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Comment

INTEREST ON EXCESS CONDEMNATION AWARDS PAID INTO COURT

INTRODUCTION

In Missouri, land required for public use may be condemned by following a prescribed statutory procedure.¹ Included is section 523.040, RSMo 1959 which provides for the appointment of commissioners to ascertain the damages that the landowner will sustain by reason of the condemnation. This section further provides that once the commissioners have made a determination as to damages, the condemnor must pay this amount into court whereupon the condemnor has the right to take possession of the land and use it. The landowner may withdraw all or any part of the amount deposited in court. Once the right of the condemnor to condemn the land has been established, the only remaining question, after the money is paid into court, is the amount of the damages awarded.² Section 523.050, RSMo 1959 provides that after the damages, as ascertained by the commissioners, have been paid into court, either party to the condemnation may file written exceptions to the commissioner's award and request a jury determination of damages. If the landowner withdraws the whole sum that is on deposit and the jury subsequently finds him entitled to the whole amount, no problems are created. However if this is not the case, several problems arise.

If the landowner withdraws the entire sum and the jury subsequently finds him entitled to less than this amount, is the condemnor entitled not only to the return of the excess withdrawn by the landowner but also to interest thereon?

If interest is allowed, from what date does it begin? If the landowner withdraws the entire sum and the jury finds that he is entitled to more than this amount, is the landowner entitled to interest on the difference, and if so, from when? If the landowner does not withdraw any of the sum, but leaves it in the registry of the court and the court clerk lends the money out at interest, who is entitled to this interest?

Neither section 523.040 nor 523.050 specifically deal with any of these possible problems. In 1959 an amendment aimed at answering the problems raised above was adopted by the Missouri General Assembly. That amendment is embodied in section 523.045, RSMo 1959.³

1. Chapter 523, RSMo 1959.

2. State *ex rel.* State Highway Comm. v. Curtis, 365 Mo. 447, 283 S.W.2d 458 (En Banc 1955); State *ex rel.* Union Electric Light & Power Co. v. Bruce, 334 Mo. 312, 66 S.W.2d 847 (1933).

3. Mo. Laws 1959, S.B. No. 248, § 1.

In June of 1963 the Supreme Court of Missouri, with one judge dissenting, handed down an important en banc decision on the construction and application of this new section in the condemnation procedure. In this case, *State ex rel. State Highway Commission v. Paul*,⁴ another problem under the condemnation procedure in addition to those raised above was presented. The landowner withdrew only part of the sum paid into court and the jury found him entitled to exactly the part withdrawn. The condemnor contended that the landowner was liable to it for interest on the amount not withdrawn under the provisions of the new statute section 523.045.

I. PRE-1959 LAW IN MISSOURI

The leading case of *St. Louis K. & N.W. R.R. v. Knapp-Stout & Co. Company*⁵ established the rule in Missouri that the condemnor is not entitled to interest where the landowner withdraws the entire sum and the jury then finds him entitled to less than this amount. In that case the award of the commissioners (as per section 523.040)⁶ was paid into court by the condemnor and the landowner withdrew that amount. Subsequently, on review by a jury (as per section 523.050)⁷ the award was for an amount less than the award of the commissioners. The balance over the jury award was ordered returned to the condemnor. The condemnor then sought to recover interest on this amount returned. The court declined, stating that there was no statute providing for such interest and:

Extraordinary power was conferred on plaintiff [condemnor], and while it has been compelled to be out of the use of its money pending the settlement of the amount it should pay, it is simply the price which the statute requires, and no default is traceable to defendant [landowner].⁸

The later case of *Arkansas-Missouri Power Co. v. Hamlin*⁹ discusses the question and sustains the *Knapp* case.

Viewing the problem from the side of the landowner, Missouri cases prior to 1959 held that the landowner was entitled to interest from the date that the land was taken by the condemnor on any amount greater than the commissioner's award as finally determined by the jury. *Arkansas-Missouri Power Co. v. Hamlin*¹⁰ contains a thorough discussion of the problem and it sustains the proposition, with an abundance of authority, that before the adoption of section 523.045 in 1959 the landowner was entitled to interest on any excess in his favor found by the jury from the time the land was taken by the condemnor.¹¹ The courts have based

4. 368 S.W.2d 419 (Mo. En Banc 1963).

5. 160 Mo. 396, 61 S.W. 300 (1901).

