1965

Recent Developments in Eminent Domain in Arkansas

Robert R. Wright

Follow this and additional works at: https://lawrepository.ualr.edu/faculty_scholarship

Part of the Constitutional Law Commons, Property Law and Real Estate Commons, and the State and Local Government Law Commons

Recommended Citation
Recent Developments in Eminent Domain in Arkansas

Robert R. Wright*

This discussion of recent highway condemnation cases in Arkansas is directed almost entirely toward decisions of the Arkansas Supreme Court since November 15, 1963, and does not include any decisions subsequent to March 15, 1965. This article is intended partially to supplement the Arkansas Eminent Domain Digest by providing a discussion of those cases decided after publication of that volume. Although this article will discuss the cases in greater depth than in the Digest presentation, this is intended to be more of a survey of the Arkansas decisions than a study in depth of any particular phase of the law of eminent domain.

DRAINAGE DISTRICTS

Arkansas State Highway Comm'n v. Sub-district No. 3 of Grassy Lake and Tyronza Drainage Dist. No. 9, which involved the condemnation of land lying in an improvement district, raised some questions which had not previously been adjudicated in Arkansas. The majority opinion stated that the question presented by these two cases, which had been consolidated for trial in the lower court, was this: Does a drainage district, by reason of its uncollected assessment of benefits, have a property interest in land within the district for which it is entitled to compensation in addition to the award made to the landowner? The trial court had said that it did have such right and that the drainage district was entitled to recover a sum equal to the total amount of all unpaid future district assessments that had been levied by the district against the land being condemned. What was involved in the condemnation portion of the case was a taking in fee simple by the highway commission, the existence of a rather typical drainage district situation in which the district had been organized some years ago, benefits had been assessed, funds had been raised through bond issues which were secured by a pledge of the assessed benefits, and taxes had been levied in annual installments against the assessment of benefits to make payment of the bonds. The district had about 16 years left on its outstanding bonded indebtedness.

*Assistant Professor of Law and Director of Continuing Legal Education and Research, University of Arkansas Law School.

Many of the comments in this paper are adapted from the author's talk on "Recent Developments in Arkansas" at the Institute on Eminent Domain and Condemnation, conducted by the Arkansas Bar Association and the University Law School on January 28-29 in Little Rock, as a part of the annual mid-year meeting of the Bar.

The Arkansas Eminent Domain Digest was published by Bobbs-Merrill in the summer of 1964 and resulted from a research project. The author of this article was Research Director of the project and served in that capacity and as editor of the digest.

237 Ark. 614, 376 S.W.2d 259 (1964).
The two cases which had been consolidated proceeded under two different fact situations in that in one the Commission had acquired a fee simple title from the landowner without making the drainage district a party and then had brought an action against the drainage district alleging that nothing additional was due to the district, whereas in the other case the Commission had joined the landowner and the district as defendants in a condemnation suit. In the latter situation, the issue was tried with respect to the landowner's interest alone, and the landowner received an award. The district contended that it had a separate compensable property right, but the supreme court held to the contrary. The court felt that the district had a remedial right against the land which was a lien or something in the nature of lien. The court pointed out that the condemnation award takes the place of the land, and the lienholder's remedy is to proceed against the award to the extent of his interest. But here, the district had chosen to forego any claim against the landowner's award and insist on a distinct cause of action against the condemnor.

One problem which the court encountered in this case was that caused by the district's substituted right to levy future taxes against the assessed benefits. The condemnation eradicated this power, but the court felt that the district's power to collect these benefits should be regarded as an element in the landowner's fee simple estate, pointing out that the value of the land had been greatly enhanced as a result of the drainage district, and when the condemnor pays for the increased market value of the land, it also pays for the benefits conferred by the drainage district.

The essential holding in the Grass Lake case, insofar as the condemnation problem is involved, is rather simple and fundamental. It is a basic tenet of the law of eminent domain in Arkansas and throughout the United States that when land is condemned, the condemnor pays the true market value of the land. But the condemnor only pays once; there is no double payment for the same piece of land. All those who have an interest in the land are takers from the award paid by the condemnor to the extent of their respective interests. It is up to the trial court to balance the interest of the

---

3Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S.W. 792 (1887); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 331 S.W.2d 705 (1960); Scott v. State, 230 Ark. 766, 326 S.W.2d 812 (1959); I ORGEL, VALUATION UNDER EMINENT DOMAIN § 17 (2d ed. 1953). See the collection of Arkansas cases in WRIGHT, ARKANSAS EMINENT DOMAIN DIGEST § 5.5E (1964).

2 NICHOLS, THE LAW OF EMINENT DOMAIN § 5.3(4) (Rev. 3d ed. 1963), states that "each of the owners . . . of an interest in or lien upon the property, has a corresponding right to share in the award. It follows that the award may be apportioned in accordance with the respective interests . . . The matter of such apportionment is of no concern to the condemnor and is a problem in which only the claimants are involved." JAHN, LAW OF EMINENT DOMAIN § 124 (1953), sums up the situation succinctly: "Where the fact-finding body (a court or jury) makes awards for separate interests in a condemned property, each interest represented receives a portion of the value of the total. But where the award is a lump sum representing all the different interests in the condemned property, there must be a division of the total award between the respective interests therein. The award now stands in place of the land. If
parties, with respect to payment of the proceeds, but out of the award will come the payment of all interests, liens, or other claims which may be involved.\(^5\) In the *Grassy Lake* case, therefore, whatever rights the drainage district had were to be asserted against the award, and the Arkansas court quite properly so held.

This is especially true with respect to liens. Generally speaking, a lien is not a proprietary interest in land, but is simply a remedy to be asserted against the land which may actually be impaired without compensation, and when land subjected to a lien is taken by eminent domain, the lienholder is neither entitled to be joined as a party nor to recover from the condemnor.\(^6\) The Arkansas Supreme Court concluded that the drainage district had a lien against the assessment of benefits which was "a remedial right against the land." In addition to this remedy, the court concluded also that the district had a substantive right to levy taxes in the future against benefits. The court regarded this power as an element in the landowner's fee simple estate (for which payment had already been made). The general rule is that the holder of a tax lien does not even have an interest which makes him a necessary party to a condemnation proceeding (although he may be joined, if desirable).\(^8\) Although Nichols points out that there is conflict of authority over whether a tax lien is "property" within the meaning of the particular statutes involved,\(^9\) in any event, as in other liens, the lien is payable out of the award rather than payable separately by the condemnor.\(^10\)

Therefore, the obvious answer for the improvement district in this case was to assert a claim against the award to the extent of its interest.

In the course of the case the drainage district pointed out that if the potential tax liability of the condemned land were extinguished without compensation to the district, the result might be to in-

---

\(^5\) Numerous cases so hold. See, e.g., *Porter v. Columbia County*, 75 So. 2d 699 (Fla. 1954); *City of Houston v. Culmore*, 154 Tex. 376, 278 S.W.2d 825 (1955); *St. Louis Housing Authority v. Evans*, 285 S.W.2d 550 (Mo. 1955); *State v. Burk*, 200 Ore. 211, 265 P.2d 783 (1954).

