McCutchen, James M; admin of Ormsod, Joseph vs. City of Booneville; 1857 Cooper Co. #1 Cir. 221/10

76/26

- suing for control of property owned by heirs for road construction
- Reversed
- heirs not given proper notice of proceedings

State of Missouri } ss
County of Cooper } Be it remembered that on
the 17th day of December 1855. the following pa-
pers were filed in the office of the clerk of the
circuit court of Cooper County Missouri, which
read in the words & figures following to wit,
State of Missouri SS

Mayors
transcript

The Mayor Councilmen & citizens of the city of
Booneville
vs
The heirs of the Estate of Joseph Ormond deceased & the
heirs of the estate of James Dow deceased
This cause or suit is brought by the city of Booneville, against
the defendants in the margin named for the pur-
pose of opening Chestnut Street in the city of
Booneville by condemning and appraising property
in said Street as authorized in the charter of
the said city of Booneville A Summons is-
sued from the Mayors court on the 29th
day of October A.D 1855 directed to the city
constable John P Maddox instructing him to
summons 12 disinterested men, free holders
of the city to serve as a jury to appraise damages
to persons by appropriating their property to
public use for the purpose of opening
Chestnut Street from 4th to 6th Streets to the
width of forty feet. Notice issued from the
aforesaid court on the 29th day of October A.D.

1855 directed to John M McCutchen administrator of the estate of Joseph Ormrod deceased also to Mrs E Dow Oct 29th 1855 as administratrix of the estate of James Dow deceased giving them notice of the time place & business of an inquest Jury summoned to meet on the 5th day of November A D 1855 for the purpose of assessing damages as hereinbefore stated. The Jury as hereinafter named met at the place & at the time named in the summonds & notices & I H B. Benedict Mayor of the city of Boonville was present with said Jury at the time & place before named and kept a record of the proceedings had in the premises by said Jury & I administered the following oath to said Jurymen & they each for themselves subscribed their names to the same, namely; City of Boonville November 5th AD 1855

Oath of Jurors.

We the undersigned Jurymen summoned to assess the damages to accrue to persons whose lands shall be used by reason of opening Chestnut Street from 4th to 6th Street in the said city of Boonville to the width of forty feet do solemnly swear that acting as said Jury of inquest as arbitrators between the parties interested we will faithfully and impartially discharge our duties as said Inquest Jury to the best of our knowledge & ability, So help us God.

I. Rice, E Lamy, E Fackle
T H Kirton I H O Brien Mr I Wertheimer A H Thompson
Wm Harley Edwd Gray H L Hoefer Peter B Harris B S. Wilson

Sworn & Subscribed before me the undersigned Mayor of the city of Boonville on this 5th day of November A.D 1855. A.P. Bundick Mayor of the city of Boonville.

verdict of Jury

We the Jury men above recited on the day and date therein mentioned met, and after being duly sworn, proceeded to examine the premises in question, and to assess the damages to the persons hereinafter named, by reason of opening Chestnut Street from 4th to 6th Street in the city of Boonville crossing fifth Street at the corner stone placed at the South west corner of a tract of land donated to the city of Boonville by G. C. Hart deceased We found the estate of James Dow deceased damaged by reason of the opening of said Street, by taking from the north side of a lot owned by said estate, twenty five feet front on fifth Street commencing at the said corner stone at the said donation to the city of Boonville, thence South along the line of fifth Street twenty five feet, thence westwardly parallel with the lines of said lot to an alley 180 feet to the amount of three hundred dollars. We further find, that by continuing said Chestnut Street, eastwardly from 5th to 6th Street it will take 25 feet of land from the north side of lands owned by the heirs of Joseph Ormrod deceased as follows commencing on fifth Street, on the south side of an alley at the north west corner of lands owned by said estate thence Southwardly along the east line of fifth Street

twenty five feet thence eastwardly parallel to the north line of said lands 180 feet or to an alley and we apply damages to said estate at one hundred & fifty dollars and we further find the estate of Joseph Ormrod deceased damaged fifty dollars for lands twenty five feet front on 6th Street bounded on the north by the alley before referred to and running westwardly to an alley 180 feet which with the alley first referred to makes Chestnut Street forty feet wide from 6th to 5th streets. In testimony whereof we the said Jury men have hereunto set our hands and seals on this 5th day of November A.D. 1855