6. § 1266, RSMo 1899.

7. § 1268, RSMo 1899.

8. *Supra* note 5 at 417, 61 S.W. at 305.

9. 288 S.W.2d 14 (Spr. Mo. App. 1956).

10. *Ibid.*

11. *Missouri Pac. Ry. v. Roberts*, 187 Mo. 309, 86 S.W. 91 (1905); *Miller v. St. Louis & K.C. Ry.*, 162 Mo. 424, 63 S.W. 85 (1901); *Webster v. Kansas City & So. Ry.*, 116 Mo. 114, 22 S.W. 474 (1893); *St. Louis Oak Hill & C. Ry. v. Fowler*, 113 Mo. 458, 20 S.W. 1069 (1893).

their decisions on the rationale that the landowner is entitled to this additional interest as an element of the just compensation he is to receive for the taking of his land by condemnation.¹² This is logical since under the provisions of the condemnation statutes the condemnor is entitled to possession of the condemned land immediately upon payment of the commissioner's award into court, and the landowner should be compensated for the fact that he has not had use of the full sum to which the jury has found him entitled while the condemnor has had full use of the condemned property.

Where the condemnor pays the sum as assessed by the commissioners into court and it is not withdrawn by the landowner, followed by a jury determination as to damages which is smaller than the commissioner's award, Missouri courts have held that the landowner is *not* entitled to interest on the fund in court even though the condemnor has had use of the land. The condemnor has done all that is required of him when he pays the commissioner's award into court and if the landowner does not withdraw the sum and the jury does not find him entitled to a larger amount, he cannot recover interest from the condemnor.¹³

When the landowner does not withdraw the sum paid into court by the condemnor and the clerk of the court deposits this sum for interest during the further pendency of proceedings, it is held by the Missouri courts that the landowner is entitled to the interest earned while on deposit.¹⁴ During the pendency of the proceedings after the condemnor has taken possession of the land the sum in court is *prima facie* the property of landowner, and "as the principal sum was the plaintiff's [landowner's], it follows that the interest earned by it is also."¹⁵

Section 523.045 adopted in 1959 alters the prior rule as to the payment of interest. Prior to 1959 the landowner could recover interest on a jury award which was larger than the commissioner's determination, but the condemnor could not recover interest from the landowner when the jury award was smaller. Section 523.045 provides that the condemnor, as well as the landowner, shall be entitled to interest and that section reads in part as follows:

If, within thirty days after the filing of any such commissioner's report the condemnor shall have paid the amount of any commissioner's award to the persons named in the petition as owning or claiming any property or rights or to the clerk of the court for them and the amount of such award shall be superseded by a subsequent verdict or amount larger than the award paid, then interest on the amount by which such verdict exceeds the award, at the rate of six per cent per annum from the date of filing the report, shall be added to the amount of the verdict; but if the amount of the award shall be superseded by a subsequent verdict or amount smaller than the award paid, then judgment shall be entered against said persons

12. *State ex rel. State Highway Comm. v. Green*, 305 S.W.2d 688 (Mo. 1957); Mo. CONST. art. I, § 26.

13. *St. Louis K. & N.W. Ry. v. Clark*, 121 Mo. 169, 25 S.W. 192 (1893); *St. Louis Oak Hill & C. Ry. v. Fowler*, 113 Mo. 458, 20 S.W. 1069 (1893).

14. *St. Louis Oak Hill & C. Ry. v. Fowler*, 142 Mo. 670, 44 S.W. 771 (1898); *Snyder v. Cowan*, 120 Mo. 389, 25 S.W. 382 (1894).

15. *Snyder v. Cowan*, 120 Mo. 389, 25 S.W. 382 (1894).

named to repay to condemnor the amount by which the award paid exceeds the amount of the verdict, with six per cent interest on such excess payment from the date of the payment of the award.

