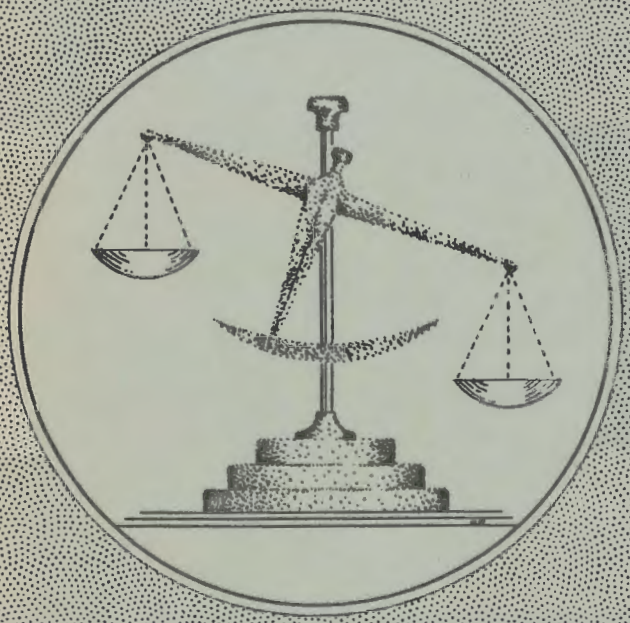

A LEGAL ANALYSIS OF EMINENT DOMAIN IN ARKANSAS

Phase IA2
of

A STUDY AND SUBJECTIVE CLASSIFICATION OF HIGHWAY LAW PREPARATION OF A MODEL HIGHWAY CODE

HIGHWAY RESEARCH PROJECT NO. 11

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HIGHWAY LAW
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Highway Research Project No. 11

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It is the intention of this paper to discuss the law of eminent domain in Arkansas as compared to the law in the United States generally and in connection with problems and deficiencies to be dealt with in the code. Such an undertaking is too broad to be accomplished easily, and although many hours have gone into the accumulation of information, there are unquestionably many additional problems of a specific nature which must be considered before a new code is prepared. These specific problems will reveal themselves more clearly as Phases II and III of the project develop and will be dealt with at that time. This paper should, however, provide a beginning in pointing up the general difficulties which exist.

In undertaking this analysis, in order that it may be more easily used in the conferences that will follow, the outline of the Eminent Domain Digest has been followed, and the analytical comments correspond to the sections in the Digest.

I EMINENT DOMAIN: THE BASIS OF THE POWER.

Arkansas has stated that the power of eminent domain is an inherent and inextinguishable right,[1] conditioned only by the right of the citizen to just compensation.[2] Thus, the basic idea is that a citizen may be forced to sell his property for public use at its par value.[3] That the power is inherent is indicated from the cases and from the fact that prior to the 1868 Arkansas Constitution, there were no constitutional provisions dealing with eminent domain.[4] The power is recognized in the current 1874 Constitution.[5]

The origin of the power of eminent domain is lost in obscurity although references may be traced to the Bible and to antiquity.[6] In England there was an ancient prerogative of the King to use land for defense purposes, which was finally abolished by statute in the time of Charles II,[7] although this ancient power bore close resemblance to the power in its modern form.[8] Eminent domain, as it now exists, apparently grew out of the common law proceeding known as "inquest of office," by which jurors inquired into any matter that entitled the King to possession of property, and which became the appropriate proceeding at common law to take land for public use.[9] The power of eminent domain was well recognized in England by the time of the American Revolution, and was used in the American colonies largely for the establishment of roads.[10] Various statutes supported the use of the power. From this background, there is no question but that the power exists in absolute and unlimited form independent of recognition by constitutional provisions.[11] The pre-constitutional existence of the power is properly recognized by the Arkansas Constitution which concedes "the State's ancient right of eminent domain."[12] Thus state constitutional provisions are limitations upon an otherwise absolute legislative power and are not grants of authority to the legislature.[13] Each American state, by virtue of its sovereignty, has complete and unqualified control over the persons and property within its own jurisdiction, deducting only the powers granted to the United States and which the states cannot exercise under the Federal Constitution.[14] The power of eminent domain may be exercised by a state on all proper occasions, and this power cannot be surrendered so as to deprive a subsequent legislature of the right to authorize a taking for public use.[15]

A Delegation of the Power.