\(^6\) See 2 *Nichols*, *op. cit. supra* note 4, § 5.74.

\(^7\) 237 Ark. at 616, 376 S.W.2d at 260. The court said that this was a lien, but added that it was a remedial right which "if not actually a lien" was "at least in the nature of a lien."

\(^8\) 2 *Nichols*, *op. cit. supra* note 4, § 5.744. See also 1 *Orgel*, *op. cit. supra* note 3, § 116.

\(^9\) 2 *Nichols*, *op. cit. supra* note 4, § 5.744.

crease the payments which other landowners in the district would have to make. Carried to its logical conclusion, this would mean that the district's outstanding bonds would have been rendered valueless had the condemnor elected to take all the land in the improvement district. The court chose to leave this question "unexplored until it arises." Fortunately, lawyers and law professors are not so burdened by judicial restraint. Again, the remedy would seem to be for the district to assert its claim, whether it be designated a "lien," "tax lien," "remedial right," or "special assessment," against the award itself. Properly, it would seem that what we are dealing with in this case is a special assessment which constitutes a lien against the property. No matter what the nature of the right may be said to be in this case, however, if it constitutes a legally enforceable claim or charge against the land in any form, it is enforceable out of the award. If it does not, it would be no more enforceable against the condemnor than it would against the award of the condemnee. Reason, however, compels the conclusion that the bonds would be paid out of the award in the event of a total condemnation. Obviously, except for the drainage district and the issuance of the bonds, the value of this land as swamp land would have been minimal. Since the improvements resulting from funds obtained through issuance of the bonds greatly multiplied the value of the land, it is only reasonable that the payment of the balance due on the bonds should be paid out of the award. This is the usual rationale for payment of assessments levied upon land as the result of public improvements undertaken for the benefit of that and similarly situated land.

The dissent in Grassly Lake, in discussing the land acquired by condemnation, contended that the Highway Commission was liable because "of the way this case was tried" and because of a stipulation that the interest of the drainage district was not to be determined at the time of trial or settlement of the landowner's interest.

---

1237 Ark. at 618, 376 S.W.2d at 261.

**Tax liens** (see 2 NICHOLS, op. cit. supra note 4, § 5.744) are enforceable out of the award the same as other liens; and of course, a lienor can proceed against the award. (2 NICHOLS, op. cit. supra note 4, § 5.74) As for the obligation of the landowner to pay for "special assessments" out of the award, one writer states: "The state decisions uniformly hold that a condemnee is liable for the amount of any 'special assessments' levied against the land and due and payable at the time the condemnation proceedings are instituted . . . . An assessment is a charge which is 'predicated upon the principle of equivalents or benefits which are peculiar to the persons or property charged therewith, and which [is] assessed or appraised according to the measure or proportion of such equivalents.' By hypothesis, then, the condemnee's property had its value enhanced when the public improvement financed through the 'special assessment' was made; such enhanced value will have been reflected in the award of damages to the condemnee; and the imposition on the condemnee of the full amount of the 'special assessment' still due and owing is theoretically sound and wholly consistent with decisions . . . prorating the current tax liability of the same condemnee in the same proceedings." Hilpert, *Liability for State and Local Taxes and Assessments in Federal Condemnation Proceedings*, 10 OHIO ST. L.J. 17, 24-25 (1949). See also, Annot., 45 A.L.R.2d 522 (1956); 79 A.L.R. 116 (1932).

See note 12 supra.

124
The dissent points out that under the applicable drainage district statute, the district was vested with an order having all the force of a judgment, which assessed the tax, and that the tax was a lien on the property. Thus, the dissent views the district as holding a judgment lien against the land under the statute. Since this lien was properly payable out of the award, the dissent argues that the Highway Commission "properly made the District a party defendant . . . and that the District was entitled to be paid out of any award made; but when the Highway Commission elected . . . to try the landowner's rights in one case and then try the District's case separately, the Highway Commission necessarily became liable to the District for the amount of the District's lien."

If the Highway Commission did in fact lull the improvement district into believing that it had a separate cause of action against it which could be asserted separately, it might be contended that the Commission in effect waived its right to object to a separate determination of indebtedness to the district. But the Highway Commission seems never to have conceded that the drainage district had a separate cause of action against it, and indeed that seems to be the crux of the issue in this case, as far as the condemnation question is concerned. If the drainage district had wanted to assert its rights against the award, it could very easily have done so; but it seems to have ignored that possibility and proceeded directly against the condemnor, against whom the majority correctly determined it had no cause of action. All the stipulation says is that the rights of the drainage district are reserved for separate determination. Since it has no separate rights against the condemnor, that determination has been made.

A more serious question is presented with respect to the land which the Highway Commission acquired directly by deed from the owner. The dissent felt that the Commission should be required to pay future accruing assessments on the benefits the same as any other grantee. There are a number of cases which have adopted the view that assessments for local benefits do not constitute "taxes" within the exemption of the sovereign from taxation. Other courts,

18 ARK. STAT. ANN., § 21-542 (Repl. 1956).
14 237 Ark. at 618, 376 S.W.2d at 261.
15 Ibid. The dissent based this contention on ARK. STAT. ANN. § 60-401 (1947), which provides that liens for improvement district assessments on taxes "shall run with the land and be assumed by the grantee."
16 Justice McFaddin's able dissenting opinion cited Willis Creek Drainage Dist. v. Yaxoo County, 209 Miss. 849, 48 So. 2d 498 (1950) in support of this view. In that case the Mississippi court held that the statute exempting public property from taxation was not intended to abate an existing judgment lien "against land subsequently purchased by the State or one of its subdivisions." 48 So. 2d at 501. Similarly, in State of Minnesota, Dep't of Rural Credit v. Washington County, 207 Minn. 530, 292 N.W. 204 (1940), it was held that by statute the state's title to lands acquired through mortgage foreclosures was subject to drainage improvement assessment liens accruing prior to the mortgage. In State ex rel. Board of Supervisors of So. Fla. Conservancy Dist. v. Warren, 57 So. 2d 337 (Fla. 1951), it was held by the Florida court that state lands could be assessed for drainage, and the lien thereon for drainage taxes could be made of equal dignity with the lien for state and county taxes. Montana has held that state lands within an irrigation district are subject to assessment, since
however, have held that while special assessments for drainage districts may be imposed on public property, the lien is not enforceable, and there must be express statutory authorization to permit expenditure of funds by a public agency for payment of assessments. The Washington court held that state lands could not be subjected to special assessments for local improvements unless there were express statutory authority. The majority rule in the United States is in accord with the view that there must be express legislative authorization before state property will be subject to special assessments. Moreover, there must be a clear statutory expression of the intent of the state to submit to such special assessments. Arkansas holds to this general view. In Waterworks Improvement Dist. No. 2 v. Logan County, the court stated that while public property is not exempt under the Constitution from assessments for local improvements, the statutes which authorized the creation of the improvement districts did not provide that property exempted by the Constitution for taxation for general revenue purposes should be taxed for improvement district purposes, and in the absence of legislative authorization, such property could not be taxed.