One of the purposes for the adoption of section 523.045 was to equalize the interest recovery rights of both the condemnor and the landowner. In reply to personal correspondence with the Senators who introduced the bill, one of the Senators wrote:

The purpose of the section was to rectify the situation so that interest would automatically be added to any increase on awards made to the landowners. By the same token, it was felt that if the amount were reduced, the condemnor should be entitled to interest if the landowner had drawn down the award and had its use during the interim.¹⁶

A policy argument for this can be found in the fact that currently it is the state that is increasingly exercising the power of eminent domain with the advent of large scale public works projects. In the past it was exercised primarily by privately owned public utilities such as the railroads. Before section 523.045 the condemnor was denied interest on the theory that it was exercising an extraordinary power and this was a price of that power. When the state uses eminent domain it is presumptively for the common good as implemented by public works projects, and the idea of a penalty or price paid for a power does not apply. Therefore the state, and the people of the state generally, should not suffer the loss of having no compensation for the use of the state's money to which it is determined the landowner is not entitled.

In addition, prior to the adoption of section 523.045 the landowner had to specifically request that interest be included in the judgment. If he failed to make this request he would not receive the interest.¹⁷ As is indicated by the quotation of one of the Senators above, the Senators who introduced the bill also wanted to provide that interest would be automatically added to the judgment.

II. CURRENT MISSOURI LAW

In 1963 *State ex rel. State Highway Commission v. Paul*¹⁸ presented the Missouri Supreme Court with a problem of construction of section 523.045, newly adopted in 1959. The State Highway Department (hereinafter referred to as condemnor) condemned land of the defendant Paul (hereinafter referred to as landowner) for use for highway purposes. Commissioners were appointed according to Missouri's condemnation procedure and they awarded the landowner \$69,000.00 for the land that was condemned. Condemnor paid the full amount assessed by the commissioners into court on February 29, 1960 and then filed

16. Senate Bill 248 was introduced by Senators William Baxter Waters, Floyd R. Gibson (now Federal District Judge for the Western District of Missouri), Hartwell G. Crain and John W. Noble. The quotation in the text is from a letter of Senator William Baxter Waters and is used with his permission.

17. *State v. Green*, *supra* note 11.

18. *Supra* note 4.

written exceptions to this award seeking a redetermination of damages by a jury in accordance with section 523.050. On May 2, 1960 the landowner withdrew \$30,000.00 of the \$69,000.00 paid in, leaving \$39,000.00 on deposit with the court.

In the subsequent jury determination of damages the jury awarded the landowner \$30,000.00 (the exact amount that the landowner had previously withdrawn). The condemnor, relying on section 523.045 concerning the recovery of interest, filed a motion requesting that the court order the defendant landowner to pay interest at 6% on the sum of \$39,000.00 which condemnor had paid into court and had not had the use of during the entire proceedings. The trial court on July 12, 1961 gave a *nunc pro tunc* order granting condemnor interest on the \$39,000.00 relying on section 523.045 for this order. The landowner then filed a motion requesting that the trial court vacate its *nunc pro tunc* order. In accordance with the landowner's motion the *nunc pro tunc* order was vacated with the trial judge expressing the belief that section 523.045 was unconstitutional. Condemnor then appealed to the St. Louis Court of Appeals. That court ordered the appeal transferred to the supreme court on jurisdictional grounds since the constitutionality of a statute was in question.¹⁹

Condemnor contended that section 523.045 required the payment of interest where the condemnor had paid a sum into court to which the jury determined that the landowner was not entitled, whether or not the landowner ever withdrew that sum. The landowner contended that mere deposit in court is not a payment to the landowner within the meaning of the statute, and under the statute only when there is a payment to the landowner, that he must repay, is there an obligation by the landowner to pay interest.

Two questions were presented to the supreme court: Is section 523.045 unconstitutional either in part, or in its entirety, as held by the trial court? Does section 523.045, if constitutional, require payment of interest by the landowner on that part of the commissioner's award left in the registry of the court?

The supreme court held that in accord with the "cardinal rule" of statutory construction and interpretation, if the statute is susceptible to a construction in accord with the Constitution of Missouri it will be given the constitutional construction. The court held that section 523.045 can be construed as it stands not to impose an obligation to pay interest on the fund left in the registry of the court, and thereby avoided the constitutional question.

In reference to specific language of the statute the court pointed out that the statute states that interest on the excess withdrawn by the landowner runs from ". . . the date of the payment of the award. . . ." If this means payment of the award into court by the condemnor then serious doubts as to the constitutionality of the statute would arise because this date has no relation to when the landowner can withdraw, or is authorized to withdraw, the sum deposited.

The court avoided this constitutional problem by finding that the language of the statute is consistent with an intention on the part of the legislature not to

19. State *ex rel.* State Highway Comm. v. Paul, 360 S.W.2d 395 (St. L. Mo. App. 1963).

obligate the landowner to pay interest when the excess determined has been left in the registry of the court.