Normally, the legislature has the power to authorize the exercise of eminent domain, and there can be no taking without the consent of the owner in the absence of direct legislative authority.[16] There is no doubt that the power may be delegated for proper purposes to duly accredited agencies, and the legislature may select such agents and impose such conditions on such grant of power as it sees fit.[17] Arkansas holds that the legislature may delegate the power to any agency, provided the power is exercised for a public purpose.[18] Such agencies may be public,[19] private,[20] domestic,[21] or foreign (if such foreign corporation complies with the domestication statutes, in which case it

is actually no longer foreign).[22] A foreign corporation may also exercise the power through a domiciled subsidiary.[23] Arkansas does not depart from the general rule. Arkansas also follows the general rule in holding that the agency to which the power of eminent domain is delegated cannot redelegate the power.[24] The grantee of the power may determine the extent of its use in the absence of legislative restriction without judicial intervention, provided its determination is made in good faith.[25] Arkansas holds that delegation of the power is in derogation of the common law and such grant will be strictly construed.[26] It is generally held, as in Arkansas, that the power of eminent domain cannot be conferred for private business purposes.[27]

B. Public Use and Purpose.

It is the universally established rule that private property can only be taken for public use.[28] However, only a few comparatively recent state constitutions, not including Arkansas', specifically prohibit taking property for non-public uses.[29] Nichols states that the usual provision relating to eminent domain in state constitutions is simply that property shall not be taken for public use without compensation, and was intended only to embody the principle enunciated by political philosophers of that period and recognized in England and many of the colonies [30] This principle needed recognition because it had been the practice in European countries and in several colonies to take private property for public use without compensation. In the early cases the taking of private property for a private use, even upon payment of just compensation, was prohibited, first upon the ground that such was opposed to natural justice, beyond the power of the legislature, and an act of spoliation, later through interpretation of eminent domain clauses to prohibit by implication the taking of property for private purposes and in some instances through interpretation of the due process clause of the state constitution.[31]

Arkansas has held that to be a "public use,"[32] the use must concern the public, and that subterfuge may not be employed to satisfy the requirement.[33] It is generally agreed that a precise definition of "public use" is hard to come by, and that the decision in a close case will normally be governed by the practices and needs of the people in that jurisdiction. There are two views as to what "public use" generally encompasses. The narrow view is that it means "use by the public," that is, public service or employment, and that consequently to make a use public a duty devolves to furnish the public with the use intended and the public must be entitled, by right, to use or enjoy the property taken.[34] Arkansas in some early cases followed this restricted view.[35] The broad view is that "public use" means "public advantage," and that anything which tends to enlarge the resources, increase the industrial potential, or promote the productive power, or which leads to the growth of communities and the creation of new resources manifestly contributes to the general welfare of all and constitutes a "public use."[36] This broader view was adopted in Arkansas in Wilson & Co. v. Compton B & M Co.,[37] which provides a classic expression of that position. Presumably, Arkansas could follow either view which served

its purpose at the moment. Nichols argues that neither view should be strictly adhered to, since both are too restricted and too broad in certain ramifications, and that a hard and fast rule should not be enunciated.[38] The proper conclusion would seem to be that while historic judicial guidelines and insights into what constitutes "public use" should not be ignored, the term should be construed liberally to effectuate the needs of society; and we in this time should not unduly constrict future generations as to what the term might encompass.

In Young v. Gurdon,[39] the Arkansas Court held that the opinion of the body exercising the power of eminent domain, whether the legislature or a corporation, as to the necessity of the exercise of the power is conclusive because the question is essentially political; and if the legislature has declared the purpose to be a public one its judgment will be respected by the courts unless the purpose be palpably private or without reasonable foundation. This does not vary materially from the general rule,[40] except that courts probably give less credence to the declarations of a private corporation than to those of the legislature.[41] In that connection, both in Arkansas and elsewhere, private purposes may also be served as long as the public is served.[42]

C. Necessity of the Taking.

The "overwhelming weight of authority" is that the necessity of the taking is a question within the legislature's discretion and "not a proper subject of judicial review."[43] There is, however, "a theoretical limit beyond which the legislature cannot go," which means that the legislature cannot engaged in spoliation, or a subterfuge, or exercise bad faith.[44] A condemnor to whom the power is delegated determines the necessity, and its decision is final as long as it acts reasonably and in good faith.[45] Arkansas holds generally to this view, stating that there is broad discretion in those to whom the power is delegated, and such discretion will not be disturbed unless it is clearly shown that the taking is arbitrary and excessive.[46] This amounts to approximately the same thing. Another case states that there must be a "clear abuse of discretion."[47] Some present or future need must be shown when there is a taking, and no more land may be taken than the public need requires.[48] The Arkansas rule in this regard does not vary materially from the general rule and seems to afford sufficient protection to landowners without unduly restricting the exercise of the power. In order to function properly in this area, the legislature and public agencies to which the power of eminent domain has been delegated by statute should be free to determine the necessity of the taking without undue judicial interference, and only bad faith or arbitrary and excessive takings should render its judgment subject to reversal.

