COUNTIES: CONDEMNATION PROCEEDINGS: County may withdraw from condemnation proceedings before owner's right to compensation becomes vested; only liable for court costs and not attorneys fees; when county may appeal from judgment of the circuit court.

February 17, 1939

Mr. G. Logan Marr
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Dear Sir:

We acknowledge your letter of February 9th, wherein you state that the county court of Morgan County concluded that the right of way of an old road should be widened, and that you proceeded under Section 7840 R. S. Mo. 1929 (formerly Section 10636 R. S. Mo. 1919).

That this was the correct section to proceed under, there can be no doubt in view of the court's statement in the case of Tebbs vs. Platte County 28 S. W. (2d) 656, 657:

> "We are not holding, of course, that counties are not vested with the power of eminent domain under which they can condemn private property for public road purposes. They are vested with such power. Section 10636 R. S. 1919; Petet vs. McClanahan, 297 Mo. 677, 688, 249 S. W. 917."

Section 7840 R. S. Mo. 1929 provides as follows:

> "The right of eminent domain is vested in the several counties of the state to condemn private property for public road purpose, including any land, earth, stone, timber, rock quarries or gravel pits necessary in establishing, building, grading, repairing or draining said roads,

or in building any bridges, abutments or fills thereon. If the county court be of the opinion that a public necessity exists for the establishment of a public road, or for the taking of any land or property for the purposes herein mentioned, it shall by an order of record so declare, and shall direct the county highway engineer within fifteen days thereafter to survey, mark out and describe said road, or the land or material to be taken, or both, and to prepare a map thereof, showing the location, courses and distances, and the lands across or upon which said proposed public road will run, or the area, dimensions, descriptions and location of any other property to be taken for the purposes herein, or both, and said highway engineer shall file said map and a report of his proceedings in the premises in the office of the county clerk. Thereupon the county court shall cause to be published in some newspaper of general circulation in the county, once each week for three consecutive weeks, a notice giving the width, beginning, termination, courses and distances and sections and subdivisions of the land over which the proposed road is to be established, or the location, area, dimensions and descriptions of any other land or property to be taken, or both, and that said land or property is sought to be taken for public use for road or bridge purposes. If within twenty days after the last day of said publication no claim for damages for the taking of any of such land or property be filed in the county clerk's office by the owner of said property, or by the guardians or curators of insane persons or minors owning said property, then the claim of any such owner shall be forever barred, and the county shall be authorized to enter upon

and appropriate said lands or other property; and the court shall make an order accordingly. If any claim for damages be filed, the same shall be heard on the first day of any regular or adjourned term of the county court after the expiration of the twenty days last aforesaid. If the county court and the land or property owner be unable to agree on the amount of the damages, the county court shall make an order reciting such fact, and cause a copy of same to be delivered to the judge of the circuit court of that county, and a transcript of the record and the original files in said cause shall be transmitted by the county clerk to the circuit clerk of the county. Upon receipt of the copy of the order of the county court last aforesaid by the circuit judge, the circuit court, or the judge thereof in vacation, shall make an order setting the cause for hearing within fifteen days, and if the order fixing the date of said hearing be made by the judge in vacation, it shall forthwith be filed in the office of the circuit clerk. The court, or judge in vacation, shall cause to be empaneled a jury of six freeholders not interested in the matter or of kin to any member of the county court, or to any landowner in interest. Said jury shall view the land, or other property, proposed to be taken, and shall hear the evidence and determine the question of damages under the direction of the court or judge. Five of said jury concurring may return a verdict, and in case of a disagreement another jury may be empaneled. The public necessity for taking said property shall in nowise be inquired into by the circuit court, and the judgment of the circuit court, or judge thereof in vacation, in said cause shall not be reviewed on appeal or by writ of error. (R. S. 1919, Section 10636)"

The underlined portion of same was held unconstitutional in the case of Barker vs. St. Louis County 104 S. W. 371 for the reason that the statute cast the initiative on the owner, requiring him to prosecute in twenty days for compensation for his property. However, you state that the owner was notified of the action of the court. The owner pursuant to Section 7840, supra, filed his claim for damages in the sum of $500.00, but an agreement was not reached between the owner and the court. The latter then pursuant to the above section "certified the case under Section 7840 to the circuit court."