The court stated that the sum paid into court is as a fund in litigation and interest is not recoverable on such a sum which remains in the registry of the court.²⁰ The court pointed to the principle found in *Bowman v. Wilson*²¹ where when the landowner withdraws the sum before final adjudication he then becomes a debtor to the condemnor. When the final adjudication for an amount smaller than that withdrawn is rendered, the landowner is then in *default* on the difference and has *use of* the condemnor's money for which he owes the condemnor interest. The court states: "Section 523.045 did not purport to create any new legal relation such as debtor-creditor, but only to provide for the payment of interest *where the debtor-creditor relation exists.*" (Emphasis added.) No debtor-creditor relationship begins under the statute until withdrawal by the landowner, and no default occurs until it is determined that the amount withdrawn exceeds the final judgment. The court declared that under the facts no default occurred under the terms of the statute since the landowner withdrew exactly what was finally awarded, and he held no excess for which he could be in default.

The dissenting opinion by Judge Westhues contested the majority's holding that the sum paid into court by the condemnor is a sum in litigation.²² In support of this the dissent stated that since the landowner is free to do as he wishes with the sum, and he may withdraw all of it if he feels that the jury verdict will be the same, it is not in fact a sum in litigation. The amount paid into court is treated as a payment to the landowner by the statute. Therefore if the landowner has actually been paid, a subsequent verdict by the jury for a lesser amount subjects the landowner to interest for the use of the excess which the condemnor has paid to him. The dissent further contends that the statute provides that if the jury verdict is less than the award, the landowner is *required* to pay six per cent interest on the amount by which the award paid into court exceeds the jury verdict.

Other contentions of the condemnor based on section 514.250, RSMo 1959²³ were discussed and dismissed by the court as inapplicable to the questions presented to the court.

III. STATUTES OF OTHER STATES

The following discussion of condemnation procedures is not exhaustive, but is meant to be illustrative of how other states handle the interest problem. The statutes discussed here are similar to Missouri's condemnation statutes, as they all provide for assessment of damages by a commissioner with either a mandatory or optional payment into court of the commissioner's award.

The Kentucky statute, very similar to Missouri's, provides that the condemnor is liable to pay interest if the damages are increased by the jury, and that

20. 47 C.J.S. *Interests* §§ 25, 54 (1946).

21. 12 Fed. 864 (C.C.W.D. Mo. 1882).

22. C.J.S. *supra* note 19.

23. Catch-line of the Section: "Tender in court after suit brought—When plaintiff shall pay all costs from the time of such tender."

the landowner also will have to pay interest if the jury decreases the award. But in one particular the Kentucky statute goes further and provides: "If the owner at all times refuses to accept the payment tendered by the condemnor, no interest shall be allowed in the judgment against the owner for the amount of the decrease."²⁴ It is doubtful however that this language covers the specific question raised in the *Paul* case. You will recall that in that case the landowner *did* accept part of the payment in the court registry. This would seem to fall outside of the language of the Kentucky statute since it reads: ". . . at all times refuses to accept the payment tendered by the condemnor. . . ." There are no Kentucky cases in which a problem of construction of this section of the Kentucky statutes is raised.

Wisconsin in 1959 amended its condemnation procedure to provide that interest is recoverable by both the condemnor and the landowner.²⁵ Prior to the 1959 amendment Wisconsin's statute made no mention of the recovery of interest, but under the Wisconsin statutes as to appeals²⁶ the courts of Wisconsin allowed recovery by the landowner of interest on an increased jury award.²⁷ They likewise allowed the condemnor to recover interest on a decreased award.²⁸ There are no available cases construing the amended procedure, but presumably the courts will award interest just as they did prior to 1959—now with specific statutory authority.