D. Distinguished from Other Powers.

Nichols notes that the distinguishing characteristic between eminent domain and the police power is that the former involves the taking of property, while the latter involves the regulation of property

to prevent the use thereof in a detrimental manner.[49] It is pointed out, however, that if an attempted exercise of the police power is so unreasonable or arbitrary as virtually to deprive the person of the complete use and enjoyment of his property, it comes within the purview of the law of eminent domain.[50] Arkansas follows this view in holding that while property may be regulated, regulation will be recognized as a taking if it goes too far.[51] To deprive one of a property right, proceedings must be by eminent domain and just compensation must be paid.[52] It is not necessary that property should be completely taken in order for eminent domain to apply. It is only necessary that there be such serious interruption of the common necessary use of the property as to interfere with the rights of the owner.[53] Generally speaking, if statutes or ordinances are unreasonable, arbitrary, and capricious, they may result in a taking or damage to property. The fact that an ordinance results in a depreciation in value of property, however, is immaterial if the same is reasonable, not arbitrary nor capricious, and if enacted under the police power.[54] On the other hand, incidental damage to property under a valid exercise of the police power does not give rise to compensation.[55] Thus, a railroad may be required to construct crossings where public roads intersect, in a valid exercise of the police power;[56] the sale of game fish may be prohibited;[57] and a zoning ordinance may restrict the use of property.[58] The mere inhibition upon the use of property is not an exercise of eminent domain.[59] However, a city could not employ a subterfuge for the taking of private property indirectly for public use without compensation by making it unlawful to erect a building within a specified distance from the highway.[60]

All of the above Arkansas law corresponds with the general rule that property is not appropriated to another use under the police power although its value may be impaired, while under the power of eminent domain it is transferred to the state to be enjoyed and used by it.[61] Nichols points out that it is always a question of degree in cases of this type, and a general restriction with the public health, safety, or morals its object, if it effectually deprives the owners of the opportunity to make beneficial use of lawfully acquired property, may be so severe as to constitute a taking.[62] The rule seems a fair one to both landowners and public agencies. Of necessity, the court must decide in each factual situation whether the police power has been so used or abused as to amount to a taking of property.

Arkansas holds that the taking of private property under the power of taxation without giving any protection or other compensation is void.[63] In a normal situation there could presumably be no confusion between a property tax and the actual taking of property. If property were taxed to raise money to devote to a use not public, however, there would be a taking of property since there is no compensation to the person whose property is taxed.[64] Moreover, there might be such a disproportinately high tax levied against property as to amount to an arbitrary taking of the property. The Arkansas rule in this situation does not depart from the general rule and simply is an expression of the idea that where there is a taking, just compensation must be made without regard to the procedural nomenclature employed.

E. Public Lands.

State-owned lands are subject to the Federal power of eminent domain, but the State is entitled to compensation.[65] State lands are not, however, subject to the power of eminent domain existing in an agency of the State.[66] Conversely to the proposition that State lands are subject to Federal eminent domain, public lands of the United States which are held for sale or settlement are subject to the State power of eminent domain.[67] The Arkansas rule on this point coincides with the general rule. Despite the phraseology of the U.S. Fifth Amendment to the effect that private property shall not be taken for public use except upon payment of just compensation, it is generally held that there is no implied limitation inhibiting the taking of a state's public property by the Federal government.[68] The power of the State to condemn Federal lands is denied unless the Federal government consents to such condemnation.[69] Schmidt v. Drainage District No. 17,[70] an Arkansas case, involved a situation in which the U.S. public lands in question were held for sale or settlement, thereby providing the element of consent.