A more pertinent question in this case, however, is what happens when the state acquires land on which there is an outstanding improvement district indebtedness. In Harris v. Little Red River Levee Dist. No. 2, the court was concerned with lands on which the state had obtained title due to unpaid taxes. The court stated that it had previously "ruled that the forfeiture and sale of lands to the state for nonpayment of taxes has the effect of suspending the enforcement of special improvement taxes against the lands during the time the title thereto remains in the state or until the lands return to private ownership." Similarly, in Stringer v. Conway County Bridge Dist., the Arkansas court held that although sale to the

irrigation assessments are not taxes within the constitutional and statutory exemption; however, the importance of this holding was considerably modified by the ruling that state lands could not be sold to satisfy the lien, and the Court left it up to the state to find "some means to discharge the lawful assessments levied." Toole County Irrigation Dist. v. State, 104 Mont. 420, 67 P.2d 989, 993 (1937).

17Board of Public Instruction v. Little River Valley Drainage Dist., 119 So. 2d 323 (Fla. 1960).
18Appeal of State, 60 Wash. 2d 380, 374 P.2d 171 (1962). A statute in Washington allowed the state's land to be subject to local assessment if "specially benefited."
1948 AM. JUR. Special or Local Assessments § 87. See also Annot., 90 A.L.R. 1137, 1143 (1934). In Arkansas see Board of Comm'ners v. Arkansas County, 179 Ark. 91, 14 S.W.2d 226 (1929).
20State v. Kilburn, 81 Conn. 9, 69 Atl. 1028 (1908); Huntsville v. Madison County, 166 Ala. 389, 52 So. 326 (1910).
21115 Ark. 257, 258, 244 S.W. 4 (1922).
22This decision was based on Board of Imp. v. School Dist., 56 Ark. 335, 19 S.W. 969 (1892).
23188 Ark. 975, 69 S.W.2d 877 (1934).
24Id., at 978, 69 S.W.2d at 879.
25188 Ark. 481, 65 S.W.2d 1071 (1933). This same result was reached in Turley v. St. Francis County Road Improvement Dist. No. 4, 171 Ark. 939, 287 S.W. 196 (1926); and Wyatt v. Beard, 179 Ark. 305, 15 S.W.2d 990 (1929). See also Hopper v. Chandler, 183 Ark. 469, 36 S.W.2d 398 (1931) (which held that a sale of lands by a road improvement district while title was in the State was
While these cases involve sales to the state for delinquent taxes, a clear parallel may be drawn. As long as the state keeps the property, the lien is suspended and cannot be enforced.

Some rather substantial authority to the contrary is available, however. In United States v. Alabama, the United States Supreme Court had before it a case involving a state statute creating an inchoate lien as of the tax day for taxes to be assessed during the year. Chief Justice Hughes, in his opinion, pointed out that enforcement proceedings against the federal government would be unavailing without its consent. But insofar as the validity of the lien was concerned:

The United States took the conveyances with knowledge of the state law fixing the lien as of October 1st. That law in creating such liens for the taxes subsequently assessed in due course and making them effective as against subsequent purchasers did not contravene the Constitution of the United States and we perceive no reason why the United States, albeit protected with respect to proceedings against it without its consent, should stand, so far as the existence of the liens is concerned, in any different position from that of other purchasers of lands in Alabama who take conveyances on and after the specified tax date.

Other federal cases, holding that the obligation to pay future assessments for drainage districts is determined by the law of the particular state involved, have required the federal government to make payment of such assessments. These cases have gone on the premise that the government's sovereign immunity which protects it from general tax liability is not applicable in the case of special assessments, which are not included in such exemption and which are not "taxes" but are apportionment of the costs of improvements among the lands benefited.

As these federal cases point out, there is very little way to reconcile these cases except on the basis of local law. Under the Arkansas Constitution, there cannot be a taking of private property for public use without just compensation. Since the general rule is that a lien is not a proprietary interest or estate, the Arkansas court

void); and Miller v. Cache River Drainage Dist. No. 2, 205 Ark. 618, 170 S.W.2d 371 (1943).

188 Ark. at 483, 65 S.W.2d at 1072.

313 U.S. 274 (1941).

Id. at 282. See also Mullen Benevolent Corp. v. United States, 290 U.S. 89 (1933), in which the government had no liability for reassessment of benefits, but had paid all liens, which included outstanding assessments, in acquiring title.


2 ART. 2, § 22.

2 Nichols, op. cit. supra note 4, § 5.74. However, the dissent in Grassy Lake pointed out that under Ark. Stat. Ann. § 50-401 (1947), improvement district assessments "shall run with the land and be assumed by the grantee," which certainly seems a legislative attempt to elevate these to a status at least equalling that of a covenant running with the land.
has not felt constrained to require payment for it by the condemnor. Another conclusion which seems clearly inferable is that the Arkansas court has not chosen to place special assessments in any special category insofar as the state's sovereign immunity from taxation is concerned.

The main interest of the dissent in the Grassy Lake case seems to be concern over the fact that the drainage district and its bondholders might go without compensation for the lien and benefits in question. In the case of condemnation proceedings, the remedy is against the award. But in the case of outright purchase by the state, where is the remedy? The majority opinion does not clearly provide the answer. It might be contended that the remedy is found in asserting a cause of action against the landowner, based on the theory that the payment for the land was in lieu of condemnation and was in the nature of an award in which the drainage district has an interest. Admittedly, this theory is rather rough around the edges; but the alternative leaves the improvement district holding an empty bag.

**EVIDENTIARY PROBLEMS**

**Expert Testimony**

One Arkansas case, which was actually decided on the basis of the lower court's error in disallowing a drawn and struck jury, but which also considered the question of testimony by experts was *Arkansas State Highway Comm'n v. Stanley*. This case cited two other Arkansas cases as authority for the proposition that even an expert's opinion is not substantial evidence if he fails to demonstrate a fair or reasonable basis for his conclusion. In the comparatively recent case of *Arkansas State Highway Comm'n v. Johns*, the court ruled that an expert witness, after having established his qualifications and his familiarity with the subject of the inquiry, is ordinarily in a position to state his opinion and need not on direct examination state the facts upon which his opinion is based. *Arkansas State Highway Comm'n v. Ptak*, however, indicated that the testimony of an expert who was not sufficiently versed as to the physical facts concerning the properties specifically involved could be discredited on cross-examination on that basis. The apparent synthesis of these cases is that while an expert need not state the basis of his opinion on direct examination, his testimony can be discredited on cross-examination by showing that he is not acquainted with the physical facts concerning the property in question. The rule that an ex-