The circuit court subsequently met, and in accordance with the above section empaneled a jury of six freeholders to view the land and determine the damages. On May 9, 1938, they returned a verdict of $800.00 "as damages for the right of way".

The Morgan County court being in session and hearing of the verdict, was of the opinion that it "should withdraw from the proceedings as soon as possible". On May 12, 1938, the date the award was returned in the circuit court, the county court being in session requested and entered an order that the prosecuting attorney "file a motion to abandon, withdraw, and dismiss any interest that Morgan County had in the right of way".

You further state that the county court is ready to pay the costs of the proceedings, but that the attorney for the landowner contends that there is no right of appeal, or writ of error, or right to withdraw from condemnation proceedings.

It is true that no provision is made in Section 7840 for dismissal, or abandonment of proceedings, as is provided for in Section 1342 R. S. Mo. 1929 for certain corporations, however, we find no statute in this state which would prohibit it.

20 C. J. Section 457, page 1077, states that:

> "In the absence of any statutory provision showing a legislative intent to the contrary, or of a stipulation with the landowner to prosecute the proceedings to a conclusion, the condemning party may discontinue the condemnation proceedings at any time before the right of the property owner to compensation or damages has become complete."

Such rule finds support in the case of Railroad vs. Rail-

road 126 Mo. App. 272, l.c. 278, wherein the court said:

> "The general rule, in the absence of statutory provisions to the contrary, is that the condemning party may discontinue the proceedings at any time before the right of the parties have become vested. There is not even a cavil as to the correctness of this rule, but as to the time when the rights of the parties become vested there is a diversity of opinion. There seems to be no denial of the right of the condemning party to abandon the proceedings where they have not been confirmed or consummated. It may do so at any time prior to the confirmation of the commissioners' report, after the assessment of the damages has been made, and the award has been filed, and either before the submission of the injury to the jury, or after verdict and prior to judgment." (See also Kansas City v. Railroad 189 Mo. 245, l.c. 258, 259.)

And in the case of Simpson v. Kansas City 111 Mo. 237, l.c. 243, 20 S. W. 38, l.c. 40, the court said:

> "The authorities directing such improvements should have, and in the absence of statutory provisions are generally held to have, discretion to accept or reject the property at the price fixed. 'This rule is a necessity in view of the rational conduct of affairs.'"

We assume that the "motion to abandon, withdraw and dismiss any interest that Morgan County had in the right of way" was filed after verdict and prior to judgment so that the owner's right to compensation did not become vested, and if same be the facts we are of the opinion that Morgan County had the right to discontinue the condemnation proceedings.

You state that the county court is ready to pay the costs

of the proceedings.

In the case of Clark vs. Adair County 79 Mo. 546, l.c. 537, the court, in defining the term "counties", said:

> "Counties are territorial subdivisions of the state and are only quasi corporations created by the legislature for certain public purposes."

In the case of Meadow Park Land Company v. School District of Kansas City 250 S. W. 441, l.c. 446, the Supreme Court of Missouri, in defining "school district", said:

> "School districts as quasi corporations are created for specific purpose -- the promotion of education among the children of school age within the district."

14 C. J. Section 43, page 73, states as follows:

> "Giving the term its true meaning, however, it may be said that public corporations are such as are created by the people or the government, state or federal, for political or governmental purposes, such as the United States, states, cities, towns, counties, school districts and other municipal or political corporations * * * * * * *."

It may thus be said that counties and school districts, although referred to as quasi corporations may also be properly termed public corporations.

In the case of Nauman vs. Big Tarkio Drainage District 113 Mo. App. 575, l.c. 581, 87 S. W. 1195, l.c. 1196, the suit was one to recover counsel fees paid out in a condemnation proceeding instituted by the Drainage District but afterwards dismissed. The Kansas City Court of Appeals in holding that

the Drainage District was not liable said:

> "The statute failing to impose any liability in the event of abandonment, beyond the payment of costs, none can be enforced without it appears that the corporation has needlessly, wrongfully, and vexationsly delayed the proceedings, and thereby damaged the landowner."

In the above case, there was a statute providing for the payment of costs upon abandonment of the suit.