With respect to municipalities, the rule in one Arkansas case that cities have an implied power to cross railroad tracks, and such crossing is not a taking of property,[71] amounts to a holding that eminent domain is not involved. It is in accord with the general rule that where a municipality or private corporation seeks to exercise the power with respect to property already devoted to a public use, and the proposed use will either destroy such existing use or interfere with it to such an extent as to be tantamount to destruction, the exercise of the power will be denied unless the legislature authorizes the acquisition either expressly or by implication.[72]

II. CONDEMNATION PROCEEDINGS AND PROCEDURE.

The procedure for condemning property for public use is statutory in nature and differs widely in the various jurisdictions -- so widely, in fact, that the decisions of any one state are of little value in other jurisdictions in which the statutes and practices may be entirely different.[1] Generally speaking, in Arkansas as in most states, an eminent domain proceeding is a proceeding at law and not at equity[2] and is a special proceeding.[3] Arkansas holds that a condemnation proceeding is a civil action[4] although other states hold it to be not a civil action.[5] There is a fairly equal division of the states on this point, and some states hold that it is or is not a civil action depending upon the use of the phrase in the statute under construction or the applicability of the statute involved to such proceedings.

In Arkansas, the only issue at law is the issue as to the value of the property.[6] This is true of both circuit court and county court proceedings.[7] There is no procedural provision for raising the issue of right to condemn,[8] nor of the legal existence of a private corporation which is in the process of condemning,[9] nor for ascertaining ownership and settling title to lands.[10] These other issues must be raised by the landowner or waived, and the issue of right to condemn, for example, must be pursued in a court of equity.[11] This is hardly a proper manner of handling a proceeding. Properly, the proceeding should be handled entirely in one court and all issues should be adjudicated which the parties may care to raise. All defenses which are going to be asserted should be asserted at this time and in the particular court involved.

By statute in Arkansas there are a multitude of eminent domain acts. These concern cemeteries,[12] coal companies,[13] counties,[14] drainage districts,[15] irrigation companies,[16] levee districts,[17] light and power companies,[18] logging railroads,[19] mills and mill dams,[20] cities,[21] natural gas companies,[22] pipelines,[23] public landings,[24] public utilities,[25] railroads,[26] telegraph and telephone companies,[27] traction companies,[28] and numerous others. We need a uniform eminent domain statute which would be applicable, by its terms, to all agencies necessarily having the power of eminent domain; and which would provide a uniform procedure to be followed. This will be discussed at length later in this paper.

Arkansas apparently holds with other states that a jury trial is not absolutely required where the state is condemning land.[29] Statutes or constitutional provisions do frequently provide for trial by jury on the question of damages.[30] In Arkansas, a jury trial is constitutionally required only where a private corporation condemns property.[31] One of the chief abuses in condemnation proceedings in this State results from trial by jury. Whatever may have been the historic antecedents, the practice today usually leads to the award of disproportionately large verdicts in favor of the landowner and against the State or other such condemning agency. The practice of trial by jury serves to erode the basic underlying concept that an individual should

receive "just compensation" for the taking of his property. It would be far better for the amount of the award to be determined by the court or, if an administrative rather than judicial procedure were followed, by a commission, rather than submitting the matter to the determination of a jury whose primary interest is in seeing that the local landowner obtains a "good" recovery. The code should seek to remedy this situation.

A. County Court Condemnation Proceedings and Jurisdiction.

The Arkansas Constitution in Article 7, Section 28 grants the county court exclusive jurisdiction over roads. It has been held, however, that this constitutional provision does not apply to condemnation proceedings, and the statutes providing for the institution of condemnation proceedings in circuit court are valid.[32] In line with this conclusion, the fact that a county court has established a road improvement district does not prevent the improvement district from instituting a condemnation proceeding in circuit court.[33]

Despite the fact that this constitutional provision, as a result of the limiting effects of cases, does not impose any restriction on the bringing of condemnation proceedings in circuit court, the provision has no sound function in a day and age in which the essential problem is the development of a functional, coordinated statewide system of roads. The provision should either be repealed in its entirety or drastically modified. The primary responsibility for roads should be vested in the State, acting in cooperation with the Bureau of Public Roads. If it is deemed appropriate for administrative purposes to designate certain secondary roads as "county roads" and not part of the state highway system, with jurisdiction over such roads to be granted to a county road administrator, then such procedure might be followed.

