no exceptions are filed the case is ready for final judgment which approves the commissioners' report. Any item of the report to which no exceptions are filed is final insofar as the award is concerned.

Exceptions are tried by the court without a jury. The trial court may reassess benefits, but it cannot assess damages.[26] Upon hearing testimony on damages, the court may overrule the exceptions, or it may sustain the exceptions and refer the matter to commissioners. Upon the trial of exceptions, under the St. Louis procedure, it is the duty of the court to review the commissioners' report. In *City of St. Louis v. Abeln*,[27] the court held that the commissioners, who made findings, were competent to testify. The court pointed out that there was no statute to disqualify the commissioners, that no principle of law was violated in permitting them to testify, and that often the courts, in considering exceptions, would be in the dark as to the theory which commissioners followed in arriving at the awards if they were not permitted to testify. The court in the *Abeln* case said

> In a review of the commissioners' report on exceptions thereto, the report itself is to be considered, and it must stand until it is shown to be wrong either in a point of law or in a matter of fact.

In *City of St. Louis v. Rossi*,[28] it was held that the commissioners had followed erroneous principles as to the measure of

25. Charter, art. XXI, sec. 7.
26. Const. of Mo., art. II, sec. 20.
27. (1902) 170 Mo. 318, 70 S. W. 708.
28. (1933) 333 Mo. 1092, 64 S. W. (2d) 600, 606.

damages, and that the report was wrong and could not stand. Unquestionably, the best way to show how the commissioners arrived at their awards either in point of fact or on principles of law would be to permit them to testify. On this point, however, the *Abeln* case was reversed in *City of St. Louis v. Schopp.*[29] It would seem that this decision is unsound in principle. In the trial of exceptions, under the St. Louis procedure where there is no jury, there would appear to be no reason on principle why a commissioner should not testify.

The Supreme Court of Missouri also departed from the ruling in the *Abeln* case in *City of St. Louis v. Schopp*[30] when it held that the effect of filing exceptions to commissioners' report was "to vacate the award and to afford the exceptors a trial *de novo.*" In that ruling the Supreme Court followed the same theory as is followed under the Corporation Statute where exceptions are tried before a jury, hereinafter briefly discussed. The ruling in the *Schopp* case, however, has not been followed in recent decisions of the Supreme Court. Judge Ragland in *City of St. Louis v. Turner*[31] approved the *Abeln* case on this point. The United States Circuit Court of Appeals in *Wabash Railway Company v. City of St. Louis,*[32] in an opinion by Judge Otis, also casts a doubt upon the soundness of the rulings in the *Schopp* case.

On a mere question of value, depending upon conflicting evidence, the Circuit Court will interfere with the award of the commissioners only in cases in which the damages are flagrantly excessive or inadequate.[33] Where there is substantial competent evidence the Supreme Court will not interfere with the trial court's ruling upon exceptions.[34]

The effect of filing exceptions under the Corporation Statute[35] is quite different from filing exceptions under Section 7 of the City Charter. Under the state procedure the filing of exceptions

29. (1930) 325 Mo. 480, 30 S. W. (2d) 733.
30. See 30 S. W. (2d) at 735.
31. (1932) 331 Mo. 834, 55 S. W. (2d) 942, 943.
32. (1933) 64 F. (2d) 921, 924. In City of St. Louis v. Franklin Bank (Mo. 1937) 107 S. W. (2d) 3, the Supreme Court of Missouri again approved the Abeln case with reference to the standing of the commsisioners' report in the trial court.
33. City of St. Louis v. Calhoun (1909) 222 Mo. 44, 55, 120 S. W. 1152, 1154; City of St. Louis v. Rossi (Mo. 1932) 55 S. W. (2d) 946, 947.
34. City of St. Louis v. Franklin Bank (Mo. 1937) 107 S. W. (2d) 3; City of St. Louis v. Franklin Bank (Mo. 1936) 100 S. W. (2d) 927; City of St. Louis v. Senter Commission Co. (1935) 336 Mo. 1209, 84 S. W. (2d) 133, 142; City of St. Louis v. Rossi (1933) 332 Mo. 498, 58 S. W. (2d) 965; City of St. Louis v. Turner (1932) 331 Mo. 834, 55 S. W. (2d) 942.
35. R. S. Mo. (1929) secs. 1340-49.