A H Thompson (Seal)
B S Wilson (Seal)
Wm Harley (Seal)
Edward Gray (Seal)
Peter B Harris (Seal)
E Larry (Seal)
C F Achle (Seal)
W J Mathews (Seal)
J H Kutra (Seal)
J Rice (Seal)
J H O'Brien (Seal)
H L Harper (Seal)

City of Boonville November 13th 1855 appeared before the undersigned Mayor of the city of Boonville on this 13th day of Nov 1855 John M McCutcheon administrator of the estate of Joseph Ormrod deceased

I applied for an abbeal from the above Judgment of damages on said estate Said McCutchen made affidavit & gave a bond with security as in case of appeal whereupon an appeal was granted Said McCutchen in said cause by me on this 13th day of November AD 1855 A & B Bundict Mayor.

Mayors cirtificate

A. & B. Bundict mayor of the city of Boonville do hereby certify the foregoing is a true copy from the Mayors docket of the city of Boonville that it contains all the entries Orders & procedings had in this cause except the Summons notice affidavit & Bond all of which are named herein and accompany this transcript by him attached thereto A & Bundict Mayor.

Order to Summon Jury

Mayors Office City of Boonville Oct 29th AD 1855

Mr John P Maddox, constable of the city of Boonville You will cause to empannuled, a Jury of twelve men citizens of the city of Boonville disinterested persons holdins to serve as a jury to assess the damages or benefits as the case may be which will result to property by reason of opening a street from 4th to 6th Streets in the said city of Boonville Said Street to cross fifth Street at the corner stone set on fifth Street it being set at the South west corner of the donation from G C Sant to the city of Boonville you will summon them to meet at the premises above described on the 5th day of Nov AD 1855 at ten oclock A M of that day for the purposes above set forth A & B Bundict Mayor of the city of Boonville

Notice to J. M. McCutchen admr of Jos Ormrod

Mayors office City of Boonville October 29th 1855
Mr John M McCutchen administrator of the estate of Joseph Ormrod deceased Sir, the city of Boonville is desirous of opening a street from fourth to sixth streets in the city of Boonville said contemplated street will run along the north line of property owned by Joseph Ormrod deceased and will take a strip of land from 5th to 6th streets 25 feet wide from north end of said estate, bordering the line of the donation to the city of Boonville made by G C Hart & this communication is to give you notice as the administrator of the estate of said Joseph Ormrod deceased that a jury will be called to assess the damages to said estate by reason of the opening of said street. The jury will meet on or at the premises on the 5th day of November A.D. 1855 and proceed to assess damages in connection with the benefits of same between the hours of ten Oclock A.M & three Oclock P.M of said day, when & where you can appear if you so desire H.B. Benedict

Mayor of the city of Boonville.

On which the constable of said city made the following return to wit. I hereby certify that I served the within notice by reading the same to John M McCutchen administrator of the estate of Joseph Ormrod deceased in the city of Boonville in Cooper County and State of Missouri on this 31st day of October 1855

John P Maddox Constable of the city of Boonville.

affidavit for appeal from Mayors injunct

State of Missouri
County of Cooper } ss

John Mc McCutchen administrator with the will annexed of the estate of Joseph Ormrod deceased being duly sworn upon his oath says, that the application for an appeal from the judgment of A B Bundict Mayor of the city of Boonville against said estate and the heirs and devisees of said Joseph Ormrod deceased upon the verdict of a jury on an enquiry of damages for opening Chestnut Street in said city running through property belonging to said estate and this is not made for vexation or delay but because he believes the appellants are injured by the judgment of said Mayor

Subscribed & Sworn to before me this 13th day of November 1855

John Mc McCutchen
administrator

A B Bundict Mayor of the city of Boonville.

Appeal Bond

City of Boonville plaintiff
vs
In matter of Opening Chestnut Street
John Mc McCutchen admr of the estate of Joseph Ormrod decd Mary Ormrod Amanda Ormrod & Joseph Ormrod jr defendants.