---

31237 Ark. 664, 375 S.W.2d 229 (1964).
33236 Ark. 585, 367 S.W.2d 436 (1963).
34236 Ark. 105, 364 S.W.2d 794 (1963).
35See WRIGHT, op. cit. supra note 3, § 6.2D. In WRIGHT, A LEGAL ANALYSIS OF EMINENT DOMAIN IN ARKANSAS (1964), it was stated: "This [rule] should be corrected by the [proposed] code to provide that all witnesses should state the basis for their opinion on direct examination. This would not preclude further cross-examination on the subject, but it would set to rest the false proposition that merely because a man is a real estate agent he becomes an expert and
pert need not state the basis of his opinion on direct examination does not apply to non-expert witnesses, who must state the basis on direct examination for the opinion to be admissible.39

In connection with opinions of experts, another recent Arkansas case held that while comparable sales form a permissible basis for an expert witness’ opinion of the value of the property in controversy, the expert should not be allowed to give his opinion about the value of similar land in the vicinity in the absence of such a sale.40

Testimony of the Landowner

Another evidentiary problem centers around testimony by the landowner as to the value of his own land. (Is there really any doubt about what his opinion will be?) Arkansas State Highway Comm’n v. Weir41 upheld an award in which the only testimony to sustain the judgment was that of the landowner. The Highway Commission had contended that under the rule set forth in Hot Spring County v. Prickett,42 the uncorroborated testimony of a landowner would not support an award. The court stated that the Prickett case did not hold that and that it actually only determined that the landowner’s testimony would be considered as disputed. The landowner’s testimony in Prickett, said the court, was a conclusion not supported by the facts.

Although the court did not say so, it should also be noted that in Prickett the landowner gave no basis for his opinion and had no experience in the real estate business. Under the rule pertaining to non-expert testimony, that alone should have discredited his testimony.43 Moreover, in the Weir case, an expert had testified that the Weirs were damaged “something over” $26,000, which may have provided some support for the $30,000 award granted by the trial court, at least to the extent of $26,000.

Certainly the better rule would seem to permit the landowner to testify but require him to state the basis for his opinion in order that it may be weighed in its proper light. But a substantial question
can give an opinion without stating the basis of it.” 5 NICHOLS, op. cit. supra note 4, ¶ 18.42(1), states that although there is authority to support the proposition that an opinion witness need not give the reasons for his opinion on direct examination, the absence of supporting evidentiary facts has been held to affect the weight of the opinion, and it is generally held that he should testify as to the facts which substantiate his conclusion and explain the reasons for this opinion.

38Ross v. Clark County, 185 Ark. 1, 45 S.W.2d 31 (1932).
41237 Ark. 692, 376 S.W.2d 257 (1964).
42229 Ark. 941, 319 S.W.2d 213 (1959).
43In another recent Arkansas case, Arkansas State Highway Comm’n v. Gladden, 238 Ark. 988, 991, 385 S.W.2d 934, 936 (1965), the court properly admitted the testimony of the landowner, stating: “Dr. Gladden, as a landowner, was not disqualified from giving his value opinion. Arkansas State Highway Comm’n v. Muswick Cigar & Beverage Co., 231 Ark. 265, 329 S.W.2d 173. According to the record, he had bought and sold considerable property within the city the past year and was familiar with the local real estate market.”

129
arises as to the validity of the result in the *Weir* case. If the owner's conclusion is viewed as sustained by the testimony of the expert that the property in controversy was worth something over $26,000, then the result (at least up to that figure) can be justified. But any landowner would naturally view his land as being worth more than an unbiased observer would. Following the *Weir* court's interpretation of the *Prickett* rule as being that the landowner's testimony should be viewed as disputed testimony, how can the court disregard substantial contrary testimony on behalf of the condemnor and the fact that the testimony of the condemnee's own expert fell short of the figure awarded? Yet the court positively stated that "it is not absolutely necessary that the landowner's testimony be corroborated."44 Despite this statement, it is difficult to imagine a situation in which a landowner's unsupported testimony would be legally sufficient for a court to reasonably base the value of real estate on this testimony in the face of substantial contrary evidence from witnesses on both sides. Nichols states that "it is generally understood that the opinion of the owner is so far affected by bias that it amounts to little more than a definite statement of the maximum figure of his contention."45 To ignore substantial contrary evidence and base an award on the landowner's testimony solely, when even the landowner's own expert witnesses cannot sustain the figure, is an unexplainable aberration which has no legal or reasonable justification.

**Exclusion of the Testimony of a Witness**

*Arkansas State Highway Comm'n v. Jackson County Gin Co.*,46 applied the well-established rule that if part of a witness' testimony is admissible, a motion to exclude all of it is properly denied.47 Similarly, *Arkansas State Highway Comm'n v. Byrd*,48 held that a motion to strike only the inadmissible portion of a witness' testimony was properly made. These holdings represented no departure from past Arkansas cases.

**Evidence of Market Value**

It was held in the second *Stanley* case49 that market value cannot be determined by a mathematical formula, but by the test of the willing buyer-willing seller relationship. The court's holding was based on *City of Little Rock v. Moreland*,50 which is sometimes referred to as the "bloating clay case," and involved no departure from the principles followed in that case.

In *Arkansas State Highway Comm'n v. Sisson*,51 the court refused to admit testimony as to the worth of certain removable chat-

---

44237 Ark. at 694, 376 S.W.2d at 259.
45NIChOLS, op. cit. supra note 4, § 18.4(2).
46237 Ark. 761, 376 S.W.2d 553 (1964).
48237 Ark. 905, 377 S.W.2d 165 (1964).
49237 Ark. 664, 375 S.W.2d 229 (1964).
50231 Ark. 996, 334 S.W.2d 229 (1960).
51238 Ark. 720, 384 S.W.2d 264 (1964).
tels installed in a service station. This evidence had been introduced to show the rental value of the station, but the court found the issue to be the rental value of the real property, not the value of chattels. Moreover, the landowner's receipt of rentals under a lease had to be taken into consideration in computing her recovery, since otherwise the state would be paying not only the value of the leasehold but also the value of the unencumbered fee.

ELEMENTS OF LOSS AND "BEFORE AND AFTER" VALUE

A number of recent Arkansas cases have considered the elements to be included as constituting loss or in arriving at a determination of the loss involved.

Arkansas State Highway Comm'n v. Jackson County Gin Co. and Arkansas State Highway Comm'n v. Carpenter, both held that evidence as to moving costs may be considered in arriving at the before and after value of property. This rule applies to movement of buildings located on the premises. A 1959 Arkansas case, Arkansas State Highway Comm'n v. Fox, held that it was error to award removal expense for property belonging to a lessee where a leasehold is being condemned, and an older case held that the cost of removing personal property was not an element of damage to be considered. Of course, the test is not the removal cost itself; the test is the value of the property before the taking and the value of the remainder after the taking, and this cost of movement of a house or other property located on the premises is simply one element to be considered in arriving at the before and after value. In another case, the court ruled that in determining the before and after value, it was error to present evidence as to the cost of an improvement that had been removed from the land prior to condemnation. In connection with before and after value, it is, of course, erroneous to instruct the jury in a situation involving a partial taking that just compensation is the "fair market value" of the land, rather than the difference between the fair market value immediately before and immediately after the taking. This was the court's holding in Myers v. Arkansas State Highway Comm'n.