automatically sets aside the commissioners' report.[36] The court does not have before it the commissioners' report, as it does in the St. Louis procedure, and the report of commissioners cannot be presented in evidence for the reason that "the jury have no more right to know what the report or assessment of damages was than any jury in any case has to know what the verdict of a previous jury was in the same case."[37]

Thus it is seen that the St. Louis procedure and the State procedure in condemnation proceedings are entirely different. Both procedures have been clearly defined by the Supreme Court of Missouri, and it is unthinkable that they should be confused. The conflict between St. Louis procedure and State procedure in condemnation proceedings, is explained in *Kansas City v. Field*,[38] in which the Supreme Court of Missouri held that condemnation proceedings were matters of mere municipal regulations and that such proceedings supersede state law when the two conflict. The *Field* case, and numerous other cases of the same import, are collected and cited in *State ex rel. Kansas City v. Lucas*.[39]

CHARTER AMENDMENT NUMBER TEN

On April 4, 1933, Condemnation Article XXI, of the City Charter was amended. The principal changes made by that amendment were in the selection of commissioners, their legal qualifications, their terms of office, the manner of referring of cases to commissioners, and the elimination, as far as possible, of the fee system for the payment of commissioners. Formerly, three commissioners were appointed by the Circuit Court to assess damages and benefits in each project. They were paid at the rate of $5.00 per day for a day of at least two hours. By the new amendment three commissioners are appointed by the Circuit Court for specific terms at fixed salaries to deal with all condemnation cases to which the City of St. Louis is a party.

With respect to the qualifications of commissioners the new amendment provides

> One such commissioner and one alternate shall be a person familiar, by practice and experience, with the value of real estate, one shall be familiar with the cost and practice of building construction, and one shall have had general business experience in the city.[40]

36. Railroad Co. v. Pfau (1908) 212 Mo. 398, 409, 111 S. W. 10; Railroad Co. v. Woodward (1906) 193 Mo. 656, 661, 91 S. W. 917.
37. Railroad Co. v. Roberts (1905) 187 Mo. 309, 321, 86 S. W. 91.
38. (1889) 99 Mo. 352, 12 S. W. 802.
39. (1927) 317 Mo. 255, 263, 296 S. W. 781, 784.
40. Charter, art. XXI, sec. 3.

In the event of the death, disability, illness or disqualification of any commissioner, an alternate is designated to take his place. However, it is also the custom of the court to refer matters to the alternate commissioners where the court feels that the commissioners have erred in making their awards.

The Supreme Court of Missouri held in *State ex rel. City of St. Louis v. Hall*[41] that Amendment Number Ten was legally adopted. It would appear that the Charter amendment, which requires commissioners to be appointed by the Circuit Court to assess damages and benefits in all cases instead of by commissioners appointed for each project, is constitutional for the state Constitution of Missouri provides that compensation shall be determined by commissioners "in such manner as may be prescribed by law."[42] There is no provision in the constitution which requires that there should be commissioners for each project. It leaves to the law-making body the authority to determine the manner of the appointment and the tenure of such commissioners. Amendment Number Ten provides that the Circuit Court, in General Term, shall appoint three commissioners and three alternates. This is the manner "prescribed by law," and appears to be in compliance with the constitutional provision.

In the past, one of the chief objections to the St. Louis procedure came from the land owners in the taxing district. The notice published in the *Daily Record* did not give them actual notice. Under the new amendment, in addition to the *Daily Record,* the notice of the benefit or taxing district must also appear in one of the daily newspapers of the city and six copies of the notice are posted by the city marshal within the taxing district. These additional notice requirements seem to have effectuated a greater degree of actual notice to the property owners affected.

The hearings before commissioners, under the St. Louis procedure, have always been informal for the reason that many property owners appear without counsel or without appraisers. There are many property owners who do not appear at all, even though they may have received "courtesy notices" by mail. In all such instances, where the property owners fail to furnish the necessary information, the commissioners have always given special consideration to matters of valuation.

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41. (Mo. 1934) 75 S. W. (2d) 578.
42. Const. of Mo., art. II, sec. 21.

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