Be the Undersigned John Mc McCutchen administrator with the will annexed of the estate of Joseph Ormrod deceased and John Mc McCutchen acknowledge ourselves indebted to the city of Boonville in the sum of three hundred Dollars to be void upon the condition Whereas John Mc Cutchen administrator aforesaid Mary Ormrod Amanda Ormrod and Joseph Ormrod jr heirs and devisees of Joseph Ormrod Sr deceased have appealed from the assessment of damages by

a jury empannelled by the Mayor of the city of Boonville in opening Chestnut Street over the land of said Joseph Ormrod dec'd from the Judgment of said Mayor thereon and in which the city of Boonville is plaintiff and the said McCutchen admr as aforesaid Mary Ormrod Amanda Ormrod & Joseph Ormrod are defendants Now if on such appeal the apptment of said Jury & the Judgment of said Mayor thereon be affirmed or if on a trial anew in the Circuit Court judgment be given against the appellants and they shall satisfy the said judgment or if their appeal shall be dismissed and they shall pay & satisfy the judgment of said Mayor together with the costs of this appeal this recognizance shall be void. John McD McCutchen admr of (Seal)
the estate of Joseph Ormrod dec'd
John McD McCutchen (Seal)
endorsed. The written bond with its security is hereby approved on this 13th day of November A D 1855

A B Benedict Mayor of the
city of Boonville

And afterwards at the March term 1856 of the circuit court of Cooper County and while said court was in Session, on Monday 3rd day of said term and 3rd day of March 1856 the following entry was made of record in said cause, to wit

Record in Circuit Court

City of Boonville
vs appeal
John McD McCutchen admr of Joseph Ormrod dec'd

The said plaintiff by her attorney J W Draffen now here enters her appearance in this cause.
And at the March term 1857 on the 4th day of March 1857 and while said court was in session the following entry was made of record in said cause to wit

Record in Cir Court

City of Boonville
vs
appeal.

John M McCutcheon admr of Ormrod decd
Ordered that this cause stand continued.
And afterwards on the 8th day of September at the September term 1857 of said court and while said court was in session the following entry was made of record in said cause to wit

Record

City of Boonville
vs

Mo M McCutcheon admr of Jos Ormrod decd
Now at this day come the said parties by their attorneys and this cause coming on to be heard thereupon come a jury to wit. James S Bell Leo Arnold Martin G Philips William Allison Alfred A Alexander Jesse G Newman William Scott J O Smith Thos J Stonke C F Moore David Drake Preston B Eads who are elected tried and sworn to assess the damages in this cause and the cause not being concluded the jury by consent are permitted to separate till tomorrow morning 9 o clock.
And afterwards on the 9th day of September 1857 at the term last aforesaid of said court & while the same was in session the following entry was made of record in said cause to wit.

Record

City of Boonville

vs

John McE McCutchen admr of Joseph Ormrod decd.

The jurors in this case appear in their seats the cause is argued and submitted, and the Jury returns the following verdict. We the Jury find for the defendants and assess their damages to the sum of two hundred & fifty dollars. It is therefore considered by the court that said defendants recover of said plaintiff the said sum of two hundred & fifty dollars as damages for opening said Street, also their costs & charges & that they have execution therefor.

And afterwards on the 10th day of September 1857 at the term last aforesaid & while said court was in session the following entry was made of record in said cause to wit

Record

City of Boonville

vs

Jno McE McCutchen admr of Ormrod

The defendant now here files his motion to set aside the verdict in this cause & dismiss this suit which said motion was in words & figures following to wit. In the Cooper circuit Court September term 1857

Motion

The City of Boonville plaintiff

against

John McE McCutchen admr of the estate of Joseph Ormrod decd defendant

The defendant in the above entitled cause comes & moves the court to set aside the verdict & to dismiss said cause from the records of this court for the following reasons. 1st That Mary Ormrod Amanda Ormrod, and Joseph Ormrod jr heirs of Joseph Ormrod Sr decd and owners of the property over which it is proposed to open Chestnut Street had no notice of the proceedings instituted by the

plaintiff in 1855 for opening said Chestnut Street and that said procedings were & are null & void.

2nd The defendant is merely admr of the estate of Joseph Ormrod decd and is not owner of nor interested in the real estate over which it is proposed to run Chestnut Street and that this cause is not properly before the court as the owners and parties interested in said real estate received no notice of the procedings instituted by plaintiff against said property

Dougherty & Hayden attys for Defendant.

And afterwards on the 11th day of September 1857 at the term last aforesaid of said court, the following entry was made of record in said cause,

Record

City of Roxborough

vs

Heirs of Ormrod

The plaintiff files motion to correct the record in this cause.

and which said motion reads as follows to wit

Motion

In the Court Circuit Court

September term 1857.