The Texas condemnation statute makes no reference to the payment of interest on jury awards greater than the commissioner's award.²⁹ However, Texas courts do allow the landowner to recover interest and the decisions cite the Texas statute despite the failure to mention interest.³⁰

The Texas courts do not allow the condemnor to recover interest if the jury award is smaller. They do not base this denial on the statute, but on the theory that so long as the condemnor has use of the property (by virtue of a payment of the commissioner's award into court) the landowner should not be required to pay the condemnor interest in addition.³¹

The New Jersey condemnation statute states that the landowner will be entitled to recover from the condemnor the excess of the jury award over the commissioner's award ". . . with interest at the rate of six percentum (6%) per annum thereon from the date of making the deposit."³² But as to the condemnor receiving interest this section states only that the court after hearing shall enter judgment for the condemnor for the excess paid and withdrawn, with no specific mention

24. KY. REV. STAT. § 177.087(5) (Supp. 1962).

25. WIS. STAT. ANN. § 32.06 (Supp. 1963).

26. WIS. STAT. ANN. § 32.11 (1957).

27. *Neilson v. Chicago & N.W.R.R.*, 91 Wis. 557, 64 N.W. 849 (1895).

28. *Watson v. Milwaukee & M.R.R.*, 57 Wis. 332, 15 N.W. 468 (1893).

29. TEX. REV. CIV. STAT. ANN. § 3268 (1 & 2) (1952).

30. *Housing Authority v. Dixon*, 250 S.W.2d 636 (Tex. Civ. App. 1952); *Texasarkana & Ft. S. Ry. v. Brinkman*, 288 S.W. 852 (Tex. Civ. App. 1926), *affirmed*, 292 S.W. 860 (1927); *Baldwin v. City of San Antonio*, 59 C.A. 262, 125 S.W. 596 (1910).

31. *Maddox v. Gulf C. & S.F. Ry.*, 293 S.W.2d 499 (Tex. Civ. App. 1956).

32. N.J. STAT. ANN. § 52:18A-65 (1955).

of interest as there was in regard to the landowner. There are no cases construing this section.

As a final contrast, the Ohio condemnation statutes provide for payment of the award into court by the condemnor, and provide for payment of the excess to the landowner if the jury award is larger (and a repayment to the condemnor if it is smaller). They at no point make mention of any interest due.³³ The Ohio courts have taken the statutes at face value and have never required a payment of interest.³⁴

IV. CONCLUSION

The terms of section 523.045 give rise to two additional practical problems in the application of the section. The first is that no security or bond is required of the landowner upon withdrawal of the amount in court. For purposes of inquiry suppose that in the principal case the landowner had withdrawn the entire \$69,000.00 as found by the commissioners, but upon the jury's subsequent award of \$30,000.00 had been unable to repay the excess \$39,000.00. This sum would have been lost to the condemnor, as the statute makes no provision for securing the repayment of the excess.

Secondly, the statute provides for repayment by the landowner of the excess, including six per cent interest. As a practical matter, can the landowner, while he is holding the funds in excess of the final award, invest the excess in such a way that it will earn six per cent? He probably could not; if there is an appeal pending, any investment will have to be a short-term one because the jury may find him not entitled to part of what he has withdrawn. Consequently, the possibility of an investment that will earn at the rate of six per cent is very unlikely. So if the landowner is required to repay part of the amount withdrawn at six per cent when he cannot earn that much with the money while holding it, is not six per cent a penalty?

If the landowner is required to return more than that which he could earn what effect does this have on the constitutional requirement of just compensation³⁵—since presumably the interest that must be repaid in excess of what can be earned will have to come out of the final award? Doesn't this reduce the final award below that amount to which the jury has found him entitled under the requirements of just compensation? Since the Constitution of Missouri requires that "private property shall not be taken or damaged for public use without just compensation," is the six per cent requirement constitutional? Is the landowner actually receiving just compensation when he must repay more interest than he can earn?

Section 523.045 has the virtues of clarifying the otherwise vague case law previously existing in Missouri concerning the interest on enlarged or lessened jury awards. It also gives specific treatment to a problem which is of ever increasing importance since the rise of the number of public work projects in Mis-

33. OHIO REV. CODE § 2709.26 (Baldwin 1958).

34. *Ornstein v. Chesapeake & O. R.R.*, 11 Ohio Op. 129, 36 N.E.2d 521 (1937).

35. Mo. CONST. art. I, § 26.

souri. It shortens the length of the proceedings by a more complete description of the proper processes to be followed.

The decision in the *Paul* case and the dissent indicate that the statute left some unanswered questions. The Kentucky statute covering the situation where the landowner makes no withdrawal provides for an area that the Missouri statute fails to cover. As condemnation procedure will undoubtedly be widely used in the future, full clarification of the actual application of the statute in many possible circumstances will be required.

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