Wenderoth v. Baker ruled that dust was not an element for which damages could be awarded. This is in line with previous Ar-

---

237 Ark. 761, 376 S.W.2d 553 (1964).
230 Ark. 287, 322 S.W.2d 81 (1959).
229 Ark. 129, 113 S.W. 1030 (1908).
238 Ark. 734, 384 S.W.2d 258 (1964).
238 Ark. 464, 382 S.W.2d 578 (1964).
kansas cases, which also hold that noise and other similar inconveniences resulting from condemnation are not compensable.\textsuperscript{61}

Moreover, brokerage commissions, abstract costs, and deed fees are inadmissible, and while a wide range of factors may be considered in determining market value, these selling costs cannot be introduced as separate items of damage.\textsuperscript{62}

**Business Income**

It has long been the rule in Arkansas that in arriving at the before and after value of property, profits from a business conducted on the property cannot be considered.\textsuperscript{63} A substantial number of cases have held this in recent years, and two this past year which so ruled were the *Weir*\textsuperscript{64} case, and *Arkansas State Highway Comm'n v. Taylor*.\textsuperscript{56} In the *Taylor* case, the court stated that where a realtor-developer had an arrangement whereby he would sell land to a third party and still have a ninety day exclusive listing during which period he could sell the lots for an additional commission, this loss of business income could not be reasonably determined and was inadmissible.\textsuperscript{68} The *Weir* case applied the view that income from a farm is an exception to the rule that business income cannot be used to form the basis for proof of damages. However, the court did not attempt to distinguish the *Weir* ruling from the decision in *City of El Dorado v. Scruggs*,\textsuperscript{67} which held that damages to a dairy business occasioned by the discharge of sewage into a stream was not compensable. The *Weir* case also involved a dairy business. In *Weir*, a dairy and dairy farm were involved and an expert testified and computed valuation by determining profits over a seven-year period. What the expert was actually doing in the *Weir* case was determining profits from the dairy *business* operation as opposed to the agricultural profits of a farm, and the supreme court therefore may have encroached somewhat on the usual rule that business profits are not admissible. Also, the decision in *El Dorado v. Scruggs* may have been substantially limited or even reversed by the *Weir* case. The court did not cite *City of El Dorado v. Scruggs* in its opinion however. In any event, what it has done in the *Weir* case is rule that a "dairy farm," or "dairy business" which is connected to the

\textsuperscript{61}Campbell v. Arkansas State Highway Comm'n, 183 Ark. 780, 38 S.W.2d 753 (1931); Missouri Pac. R.R. v. Juneau, 178 Ark. 417, 10 S.W.2d 867 (1928).
\textsuperscript{62}Arkansas State Highway Comm'n v. Massengale, 238 Ark. 1069, 386 S.W. 2d 710 (1965).
\textsuperscript{63}Arkansas State Highway Comm'n v. Hood, 237 Ark. 202, 372 S.W.2d 387 (1963); Arkansas State Highway Comm'n v. Wilmans, 236 Ark. 945, 370 S.W.2d 802 (1963); Hot Spring County v. Bowman, 229 Ark. 790, 318 S.W.2d 603 (1958); Arkansas State Highway Comm'n v. Addy, 229 Ark. 768, 318 S.W.2d 595 (1958); Hot Spring County v. Crawford, 229 Ark.. 518, 316 S.W.2d 834 (1958); Desha v. Independence County Bridge Dist. No. 1, 176 Ark. 253, 3 S.W.2d 969 (1928).
\textsuperscript{64}237 Ark. 692, 376 S.W.2d 257 (1964).
\textsuperscript{65}238 Ark. 278, 381 S.W.2d 438 (1964).
\textsuperscript{66}The court did not discuss this evidence in terms of the business income exclusion, although that is clearly what it appears to be. The court apparently excluded this testimony because it was nebulous and uncertain.
\textsuperscript{67}113 Ark. 239, 168 S.W. 846 (1914).
farm, is within the agricultural exception, and that profits relating to such a business operation may be admitted in evidence while profits which pertain to other types of businesses cannot be admitted. The Arkansas rule in connection with non-admissibility of business profits is in accord with the general prevailing rule in this country. With respect to admissibility of evidence as to farm profits, Orgel indicates that "scattering decisions" support this rule. An Oklahoma case indicates that this evidence is often admitted simply to "shed light upon the reasonableness of the value fixed by the evidence," and a Kentucky case states that this evidence is only used as a means of measuring production. From an academic standpoint, it would seem that the rule which excludes profits from a business while permitting evidence of profits from farm property is inconsistent and cannot be justified. The rationale is that business conducted upon the condemned land and the fruits thereof are too uncertain, remote and speculative to be used as the criterion of the market value of the land, since the profits for any given period depend upon many diverse circumstances. Despite the existence of agricultural price supports, it would seem that this same rule should be no less true in connection with farm property. However, in place of excluding testimony as to farm income, the alternative of allowing the introduction of testimony as to business income for whatever weight the court might wish to give it might be considered. It seems unreasonable that a court should not be qualified to consider the aspect of business profits, taking into account the fact that these are transitory and cannot necessarily be viewed as "fixed." Although that is not the general view in this country today, there has been some statutory departure from the rule at least in three states.

Offers to Purchase

The court in the Jackson County Gin case followed a 1962 case in holding that an unaccepted offer to purchase property is

---

6See 4 NICHOLS, op. cit. supra note 4, § 13.3. The owner cannot recover the anticipated profits of his business which are lost by the taking of the land upon which it is located, although evidence of profits may be considered in determining market value where the profits are attributable to the character of the land rather than to the character of the operator. See also, 5 NICHOLS, op. cit supra note 4, § 19.3.

1ORGEL, op. cit. supra note 3, § 167. There is a fairly even division of cases on either side of the controversy, according to Orgel. 1 ORGEL, op cit supra note 3, § 166.

City of Cushing v. Pote, 128 Okla. 303, 262 Pac. 1070 (1928).

Kentucky Water Service Co. v. Bird, 239 S.W.2d 66 (Ky. 1951).

See 4 NICHOLS, op. cit. supra note 4, §§ 13.3 (1)-(2).

Florida, New York and Vermont. See: FLORIDA STATUTES, § 73.10(4) permitting damages for loss of business to be assessed and added to the value of the land taken where the business is over five years old, is owned by and operated on the condemnee’s premises, and the taking is for right-of-way purposes by certain designated public agencies; 19 VT. STAT. ANN. §212(2), No. 242, Acts of 1957; Application of Huie, 11 App. Div. 2d 837, 202 N.Y.S.2d 954 (1960).