City of Roxborough

vs

The heirs of Joseph Ormrod decd

The plaintiff by his attorneys comes and moves the court to amend or correct the record in this cause so that it be made to conform to the record and proceedings of the Mayor contained in his certified transcript to this

court. The Clerk of the Circuit Court had no power or right to change the title of said cause. The trial in the circuit court was a trial de novo of the same matter that was tried before the Mayor.

Drafton & Hutchinson for Plff.

and afterwards on the 18th day of September 1857, at the term last aforesaid of said Court and while the same was in session the following entry was made of record in said cause to wit.

Record

The Mayor Councilmen & citizens of the city of Boonville

vs

The Heirs of Joseph Conrad deceased.

The motion to correct the record as to the title of this cause is now heard and it is considered by the court that the same be sustained to which opinion of the court the defendants except, and the defendant McCutchen having filed his motion to set aside the verdict in this suit and dismiss the same It is considered by the court that said motion be overruled, to all which ruling of the court defendants except and now file their affidavit for an appeal which is allowed.

which affidavit reads as follows to wit.

affidavit

Cooper Cir Court

September term 1857.

Mayor Councilmen & citizens of the city of Boonville

vs

John McCutchen admr of Joseph Conrad dec'd &c.

Now on this day comes the defendant & prays for an appeal in this cause to the Supreme court. And the undersigned E K Hayden agent for said defendant. being first duly sworn makes oath and states that this appeal is not made for vexation or delay but because this affiant believes that the appellants are agreed by the judgment of decision of the circuit Court.

E K Hayden

Subscribed & Sworn to this Sept 18th 1857

Benj Tompkins clerk.

And afterwards on the 22nd day of September 1857 at the term last aforesaid and while said court was in session, the following entry was made of record in this cause. to wit.

Record

The Mayor Councilmen & citizens of the City of Boonville

vs

John M McCutchen admr of estate of Joseph Ormrod deceased.

The defendant now here files his bill of exceptions.

And which bill of exceptions reads in words & figures follows. to wit.

Bill of Exceptions

In the Circuit Court of Cooper County September term 1857

The Mayor Councilmen & citizens of the City of Boonville

vs

John M McCutchen admr of Joseph Ormrod deceased.

Be it remembered that after the verdict & Judgment in this cause, the defendant filed the following motion to set aside said verdict and dismiss the cause, which said motion reads as follows (vide 10th page of this transcript.) which said motion was by the court overruled to which aforesaid of the court the defendant excepted, & now here files this, his bill of exceptions which he asks may be signed sealed & made a part of the record in this cause which is done according ly.

G W Miller. Seal
judge.

State of Missouri }
County of Cooper } ss I Benj Tompkins clerk of the circuit court in & for said county do hereby certify that the above & foregoing 14 pages contain a true & correct transcript of (with exceptions therein named) of the record & proceedings in the above cause, as they are now in my office

Given under my hand & seal of said court at office this December 15

1857 Benj Tompkins clerk

Index

Mayors transcript page 1 to 8. Bill of exceptions. 13.
Cir Court Record " 8.9.10 11.12.13
Motion to correct Record 11
" to set aside verdict & dismiss 10

Clks fees

copying 3240 words 3 copies @ 15 cts per 100	4,86
certificate seal	50
filing appeal bond	50
entering appeal	50
	$ 6.46

13. 6

City of Boonville
vs Z Record
Jno M. McCutchen (Ormrod)
admr. of Joseph Ormrod
deceased appt.

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filed Dec. 22, 1857
Wm E Dunscomb
Clerk

Cooper
1st

In the Supreme Court
Jany Term 1858

The Heirs of Joseph Osmond
deceased = Appellants
vs
The Mayor Councilman & citizens
of the City of Boonville = Respondents

Now at this day comes
the said Respondent by her Attorney
and ~~for~~ Joinder in error says
that the Court did not err in
giving of the Judgment in said
cause, nor does it appear from
said Record & proceedings that
the Court below committed any error
in said cause, the Respondent
therefore prays that the Judgment
aforesaid be in all things affirmed,

Dragon Atty for
Respondents

The Heirs of Joseph Ormrod, dec^d

vs Appellants

The Mayor &c of the city of Boonville

Respondents

Joinder in Error

filed Jany 11. 1858

Jno E. Dunscomb

Clerk

In the Supreme Court
January Term 1858.

