

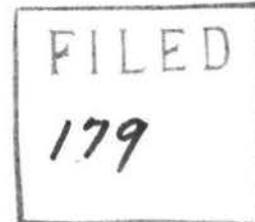
EMINENT DOMAIN:  
JUST COMPENSATION:  
BONDS:  
SECURITIES:  
CONDEMNATION:

Bonds do not satisfy the Missouri constitutional requirement for just compensation for property taken by the state by condemnation.

OPINION NO. 179

December 2, 1969

Honorable Harold J. Esser  
Representative - 18th District  
3 West Glen Arbor Road  
Kansas City, Missouri 64114



Dear Mr. Esser:

This office is in receipt of your request concerning the constitutionality of bonds as compensation for land acquired for highway purposes by condemnation. A resolution of this question depends ultimately on whether bonds fulfill the fundamental requirements of just compensation prescribed by Section 26, Article I of the Missouri Constitution.

Section 26, Article I of the Missouri Constitution provides in part:

"That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. . . ."

A bond is defined in the Missouri Revised Statutes, as an "obligation." Section 99.320, RSMo 1959. Bonds do not serve as actual payment for the land acquired, but are promises to pay in the future. Bonds are also a contract which, if tendered, bind the state to some future payment. *Stifel Estate Co. v. Cella*, 220 Mo.App. 657, 291 S.W. 515 (St.L.Ct.App. 1927), refers to bonds as contracts.

The state may acquire private property by an exercise of its police power, Railroad Company v. Husen, 95 U.S. 465, (1877), through the power of eminent domain, Backus v. Fort Street Union Depot Co., 169 U.S. 557 (1898).

In the case of Waterbury v. Platt Bros. & Co., 56 A. 856, the Supreme Court of Errors of Connecticut said, l.c. 858:

". . . 'Just compensation' means a fair equivalent in money, which must be paid at least within a reasonable time after the taking, and it is not within the power of the Legislature to substitute for such present payment future obligations, bonds, or other valuable advantage. . . ."

Section 17, Article II of the Arizona State Constitution provides in part:

"No private property shall be taken or damaged for public or private use without just compensation having first been made, or paid into court for the owner. . . ."

In Gardner v. Henderson, 103 Ariz. 420, 443 P.2d 416 (1968), the Arizona Supreme Court said, l.c. 420, 421:

"A bond is not money. A bond is not payment. A bond is not 'just compensation made' and its deposit with a court is not a payment into court. A bond is a certificate or evidence of a debt. It is a contract to pay upon the happening of certain contingencies. It is a mere promise to pay. See Black's Law Dictionary, Deluxe Fourth Edition.

"Article 2, § 32 of the Arizona Constitution, states:

'The provisions of this Constitution are mandatory, unless by express words they are declared to otherwise.'

"The immediate taking of possession of property by a municipality is a taking of property. Possession is certainly one of the greatest attributes of ownership of property. The possessor exercises dominion over the property, and a condemnor, be it municipality or private corporation thereafter denies the owner of its usage, its rental value, and its enjoyment. Where the condemnor proceeds to convert the property to its

public usage he proceeds to 'damage' the property. While a taking may not be complete until after final judgment and vesting of title a taking nevertheless commences with an order of immediate possession which permits the condemnor to enter the land, demolish improvements, and commence the erection of public improvements. It follows therefor that an order of immediate possession must comply with Art. 2, § 17, supra.

"It is obvious from the provisions of the Constitution and laws of this state that private property may not be taken for public use without just compensation having first been made or paid into court for the owner. The portion of the Constitution quoted above is mandatory.' State ex rel. Morrison v. Jay Six Cattle Company, 85 Ariz 220, at page 224, 335 P.2d 799, at page 801. [Emphasis in original]

"A bond is a security for just compensation and its deposit in court is a promise to pay into court at a later date. In holding the bond provision of A.R.S. § 12-1116 unconstitutional because of the mandatory provisions of Art. 2, § 17, we yet note the practical and economical wisdom of the arguments for bond usage. The root of our power, however, is derived from the Constitution and the preservation of its mandatory provisions is essential to the security of individual rights and the perpetuity of free government. If it be deemed desirable in this state that the 'state, county, city, town, or political subdivision thereof' be entitled to file 'a bond in a form to be approved by the court' then that result must be obtained through constitutional amendatory channels."

The Missouri Constitution is similar to that of Arizona. We believe that the reasoning of the Supreme Court of Arizona is applicable to the provisions of Section 26, Article I of the Constitution of Missouri and that a law providing payment by bonds for property condemned by the state would be unconstitutional.

#### CONCLUSION

It is therefore the opinion of this office that payment with bonds for the taking of private property by the state by condemnation does not satisfy the requirement in the Missouri

Constitution that private property not be taken without just compensation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Harvey M. Tettlebaum.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Danforth". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

JOHN C. DANFORTH  
Attorney General