237 Ark. 761, 376 S.W.2d 553 (1964).

inadmissible to show the market value of the property. The court in this earlier case discussed both the absolute exclusion rule and the "Illinois rule" which admits the evidence if the proponent can show that it was a bona fide offer for cash and was made by a person able to fulfill the offer. Arkansas apparently follows the absolute exclusion rule.\textsuperscript{77}

**NOTICE**

One of the principal problems in condemnation cases in which the county condemnation procedure\textsuperscript{78} has been followed is that of notice. Although Act 387 of 1965 amended the prior law to provide for publication of notice at least ten days prior to the hearing and service of a copy of the order on all affected landowners within ten days after the entry of order, the problem remains with respect to previous county condemnation proceedings. The problem is illustrated by the recent case of *Arkansas State Highway Comm'n v. Montgomery*,\textsuperscript{79} in which there had been no publication of notice to the landowners in the county court proceedings. Where there has been no publication of notice (under the old procedure) and no payment of compensation, the burden is on the condemnor to prove actual notice to the landowner, or the judgment is void.\textsuperscript{80} To prove actual notice, the Highway Commission must show actual entry on the land.\textsuperscript{81} In the *Montgomery* case, such an entry was found to have taken place, the entry consisting of ditching and laying tile. Consequently, the court held that actual notice had been established. Another recent case, *Arkansas State Highway Comm'n v. Dean*,\textsuperscript{82} held that the paving of an existing road was insufficient to put adjoining property owners on notice that additional land was being taken. Similarly, *Arkansas State Highway Comm'n v. Anderson*,\textsuperscript{83} held that the landowners did not have sufficient notice where a county court in 1935 had entered an order condemning an additional ten feet of right-of-way, which was never occupied, and no notice was ever published. In *Arkansas State Highway Comm'n v. Glad-

\textsuperscript{77}In the Elliott case (note 76 supra), the court stated that the offered evidence was inadmissible under either the absolute exclusion rule or the "Illinois rule," but that "the evidence of an offer to purchase is not admissible to establish the fair market value of particular property." 234 Ark. at 623, 353 S.W.2d at 529. This leaves the impression that Arkansas follows the absolute exclusion rule.

\textsuperscript{78}The county condemnation procedure is found in ARK. STAT. ANN. §76-917 (Repl. 1957). As mentioned in the article, the deficiencies as to notice have been remedied in great measure by Act 387 of 1965. Nonetheless, this entire county procedure is outmoded and antiquated. In the drafting of the proposed highway code, it is the author's intention to eliminate this procedure and substitute for it the same procedure followed by the State Highway Commission. This will not cure the problem presented by county condemnation proceedings which took place many years ago, however.

\textsuperscript{79}237 Ark. 857, 376 S.W.2d 662 (1964).

\textsuperscript{80}See Arkansas State Highway Comm'n v. Anderson, 234 Ark. 774, 354 S.W.2d 554 (1962).

\textsuperscript{81}Arkansas State Highway Comm'n v. Cook, 233 Ark. 534, 345 S.W.2d 632 (1961); Arkansas State Highway Comm'n v. Holden, 217 Ark. 466, 231 S.W.2d 113 (1950).

\textsuperscript{82}236 Ark. 484, 367 S.W.2d 107 (1963).

\textsuperscript{83}234 Ark. 774, 354 S.W.2d 554 (1962).
den," also, the court found that there was no evidence that appellees or their predecessors in title had ever received any compensation for the land or that the order was published or that the landowners had any notice of it until less than a year before this case was filed; and in that situation (the Highway Commission having failed to show actual entry), the court properly found the county court order to be void. The question of notice is important since notice sets in motion the one year statute of limitations provided in this county condemnation procedure for the filing of claims. Under this statute, prior to Act 387 of 1965, publication of notice or actual entry initiated the statutory period. Under the new provisions, however, the statute of limitations begins to run from the date of service of the county court order on the landowner. This is a vast improvement.

In Sloan v. Lawrence County and in Arkansas State Highway Comm'n v. Cook, the supreme court stated that the old county court condemnation procedure was defective, but not unconstitutional, because it made no provision for giving notice to the landowner. The court held essentially the same thing as recently as mid-January in Arkansas State Highway Comm'n v. Scott. In that case the court found that there had been actual entry by the Highway Commission, which provided the necessary notice, and with respect to Scott's assertion that the county court orders were unconstitutional due to absence of notice, the court stated that the appellee had confused "notice of the proceedings" with "reasonable opportunity to seek compensation." The court said that the latter was necessary while the former was not required. The fact of the matter is that the procedure previously provided in this county condemnation statute failed to protect the rights of landowners and provided a cumbersome and unsatisfactory method of condemning property. It will still breed, for some time, continual litigation for the Highway Commission, and it provided (and still provides, through application of it) a method of cheating landowners out of their just compensation. The results in these cases, all too often, deprive the landowner of just compensation based on rather thin technicalities. If there was enough to constitute "entry," the landowner had to act affirmatively within a year or suffer the consequences. -Although

---

81 238 Ark. 988, 385 S.W.2d 934 (1965).
83 134 Ark. 121, 203 S.W. 260 (1918).
84 233 Ark. 534, 345 S.W.2d 632 (1961).
86 238 Ark. 883, 385 S.W.2d 636 (1965).
87 Id. at 888, 385 S.W.2d at 640.
88 See Wright, op. cit. supra note 3, § 2.8C. In Wright, A Legal Analysis of Eminent Domain in Arkansas, op. cit. supra, note 36, at 18, it was said in connection with this statute (before its amendment in the last legislature) and these cases: "It appears to be possible in Arkansas for a landowner to have his land taken legally without ever receiving just compensation and without having any redress in the Courts! Such amounts to a lack of both procedural and substantive due process, and it should be the aim of this code to remedy such deficiencies. The answer is a specific mode of procedure which will make mandatory the service of written notice at the time of the institution of the proceedings upon all who claim an interest in the land, and in the case of non-residents, by provision for publication of notice."
personal notice is admittedly not required in order to meet the requirements of due process, there is considerable question as to whether the old county condemnation procedure in Arkansas was a legally sufficient substitute.

Despite the passage of Act 387, as mentioned, the old procedure will haunt the courts for a long time to come. Most of the current cases of this type result from county orders entered anywhere from ten to forty years ago. The rule of the Sloan and Cook cases will thus continue to provide occasional injustices for the next decade or more, unless overruled.