John M. McClintock Admr of Joseph Ormond, decd — Appellant.

vs

The Mayor, Councilmen and Citizens of the City of Bonville — Respondent.

The appellant now here comes and says that in the said record & proceedings and in the giving of the judgment condemning the property of the heirs of Joseph Ormond decd, there is manifest error, in this Court,

1st That the Court erred in giving judgment against Mary, Amanda and Joseph Ormond, heirs of Joseph Ormond deceased, condemning their property when they were not made parties to the proceeding.

2nd The Court also erred in overruling appellants motion to set aside said judgment & proceedings as moved for by appellant.

3d The Court erred in deciding the law to be that the real estate belonging to heirs of Joseph Ormond decd might be condemned to public uses by giving notice of the proceeding

to the administrator.

4th The Court erred in deciding the law to be that it was not necessary to give notice to the heirs of Joseph Ormrod of the proceedings had against their property.

5th The Court erred in sustaining the motion of respondent in making amendment of the record so as to make the heirs of Joseph Ormrod dec'd parties without first having given them notice of the proceedings as required by the laws of the land.

6th The Court erred in overruling the objections of appellant to its decisions.

Wherefore for the errors aforesaid, and others being in said record and proceedings the appellant prays that the judgment in said cause be annulled, dismissed & held for nought, and that he be restored to all things he may have lost by reason of the same - and that the respondent fine in error &c.

Douglass & Hayden
Attys for Appellant

6

Mc Culchen
admr of Ormsod
vs
Mayor, &c, of Boonville

assignment of
Errors

filed Jany 11. 1858
Wm E. Dunscomb
Clerk

City of Booneville Respdt.
vs.
John Mc ~~Cracken~~ Cutchen admr.
of the estate of Jos. Ormrod

Appeal from the Cooper Circuit Court.

This was a proceeding on the part of the plaintiff to condemn for public use lands belonging to the estate of Jos Ormrod decd. Notice of the ~~application~~ intention to take such steps was given to John Mc ~~Cracken~~ Cutchen admr. of Ormrod but none was ~~imparted~~ served on ~~to~~ the heirs of the deceased.

In order to ascertain who are the parties to a legal proceeding we look in the record for those who have been served with notice or who appear and defend. The respondent seems to have been aware of the necessity of giving notice to those whose rights were to be affected, but while acknowledging this necessity gives the notice to one who is in no wise interested. It is not seen how Mc ~~Cracken~~ Cutchen as admr. could be made a party to a proceeding affecting the rights of the heirs of his intestate. It does not appear that he was empowered to act as their agent, & if he was, the notice should not ~~be~~ be to him but the heirs: From the

record it does not appear that they had any notice: The unauthorized use of their names on the bond of Mc Culloch who actually took the appeal & who alone had notice could not affect them: The constitution may not require notice to be given of the taking of private property for public use, yet when the legislature prescribes a mode by which private property may be taken for such purpose we will out of respect to it, suppose that it ~~would exist~~ contemplated a violation of that great rule, recognized & enforced in all civil governments, that no one shall be injuriously affected in his rights by a judgment or decree resulting from a proceeding of which he had no notice and against which he could make no defense. Nothing would so much impair that just self respect arising from the ownership of property fairly acquired as the reflection that it is subject to be defeated by others without notice to the proprietor. The times require that courts should be zealous in carrying out that great aim of government, the defense of men & their children in the enjoyment of property acquired by their diligence

toil and labor. No one can cherish a warm affection for a government, that suffers others without notice and be heard his back to seize and appropriate his property on occasions justified by no emergency. In a case in the 15th Wen. 374 it was held that private property could not be taken for public use without notice of the proceeding to the owner, but that it was competent to the legislature to direct the mode of giving such notice & of the requirements of the statute in such case should be complied with it would be sufficient: The case of Corlis vs Corlis & Bro. was one in a probate Court, and ~~the Court~~ it was remarked that notice is so essentially necessary, that without it such proceedings are uniformly held to be void, except in cases where the statute has ~~required~~ provided specific means of relief. So far has this principle been carried, that such proceedings have frequently been adjudged void for want of notice even where none was directed by statute.