B. Effect of Ability to Pay Compensation on County Court Jurisdiction.

Where a County Court enters a condemnation order, a landowner has 12 months, by statute, within which to file a claim for compensation.[34] However, Amendment 10 to the Arkansas Constitution provides that the County Court may not make any allowance in excess of revenues from all sources for the fiscal year in which the allowance is made. Therefore, the County Court may not allow any claims or damages which "accrued" during a particular year if the revenues of that year are exhausted. A claim accrues when the land is actually taken and entered. Thus, a landowner's claim must be satisifed, if at all, out of the revenues for the year in which the land is taken and entered upon by the County.[35] The practical effect of this rule is to shorten the one-year statute of limitations under certain circumstances. If land is "taken" on July 1, and the County operates on a January 1 to December 31 fiscal year, the landowner will have only six months in which to file his claim, and the claim must be paid out of that year's revenues.[36] If there are no funds to pay for the condemned land, a Chancery Court may enjoin the taking of the property until payment of compensation.[37] In the

situation in which an injunction is issued, the condemnation order is not absolutely void, but it may be held to be void if the evidence demonstrates that the County has such a large deficit that the allowance of claims would increase the deficit to such an extent that the landowner could not be paid for several years.[38] If a County has no funds with which to pay claims for compensation, the County Court cannot condemn property,[39] and if a condemnation order makes no provision for payment of compensation to the owner, the order is void.[40] Moreover, the condemnation order is void if payment of compensation is prevented by the provisions of Amendment 10.[41]

Despite these judicial rulings, where the County Court has sought to condemn property the landowner must file his claim and the County Court must refuse it before the taking will be prevented.[42] Clearly, a landowner can be subjected to considerable expense in preventing his property from being taken without receiving compensation, even though the ultimate result will be that any order entered will be declared void. The cases illustrate that quite often the fact that an order is "void" has to be declared by the Supreme Court before that fact will be accepted.

If Counties and County Courts are to be allowed to continue to exercise authority, the injustice caused by situations in which no funds are available, as well as the peculiarity created by cases dealing with the time the land is "taken" and the time the claim must be paid, should be corrected. The correction seems fairly obvious. It should be provided that before a County Court can enter an order of condemnation or even have jurisdiction to proceed in the condemnation of certain land, the County must post a deposit in the amount of the appraised value of the property in question and should demonstrate in a proper evidentiary manner that such deposit comes out of the funds for the current fiscal year and that the deposit of such money is not in violation of Amendment 10 to the Arkansas Constitution. (A bond might suffice if similar safeguards are provided against constitutional difficulties.) The deposit once made should remain in the registry of the County Court until the condemnation proceedings are completed, subject to increase in the amount of the deposit upon its being shown that the deposit is insufficient. At the conclusion of the condemnation proceedings, or at such point as title has vested, the order of the County Court would provide that the amount of the deposit -- whether the original amount or the increased amount -- could be withdrawn from the registry of the Court by the landowner. This requirement would be jurisdictional, and failure to comply would subject the County Court to a writ of prohibition issued either out of the Circuit Court for that County or out of the Supreme Court of Arkansas.

C. County Court Proceedings Initiated by the State Highway Commission.

Under the Arkansas statutes, the State Highway Commission may acquire rights-of-way by two methods.[43] It may petition the County Court and pursue condemnation proceedings through that Court, or if the County Court to condemn the property, the Commission may

institute proceedings in its own name in Circuit Court and deduct one-half of the cost of acquisition from the Counties' next "turnback" funds.[44] The Supreme Court has held the legislative act allowing this to be valid and not to amount to an invasion of the County Court's constitutional jurisdiction over County Roads and taxes.[45]

Some reluctance on the part of the County to condemn land for the State may stem from the fact that the Highway Commission is not liable for damages resulting from a County Court condemnation order, even if the County Court order was made on petition of the Commission.[46] The County itself becomes liable for all damages caused by the condemnation.[47] The landowner has 12 months in which to file a claim, [48] and if he appeals to Circuit Court, the Highway Commission cannot be made a party because such would be a suit against the State.[49] Here again, we encounter the rule that the landowner must file a claim for damages within one year, pursuant to Ark. Stat. Sec. 76-917.

One problem evident in the cases is what constitutes notice to the landowner. It is clear that the landowner is entitled to sufficient notice of an order of condemnation.[50] The notice need not provide information as to the extent of taking but only that an order of condemnation has been made.[51] It has been held that actual notice is given the landowner by virtue of the taking and is as fully binding as if the landowner had been served.[52] One case held that where a right-of-way was extended, and notice given by entry, but such entry did not indicate to the landowner that the Highway Commission had extended the right-of-way since they did not claim any control over other lands by the entry, this did not constitute sufficient notice and did not set in motion the one-year statute of limitation.[53] The same case held that where insufficient notice is given, the Commission can enter the land only by depositing a cash bond. In a situation in which the Commission has to deposit money to satisfy claims of landowners, and claims against the County Court are denied because of lack of funds, the landowner may take the money deposited by the Highway Commission. In order to contest such taking, the Commission must appeal the order of the Chancery Court requiring the deposit.[54]