And in the case of Meadow Park Land Company vs. School District of Kansas City 301 Mo. 688, 257 S. W. 441, 31 A.L.R. 343, the question was whether the School District of Kansas City, which instituted a proceeding to condemn land of the appellant for school purposes, and after prosecuting that proceeding for several months, dismissed it, was liable for attorneys fees and other attendant expenses. The court in denying such liability but indicating that court costs would have to be paid, said:

> "No statute forbids a school district from dismissing. The question of dismissing the proceeding to condemn a particular parcel of land for a site must be determined by the members of the board of directors, as public officials, and as in the public interest. In the absence of any statute imposing liability upon the school district for their act of discontinuance, it should not readily be held that the school statute (section 11428), which authorizes the district to condemn a site and points out article 2 of chapter 13 as prescribing the manner or mode of procedure to be followed, must be construed as meaning that the school district by discontinuing its proceeding to condemn

> incurs the same liability as it has been held the private corporations, therein designated, incur by a discontinuance. * * * * * * * * * * But the court could not have taxed these expenses, but only costs against the school district in that proceeding, under the decision in St. Louis vs. Meintz 107 Mo. 611, 18 S. W. 30, and Section 1793 R. S. Mo. 1919; * * * * * *."

In the above case, there was also a statute for payment of the costs on the abandonment of the suit.

The case of Manly vs. State Highway Commission 82 S. W. (2d) 619 was an action to cover expenses alleged to have been sustained in defending a condemnation proceeding brought by the State Highway Commission against the plaintiffs in circuit court. The court stated the following rule with reference to the liability of public corporations upon abandonment of a condemnation suit:

> "It is equally well settled that plaintiffs are not entitled to recover if the defendant, as it contends, is a purely public entity or corporation. Meadow Park Land Co. vs. School District of Kansas City 301 Mo. 688, 257 S. W. 441, 31 A.L.R. 343."

In the instant case, there is no statute imposing liability for costs upon abandonment of the suit, however, from the foregoing, we are of the opinion that Morgan County, being a public corporation, would not be liable for attorneys fees and other attendant expenses incurred in condemnation proceedings, and would only be liable for court costs in the discretion of the court.

Section 7840, supra, provides in part as follows:

> "The public necessity for taking said property shall in nowise be inquired into by the circuit court, and the judgment of the circuit court or judge thereof in vacation, in said cause shall not be reviewed on appeal or by writ of error."

From a casual reading of the above section, it would seem to indicate that Morgan County would have no right to appeal the judgment of the court, inasmuch as appeals are wholly statutory, and there can be no appeal unless the statute authorizes it. Thus, in the case of Bussiere's Administrator vs. Sayman 257 Mo. 303, l.c. 308, the court said:

> "It is a minor premise to the discussion that appeals are wholly creatures of the statute, and that the right of appeal does not exist where expressly given. This is fundamental, or if not fundamental, well settled." (Citing cases)

There is, however, a rule of statutory construction which states that "laws are passed in a spirit of justice and for the public welfare and should so be interpreted if possible or to further these ends and avoid giving them an unwarranted effect." Bowers vs. Missouri Mutual Association 62 S. W. (2d) 1058, l.c. 1063.

And another rule that the purpose of statutory construction is to determine the legislative intent, Gendron v. Dwight Chapin & Co., 37 S. W. (2d) 486, 225 Mo. App. 466.

The legislative intent of Section 7840, supra, prohibiting a review on appeal or writ of error from a judgment of the court was evidently intended to go as to the question of public necessity for taking the property and to the amount awarded as damages.

It should not be interpreted to prohibit a review of the court's action in failing to sustain a motion for dismissal by the county before the rights of the property owner vested. To hold otherwise would be to defeat the ends of justice and public welfare which gives a quasi public corporation the right to determine whether it is wise to expend the taxpayer's money for a right of way.

You state, however, that although the verdict was rendered on May 12th, you did not file your motion for new trial until December 7th, same being overruled when it was argued at a later term, viz., January 9, 1939.

Section 1005 R. S. Mo. 1929 provides when motions for new trial and in arrest of judgment may be filed:

> "All motions for new trials and in arrest of judgment shall be made within four days after the trial, if the term shall so long continue; and if not, then before the end of the term."

It is to be noted that the rule is the same in motions in arrest of judgment as in motions for new trial.