The 4th sec. of the act amendatory of the Charter of the City of Boonville Jasper acts 1847 page ~~183~~ 183 directs

That if the parties cannot agree upon a compensation, the mayor shall cause the same to be ascertained by a jury &c: In the case of Hinckley & others 15 Pick. 448 a similar provision on a statute providing for an agreement of the parties was held clearly to indicate that the Legislature contemplated a notice to the party whose property was to be taken for public use. See Angel on highways sec 122

I Napton concurring the judgment will be reversed

Wm Scott

6

City of Boonville
vs
J. McCutchen adm.r

Opinion

Recd

Filed March 11 1858
Wm C Dunicomb
Clerk

In the Supreme Court,
January term 1858.

John M. McCutchen, Admr of the estate of Joseph Omrod, decd, - Appellant.

vs } Appeal from the Cooper Circuit Court.

The Mayor, Councilmen & Citizens of the City of Boonville - Respondent.

This was a proceeding instituted by the Respondent on the 29th day of October 1855, for the purpose of opening & extending Chestnut Street, in the City of Boonville, over the real estate belonging to the heirs of Joseph Omrod decd, situated between 5th & 6th Streets, and appropriating it to public use as a highway. The Respondent on the 29th day of October 1855, issued a summons for a jury of free-holders to meet on the 5th day of Novr following on the real estate aforesaid, and to assess damages & benefits to the owners of it. Notice of the institution of this proceeding was duly given to the Appellant as admr of the estate of Joseph Omrod decd. The jury, as directed, met on the property aforesaid, lying between 5th & 6th Streets, they were duly sworn, viewed the premises and condemned 25 ft of said property fronting on 5th & running back to an alley 180 feet, and also 25 ft fronting on 6th Street & running back 180 feet, and assessed the sum of Two Hun-

dred Dollars as damages to the estate of said Ormrod for the same. An appeal was taken by the appellant on the 13th day of Novr 1855 from the judgment of assessment to the March term of the Cooper Circuit Court 1856. Said cause was continued from term to term, until the September term of the Court 1857, when the parties appeared, a jury was sworn, & the cause argued & submitted to them. The jury rendered a verdict in favor of the defendants for the sum of Two Hundred and fifty Dollars; and, afterwards, judgment was entered accordingly. After the rendition of the verdict, to wit on the 10th day of Septr 1857, the Appellant filed the following motion, to wit; "The defendant in the above entitled cause comes & moves the Court to set aside the verdict, & to dismiss said cause from the records of this Court, for the following reasons. 1st That Mary Ormrod, Amanda Ormrod and Joseph Ormrod Jr, heirs of Joseph Ormrod Sr dec'd are owners of the property over which it is proposed to run Chestnut Street & had no notice of the proceedings instituted by the plaintiff in 1855 for Opening said Chestnut Street, and that said proceedings were, and are null & void.

2nd The defendant is merely admr of the

estate of Joseph Ormrod, decd, and is not
owner of nor interested in the real estate
over which it is proposed to run Chestnut
Street; And that this cause is not properly
before the Court, as the owners and parties
interested in said real estate received no
notice of the proceedings instituted by
plaintiff against said property. Which
motion was overruled by the Court, and to
the opinion of the Court in overruling said
motion the defendant at the time excepted.

The plaintiff also filed the following
motion, towit, "The plaintiff by his attorney
comes & moves the Court to amend or correct
the record in this cause so that it be made
to conform to the record & proceedings of
the Mayor contained in his certified Tran-
-script to this Court. The Clerk of the Circuit
Court had no power or right to change the
title of said cause. The trial in the Circuit
Court was a trial de novo of the same matters
that were tried before the Mayor." Which
motion the Court sustained, and to this
opinion of the Court the defendant at the
time excepted. And afterwards, towit, on
the 22nd day of Septr & during the Session
of said Court the defendant filed his
bill of exceptions, which was allowed by

the Court, and he brings this case to this Court by appeal.

Douglass & Hayden for Appellant.

Points & Authorities.

1st This record presents the question whether private property can be condemned for public uses without notice to the owners. The Charter of the City of Bonville, & the amendments thereto, under which this proceeding was had, are silent upon the subject of notice. See Original Charter in the laws of Missouri of 1839, page 297 sec 13 and Amendment to same in laws of Missouri of 1847, pages 183 & 184 sec 4 & following - And laws of Missouri of 1855 page 350, sec 2.