**Consequential Loss of Value**

A few recent Arkansas cases have been concerned with a diminution in value due to condemnation of property not owned by the complaining landowner. One such case was *Arkansas State Highway Comm'n v. McNeill*, in which the landowner claimed damages caused by the condemnation of adjoining property. The testimony showed that erection of the highway on the adjoining property would reduce the value of the landowner's residence by $10,000. But the supreme court held that no recovery could be allowed. If land is not actually taken, the court said, the owner cannot recover even though the inconvenience to that landowner is greater than to the public generally. An exception is a situation in which there are special damages to that particular landowner, such as might result from a change of grade or loss of access. In the *McNeill* case, the landowner had actually asserted two theories although he had relied largely on the second one. Under his first theory, he had sought damages outright for loss of value due to the construction of the highway on the adjoining property. Under his second theory, he had asserted the destruction of a property interest in the form of a restrictive covenant on his and other property situated in the subdivision which would have normally prevented the construction of the highway. The Arkansas court stated that other states are about equally divided, but in Arkansas, an award cannot be based on a violation of a restrictive covenant because the loss is not due to the actual violation of the restriction but rather to the construction of

---

1 Nichols, op. cit. supra note 4, § 4.103(2). Nichols states that "it is a fundamental maxim of the common law that he (the landowner) is entitled to a hearing at some stage of the proceedings, and consequently to be notified when the hearing is to take place." Yet in Arkansas, under the old procedure, there might never be a hearing if the landowner did not assert his rights within one year of the actual entry. Note in the *Scott* case (supra note 89) that the county court order "was made without notice to the landowner, but gave him one year in which to file his claim for the taking." 238 Ark. at 885-886, 385 S.W. 2d at 638.

2 See Schroeder v. City of New York, 371 U.S. 208, 89 A.L.R. 2d 1398 (1962), in which the Court stated that an elementary and fundamental requirement of due process is notice reasonably calculated under all the circumstances to apprise interested parties of the pending of the action and afford them an opportunity to present their objections, and Roller v. Holly, 176 U.S. 398 (1928), in which it was held that notice must be reasonable and adequate for the purpose.

3238 Ark. 244, 381 S.W.2d 425 (1964).
the highway. The loss, reasoned the majority opinion, would be the same whether the covenant existed or not because the loss was not due to the violation of the restrictive covenant but rather was due directly to the construction of the highway, and such loss is not compensable unless special damages result. There was a vigorous dissent, which argued that a restrictive covenant is a property right for which compensation should be paid under the Arkansas Constitution.

On October 12, 1964, in Wenderoth v. Baker, another decision was rendered with respect to injury to property not taken. Here the landowners argued that due to the construction of a new highway, they would have to travel an additional half mile to get to town or to school. The supreme court again held that a landowner whose land is not being taken is not entitled to compensation for inconvenience even though his inconvenience is greater than that suffered by the general public. The court added:

It is not enough for a landowner to show that his damage differs from that suffered by the general public. He must also show either that part of his land has been taken or that a property right has been invaded. Nichols, Eminent Domain (3d Ed.), § 14.1. It must often happen that the value of a city lot is diminished as a result of the condemnation of adjoining property for some distasteful purpose, such as the construction of a city jail. But, as the court convincingly demonstrated in City of Geary v. Moore, 181 Okla. 616, 75 P.2d 891, this is an injury "for which the law does not, and never has, afforded any relief."

A case decided on the same day as the McNeill case, Arkansas State Highway Comm'n v. Taylor, involved the development of a subdivision, in which the developers had made improvements, installed utilities, filed a plat, and sold about one-third of the lots involved. The Highway Commission had condemned a strip off of the east side of the sixty-acre development. The supreme court held that the owners could not consider this acreage as one tract and recover damages to the part not taken, due to the fact that they had divided it into lots, improved it and sold a substantial portion of the lots. The court allowed recovery only for the damage to the lots taken or partly taken as a result of condemnation, plus any special damages (such as change of grade or loss of access) to the lots not taken. Although this case technically did not involve an assertion of

---

According to 2 Nichols, op. cit. supra note 4, § 5.73(1), the majority view in the United States holds that a restrictive covenant (often characterized as an equitable servitude) constitutes property in the constitutional sense, for which compensation must be provided if the land in question is taken; Nichols states: "Such restrictions constitute equitable easements in the land restricted, and when such land is taken for a public use that will violate the restrictions, there is a taking of the property of the owners of the land for the benefit of which the restrictions were imposed." The owners are entitled to an award of compensation for the destruction of their easements.

See note 95 supra. The dissent is in accord with the majority view.

238 Ark. 464, 382 S.W.2d 578 (1964).


238 Ark. at 466, 382 S.W.2d at 579.

238 Ark. 278, 381 S.W.2d 438 (1964).
consequential damage to adjoining land, certainly that must have been the main reason in attempting to recover for damages to the entire subdivision since the "special damages" recoverable in connection with the lots not taken would be peculiar and limited in nature.

In all of these cases, whether more or less directly as in the McNeill case, or by indirection as in Wenderoth v. Baker and the Taylor case, the landowners and attorneys involved were facing a problem and an issue which is gradually growing in intensity in the law of eminent domain. Whether it is referred to as "consequential damage" or "inverse condemnation," the problem is a very genuine one whenever land is condemned for highways through residential areas. The McNeill case illustrates it quite vividly. The landowner in that case had not lost a single inch of land, but his property had suffered substantial diminution in value due to the nearness of the highway. He had lost without legally losing. A leading article in the Virginia Law Review quotes with favor this penetrating analysis of the New Hampshire court:

The vital issue then is, whether the injuries complained of amount to a taking of the plaintiffs' property within a constitutional meaning of those terms. . . . The constitutional prohibition (which exists in most, or all, of the states) has received in some quarters, a construction which renders it of comparatively little worth, being interpreted much as if it read, — 'No person shall be divested of the formal title to property without compensation, but he may without compensation, be deprived of all that makes the title valuable. To constitute a 'taking of property,' it seems to have sometimes been necessary and held necessary that there should be 'an exclusive appropriation,' 'a total assumption of possession,' 'a complete ouster,' an absolute or total conversion of the entire property, 'a taking of the property all together.' These views seem to us to be founded on a misconception of the meaning of the term 'property,' as used in the various state constitutions.

Can the view of the New Hampshire court, although represented by this rather old case, be viewed as representing the developing trend within the country? Nichols states that the modern and prevailing view is that any substantial interference with private property which destroys or lessens its value, or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is in fact and in law, a "taking" in the constitutional sense to the extent of the damages suffered even though the title and possession of the owner remains undisturbed. In support of that statement, it might be pointed out that pollution of the air; destruction of light, air, view and access; some types of regulation; change in grade, may all amount to a taking for which compensation will be awarded. But the situation discussed by Nichols involves actual


\footnotesize{\textsuperscript{101}}NICHOLS, op. cit. supra note 4, \$ 6.3.