In the case of Schwettman vs. Sander 7 S. W. (2d) 301, a verdict was returned on September 22nd and on October 8th, within term time the court entered its judgment. Thereafter, at the same term, on October 12th, and within four days after rendition of judgment, defendant filed a motion in arrest of judgment which was overruled and the defendant appealed. The court in holding that Section 1456 R. S. Mo. 1919 (now Section 1005 R. S. Mo. 1929) required the motion in arrest of judgment to be filed within four days after trial and not four days after judgment said:

> "Respondent (plaintiff) has filed a motion to dismiss the appeal. The ground relied upon in support of the motion to dismiss this appeal is that, under section 1456, Revised Statutes of Missouri 1919, all motions for new trials and in arrest of judgment shall

> be made within 4 days after the trial, if the term shall so long continue, and if not, then before the end of the term; and that, since the record discloses that the motion in arrest of judgment filed by the defendant was not filed within 4 days after the trial, the trial court properly overruled same.
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> The point that defendant's motion in arrest was not filed in time is well taken, since it has been held repeatedly that section 1456 of the statute is mandatory, and where a motion for new trial or a motion in arrest of judgment is filed after the time allowed, the same will not be considered by the court. Section 1456, Revised Statutes of Missouri 1919; State ex rel. Waggoner v. Lichtman, 184 Mo. App. 225, 168 S. W. 367; Saxton National Bank v. Bennett, 138 Mo. 494, 40 S. W. 97. Defendant's motion in arrest of judgment, having been filed out of time, amounted to no more than a suggestion to the court that it should set aside the judgment of its own motion during the judgment term. State ex rel. Conant v. Trimble, 311 Mo. 128, loc. cit. 144, 277 S. W. 916, a most comprehensive opinion in which an exhaustive review of the many cases germane to the question is to be found."

In the instant case, your motion for new trial was not filed within four days after trial and hence it was, in our opinion, properly overruled.

You inquire whether you "should attempt to have an order granting the appeal made by the circuit court as an order nun pro tunc from the writing in the record, then appeal to the Supreme Court; or if I fail in that, apply for a writ of error to bring up what I contend to be an invalid judgment against Morgan County for $800.00."

Section 1020 R. S. Mo. 1929 provides on what conditions

appeals may be allowed:

> "No such appeal shall be allowed unless: First, it be made during the term at which the judgment or decision appealed from was rendered; and, second, the appellant or his agent shall, during the same term, file in the court his affidavit, stating that such appeal is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court."

Section 2003, R. S. Mo. 1929 provides the time for holding court in the judicial circuits of the state as follows:

> "In the judicial circuits of this state the courts shall be held at the hereinafter designated places and at the time hereinafter named in each of the several counties respectively in each year."

Section 2017 R. S. Mo. 1929 relates to the fourteenth judicial circuit which includes the county of Morgan:

> " * * * in the county of Morgan, on the second Monday in January, the fourth Monday in April, and the second Monday in September."

Inasmuch as the verdict of the court was rendered in the April term and the affidavit and application of appeal was filed out of term, viz., January term of the court, we are of the opinion that by virtue of Section 1020 R. S. Mo. 1929, Morgan County has lost its right to appeal from the judgment of the circuit court.

As to the question of whether you should get an order nun pro tunc from the writing in the record, we fail to see how same

would be of any aid.

In the case of Neil vs. Tubb, 241 Mo. 666, l. c. 679, the court said:

> "When a court at a former term has made an order or rendered a judgment which should have been then entered on the record but was not, it may be entered at a subsequent term as now for then, provided the court has a sufficient memorandum of its own to show that the order or judgment had actually been made at the former term; but when entered it is not the order or judgment now made but that which was then made."

The order or judgment of the court would be as of the date made, but inasmuch as the appeal would still have been filed at a subsequent term, we are of the opinion that no appeal is allowable.

CONCLUSION

From the foregoing, we are of the opinion that if the facts disclose that you filed the "motion to abandon, withdraw and dismiss any interest that Morgan County had in the right-of-way," after verdict and prior to judgment so that the owners right to compensation did not become vested, then the judgment rendered would be of no force and effect. However, since you failed to file your motion for new trial within four days after trial and to appeal from the court's action during the term at which the judgment appealed from was rendered, no right to appeal from said judgment would lie and hence, Morgan County has lost its right to appeal from the judgment of the circuit court.

Respectfully submitted,

APPROVED:

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