Although nothing is said in the law about notice, yet in all such cases it is held to be an indispensable requisite before a party's property can be taken away by any proceeding, and especially by a summary proceeding of this kind. See 4th Black. Com. side paging 283. 11 Coke's Rep. 99. 1 Salk 181. 6 Mod. 41. 2nd Ld. Ray 1407. Rex vs Benn 6 T R. 198. 3d Vol U.S. Digest title notice page 62. Corliss vs. Corliss 8 Vermont Rep pages 387 & 389. Owners vs Mayor of Albany 15th Wendell page 374. Reference is particularly made to the two cases last named.

2nd Ormrod's heirs and not his administrator were the parties interested in the land. An administrator is in no sense interested in the real estate of his intestate. He only has a Statutory power to sell land for the payment of debts. The title is in the heirs, and remains in them for all purposes until it is sold for the payment of debts. [See Aubuchon vs. Long 23d Mo Rep p. 99.] Yet, in this case, the administrator was the only party notified, and he was the only party who appealed from the Mayors decision, as will appear by the entry on the Mayor's docket, or the transcript of the docket. The recital in the appeal bond did not, and could not make them parties. The trial in the Circuit Court was between the City of Bowmille, &c, and Ormrod's administrator, and the Court had no right after the trial & verdict to amend the record so as to make the heirs parties. No notice had been given to them, and they were not properly in Court for any purpose. To condemn private property to public uses without giving the owners notice of it, would be a gross abuse of the right of eminent domain. See 2nd Kent [5th Edition] page

339 Note. C. The clause of the Constitution referred to by the Counsel for the respondent in his brief has no bearing upon this case: And, said brief, is full of unfounded propositions, incongruities, inaptitudes & absurdities.

6

John M. McCutcheon
Admr. - Appellant

vs.

City of Bonville, &c.
Respondent.

Brief of
Douglass & Hayden, for
Appellant.

In the Supreme Court
January Term 1858

The Heirs of Joseph Ormrod
deceased = Appellants

vs

The Mayor, Councilman & Citizens
of the City of Boonville = Respondents.

This was a proceeding
Commenced befor the Mayor of the
City of Boonville, on the 29th day
of October 1855, for the purpose
of opening & extending Chesnut
Street in the City of Boonville,
over the real estate belonging to
the heirs of Joseph Ormrod,
deceased. Viz Mary Ormrod,
Amanda Ormrod, & Joseph
Ormrod Jr., which said real
estate is situated between 5-th
& 6th Streets, & was desired for
public use, as a highway in
laying off said Street.

The Respondent, on
the 29th day of October 1855,
issued her Summons to the
Constable of said City, directing
him to summons a Jury of

Twelve men, free-holders, to meet on the 5-th day of November following, on the real estate aforesaid, and to assess damages & benefits to the owners of it,'-

The Jury as directed, met on the day last aforesaid, in Company with the Mayor, on the premises to be condemned, and they were duly sworn, and thereafter viewed the premises & condemned 25-ft of said property fronting on 5-th & running back to an alley 180 ft, and also 25-ft fronting on 6-th Street & running back 180 feet, and assessed as damages to the Heirs of said Ormond. The sum of Two hundred Dollars;-

An appeal was taken by the Heirs of said Ormond through John M McCutchen their agent on the 13-th day of November 1855 from the Judgment of assessment to the Cooper Circuit Court, said cause was continued from Term to Term, until the September Term

of the Court 1857, - when the parties appeared, a Jury was sworn, such evidence heard, the Cause argued & submitted to them. The Jury rendered a verdict for the Defendants for the sum of Two hundred & fifty Dollars for their damages by reason of the opening of said Client, & Judgment was entered accordingly. -

After the rendition of the verdict, to wit, on the 10th day of ~~the~~ September, 1857 John M McCutchen filed a motion to set aside said verdict & to dismiss said Cause from the records of this Court for reasons therein specified, & during the pendancy of this motion the Respondent filed a motion to correct the record, - the Court overruled appellants motion & sustained Respondents to which action of the Court John M McCutchen excepted, and brings this Cause here by appeal -

Draffen & Hutcheson for
Respondent
Points & authorities.—

1st This proceeding was conducted in strict conformity to the Charter of the City of Boonville; all of its provisions were complied with;—See Original Charter in the Laws of Missouri of 1839 page 297— Section 13, and amendments thereto in Laws of Missouri 1847 pages 183-184 Sec 4 & following, and Laws of Missouri 1855 page 350 Sec 2.—