\footnotesize{\textsuperscript{102}}See Sewer Improvement Dist. No. 1 of Sheridan v. Jones, 199 Ark. 534, 134 S.W.2d 551 (1939) (pollution of water); Sewer Improvement Dist. No. 1 of Wynne v. Fiscus, 128 Ark. 250, 193 S.W. 521 (1917) (pollution of air); Campbell v. Arkansas State Highway Comm'n, 183 Ark. 780, 38 S.W.2d 753}
nonphysical taking, and the situations mentioned in which there has been no appropriation of land all involve "special" or "peculiar" damages to the tract involved, not simply loss of value.\textsuperscript{104}

Under the Arkansas Constitution, land does not have to be actually taken; it can be damaged for public use and compensation received for same.\textsuperscript{105} This provision has given rise in at least thirty states to recovery for various forms of consequential damages.\textsuperscript{106} Again, however, it should be noted that despite this provision and the allowance of some forms of consequential damages, a distinction is drawn between damages to the remainder where part of the land is taken and consequential damages to a tract where no part of it is appropriated. In the latter situation, as mentioned, there must be "special" or "peculiar" damages in order for there to be a recovery, and simple loss of value is ordinarily not enough to qualify.\textsuperscript{107}

Most jurisdictions have rejected the argument of the landowners in \textit{McNeil} that recovery should be allowed when no property was taken but when public use of adjoining land caused an ascertainable depreciation of the present market value.\textsuperscript{108} As mentioned, compensation has been denied unless the loss sustained falls within some narrow concept of damage. Moreover, in some states the present trend seems to be to curtail rather than liberalize recovery for consequential damages.\textsuperscript{109} The reason for the rejection of such assertion is obvious. To accept this premise would give rise to a multiplicity of claims whenever a public improvement was constructed and might render highway construction inordinately expensive and thereby retard progress.\textsuperscript{110} It is also argued that this would create an unjust and arbitrary discrimination against the public and in favor of private improvement of land as well as in favor of those damaged by public improvements as against those damaged privately.\textsuperscript{111} Thus, while the view favoring recovery for

(1931) (obstruction of free flow of light and air); Arkansas State Highway Comm'n v. Union Planters Nat'l Bank, 231 Ark. 907, 333 S.W.2d 904 (1960) (destruction of ingress and egress); Hot Spring County v. Bowman, 229 Ark. 790, 318 S.W.2d 603 (1958) (change of grade); Shellnut v. Arkansas State Game & Fish Comm'n, 222 Ark. 25, 258 S.W.2d 570 (1953) (regulation prohibiting hunting). \textit{But cf.} Arkansas State Highway Comm'n v. Hightower, 238 Ark. 569, 383 S.W.2d 279 (1964) (regulation of access driveways).

\textsuperscript{104} NICHOLS \textit{op. cit. supra} note 4, § 6.4432(2).

\textsuperscript{105} \textit{Ark.} 2, § 22.

\textsuperscript{106} NICHOLS, \textit{op. cit. supra} note 4, § 6.4432(2), states that under the constitutional provision which requires the payment of compensation when property is damaged (as the Arkansas Constitution does), consequential damages may be recovered. Cases from thirty states are cited in support of this proposition. Where the Constitution provides for compensation for a taking only, damages are generally not compensable. \textit{2 NICHOLS, op. cit. supra} note 4, § 6.4432(1).

\textsuperscript{107} NICHOLS, \textit{op. cit. supra} note 4, §§ 6.441(1) and 6.4432(2); Spies & McCoid, \textit{supra} note 101, at 448.

\textsuperscript{108} See note 107 \textit{supra}.

\textsuperscript{109} Spies & McCoid, \textit{supra} note 101, at 448.

\textsuperscript{110} See 1 \textit{ORDEL, op. cit. supra} note 3, § 77; and 2 NICHOLS, \textit{op. cit. supra} note 4, § 6.441(1). The Spies and McCoid article questions the validity of this assumption. \textit{Spies & McCoid, supra} note 101, at 454.

\textsuperscript{111} NICHOLS, \textit{op. cit. supra} note 4, § 6.551(1).
loss of value has received some support, it has generally been rejected.

These reasons against a broadening of recovery to include diminution in value of land not taken seem particularly compelling in a state such as Arkansas where substantial funds for public improvements are not available in large quantities. The argument that public highways are largely constructed with federal funds does not eliminate the fact that there is still a fairly substantial portion of the expense attributable to state funds (even if you can subscribe to the "let's tap the federal government" viewpoint). The problem essentially boils down to the policy question of whether to drain the state highway budget and seriously retard road construction in order to pay for these consequential damages. The conclusion must necessarily be that from the standpoint of the public interest, the Arkansas Supreme Court has reached the proper decision.

GENERAL AND SPECIAL BENEFITS

The problem in this area of condemnation litigation, as far as the courts are concerned, is to determine what constitutes a benefit which is peculiar to the land under consideration as opposed to a benefit which accrues to the public generally. In the situation of special benefits to the landowner's remaining property, these may be offset against the award, whereas general benefits may not be deducted. In *McMahan v. Carroll County*, the supreme court reiterated that where the public use for which a portion of land is taken so enchances the remainder as to make it of greater value than the whole was before the taking, the owner in such case has received just compensation in benefits if these benefits are "local, peculiar and special to the owner's land." The burden is on the condemnor to prove that such special benefits have offset any damage suffered. The court pointed out that although a paved highway may be of benefit to the general public, it may also be a special benefit in certain circumstances. This case is in accord with previous Arkansas law and with the rule in the United States generally.

---


113See note 107 supra.

114Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 331 S.W.2d 705 (1960); Ball v. Independence County, 214 Ark. 694, 217 S.W.2d 913 (1949); Cribbs v. Benedict, 64 Ark. 555, 44 S.W. 707 (1897).

115238 Ark. 812, 384 S.W.2d 488 (1964).

116Id. at 814, 384 S.W.2d at 489, citing Lazenby v. Arkansas State Highway Comm'n, supra, and other Arkansas cases. The court also cited WRIGHT, op. cit. supra note 3, § 7.1, which is the section of the Digest in which cases on special benefits are compiled.

117See note 114 supra.

1183 NICHOLS, op. cit. supra note 4, § 8.6207.

140
CONCLUSION

In the short span of time since the *Arkansas Eminent Domain Digest* was published, the Arkansas Supreme Court has decided a number of important cases. The volume of condemnation litigation in the state is not likely to diminish in the near future, due to the construction of interstate highways, the improvement of the existing state highway system, urban redevelopment, and the development of the Arkansas River Valley. The trend in Arkansas, if anything, seems toward a channelization of recovery within widely accepted concepts of eminent domain and property law generally. Moreover, the tendency seems to be to limit rather than broaden the base of recovery. This trend or tendency was manifested in both the *Grassy Lake* and *McNeill* cases. The *McNeill* case demonstrated the application of the limiting factor even where recovery might have been grounded upon interference with or destruction of a property right. Whatever shortcomings may be apparent in isolated situations however, the public generally should benefit from this approach since the alternative would greatly expand the amount of damages recovered in condemnation cases.

As this article illustrates, some of the major, recurring problems in Arkansas are of a procedural nature, and it is to be hoped that many of these will be corrected through the enactment of the highway code to be presented to the 1967 legislature. In that connection it would seem that at the very least genuine procedural due process should be obtained through the elimination of the antiquated county condemnation procedure. Correction of this inadequacy, even if the code did nothing else, would prove highly beneficial to Arkansas landowners.