2nd Is it necessary in a case like the present to notify the owners of the land of the inquest or assessment of damages to be had thereon?— The Constitution of the State of Missouri speaking, says: "That no private property ought to be taken or applied to public use without just compensation".— Now, if the compensation is paid, the public have a right to the use of the land, & the proper and lawful

mode of ascertaining this just compensation is by the verdict of a Jury, & how are they to be enlightened by serving a notice on the owners of the land? The Jury make their own examination of the premises, & fix the amount of the compensation, & a notice to the owners could not in any way change the result. The owners of the land are not divested of their title, but they retain their rights, subject to an easement in the public; - that is, the public have a right to pass over the land, & nothing more. It is thus for insisted that the Constitution, in a case like the present, (which is clearly distinguishable from Ordinary suits at Law) is of itself a sufficient prohibition to secure to the owners of land (which may be necessary for opening a public street or road, for the good of the public) all the rights that the owners of said land are entitled to.

And the Legislature seems to have acted upon this principle ever since the State had an existence for the Law now in force does not require a notice either by publication or otherwise to be given in the Opening of Roads & highways, when the owners of the land over which the same are to be run are either non residents or Minors. See Revised Statute of Missouri Article 1st Title Roads & Highways Sections 18 & 19.

3rd Should this Court be of Opinion that the owners of the land in this Case were entitled to a notice at the time this proceeding was Commenced before the Mayor; It is then insisted on the part of the Respondent, that said owners made themselves parties to the proceedings by taking an Appeal to the Circuit Court. The Case found its way into the Circuit Court, & the question is asked, who took it there? The Administrator

of the Estate, as such, could not take the appeal; for he could not make the affidavit required by Law. The party appealing in such a case has to swear that he is injured by the Judgment of the Mayor. Now as the Administrator had no interest in the Land condemned, could he make the affidavit required in such a case? If he had no interest in the land, (which is admitted to be true) how could he be injured by the Judgment of the Mayor? It is therefore most manifest that the owners of the land in this case took the appeal to the Circuit Court through their Agent the Administrator; the owners were therefore before the Circuit Court at the time it Judgment was pronounced, they examined witness after witness were represented by able Counsel, & after a full, fair, & impartial investigation before a Jury of the Country, and after a verdict in their favor, they turn around

around and say, that they were not in court, & for that reason the whole proceeding should be set aside. If the owners of the Land in question were not before the Circuit Court, then, there was no case before that Court; for the Administrator as Administrator, had no right to take an appeal.

But the truth is the owners of the land Condemned took the appeal, and thereby made themselves parties to the proceedings, & are bound by the action of the Circuit Court under any view of the case; & for them now to say they are not, is to contradict their own act & at best is but an after-thought. The action of the Circuit Court as it is believed, was therefore correct, & should be sustained,

6

The Heirs of
Joseph Armrod, dec'd
Appellants

vs

The Mayor, Council-
men and Citizens of
The City of Boonville
Respondent

" "

Brief for Respondent

Geo. M. McCutchen
admr of Jos. Armod,
vs
City of Boonville

In the Supreme Court on appeal from the Cooper Circuit Court.

Fee bill of costs in the Supreme Court to be paid by the said City of Boonville

Wm E Dunscomb's costs as Clerk of said Supreme Court.

docket 50 appearances 30 errors & joinder 1.00	1.80
argt & submission 1.25 Recd & judgt. 1.50	2.75
opinion 50 index 10 costs 25 filing papers 50	1.35
certified judgt. 75 certified opinion 1.70	2.45
this fee bill	.75
	$9.10
Wm D Dorriss	30
Ben Tompkins	6.46
total	$15.86

Attest

Wm E Dunscomb, Clerk

To the Sheriff of Cooper County Mo

SEAL OF THE SUPREME COURT OF MISSOURI

Came to hand Augt 24th/58
H. Bunce
Shp

241

McCutchen adm Ormond

vs } Fee Bill

City of Boonville

Costs

Ben Tompkins	6.46
Mc D Dennis	30
Wm E Dunscomb	9.10
	$15.86
Shpp fee	1 26
	17.12

Cooper

Satisfied

H. Bunce
Shp

SEAL OF THE SUPREME COURT OF MISSOURI