A County Court order allowing part of a claim amounts to a final judgment with respect to the entire claim, and the landowners must then appeal or lose all further rights.[55] With respect to the Highway Commission, the County Court cannot make changes in an order granting condemnation.[56] Moreover, if the County Court does not act on the petition of the Commission, the petition will be deemed to have been dismissed upon the filing by the Commission of a proceeding in Circuit Court.[57] If a petition is left in the County Judge's office for several weeks, that amounts to sufficient presentation to the County Court from a legal standpoint.[58]

The cases present considerable apparent difficulty with County Court proceedings. Much of this difficulty arises by nature of the County Court itself. In Arkansas, it is presided over by the County Judge, who does not have to be a lawyer and in practice seldom is. The County Court is not a court of record in the sense that its proceedings

are recorded stenographically and transcribed although such proceedings may be recorded in this manner if one of the parties wishes to pay a reporter for the transcript. Officially, however, the proceedings are not recorded. Moreover, as might be expected, the proceedings in County Court are much looser than those in Circuit or Chancery Court, and the result is often cracker-barrel justice in the purest sense. It seems extremely questionable, as a matter of policy, in dealing with something of as much importance and value as property rights that these rights should be adjudicated or even affected by such a court. The code should, unless there are compelling circumstances which are not presently apparent, prepare a uniform system of procedure for condemnation cases as far as the State is concerned, and this procedure should be processed through either the circuit or chancery courts, the judge of which must be an attorney, which are courts of record, and which are used to dealing with matters of this type. If the County Court procedure is still to be allowed for use by the State, then it will have to be reformed considerably. If that route is to be taken, it is obvious that a standard procedure with respect to notice should be adopted. The question of whether the landowner has sufficient notice should be dispelled and cases dealing therewith rendered moot by the adoption of a procedure whereby notice is served upon the landowner or, in cases involving a non-resident landowner, where notice is published in a newspaper having general circulation in the county in which the land is located. In other words, the landowner should be a party to the proceeding from the very beginning, and his rights should be adjudicated and disposed of in the same manner as other cases involving land, such as partition suits, foreclosure actions, and the like.[59]

The present procedure is especially obnoxious with respect to notice and smacks of lack of due process. The fiction of whether the State proceeds in its own name or not should be eliminated. Such would be the natural result of the abandonment of the County Court procedure as far as the State is concerned. However, if the County Court procedure were still to be pursued, the State should be required in any action involving condemnation for state highways to institute the proceeding in the name of the State Highway Commission. As far as the cost of acquisition is concerned, the code generally should provide for some method of restricting the amount of "turnback" funds available to counties, so that a greater proportion of monies will be available to the State Highway Commission for a truly statewide system of roads. The result should somewhat lessen the benefits the State may derive from proceeding in County Court by having the County liable for damages caused by the condemnation.

In summation, it should be the attempt of the drafters of the code to create a situation in which there is a uniform condemnation procedure, in which there is adequate financial support for the State condemnation proceedings and the vast proportion of highway funds in Arkansas are at the disposal of the State, rather than the counties, and in which County Court jurisdiction is restricted as much as it constitutionally can be; preferably restricting it purely to County matters involving County Roads. Even with such restriction, County Court procedural defects should be corrected and commonly accepted

minimum standards of procedural due process applied.

Neither the code nor these comments would alter the ancient rule that a public way may be established through prescription or by voluntary dedication, and in such situation the landowner is not entitled to demand compensation.[60]

D. Proceedings in Circuit Court.

As has been mentioned previously, a condemnation proceeding in Circuit Court is a special proceeding, and the only issue is the value of the property taken.[61] In Arkansas, as elsewhere, when such a proceeding is instituted by the Highway Commission, the Highway Commission becomes liable for damages which may be assessed.[62] If equitable defenses are raised, it is proper to transfer the proceeding to Chancery Court,[63] but both sides may proceed to trial in the law court, thereby waiving the transfer.[64] A county road improvement district may also institute condemnation proceedings in Circuit Court.[65]

Although we have dual court systems of law and equity in Arkansas and although the above-enunciated rule in condemnation cases does not vary from the general Arkansas rule that where equitable defenses are interposed in an action at law, a motion to transfer to Chancery Court will be entertained, there seems to be no sound reason why one court should not settle the entire matter without the necessity of a transfer. Such a provision should be made in the new code. In terms of expediting matters, such a rule would also be desirable, even though it would conflict with the customary Arkansas differentiation between matters cognizant in courts of equity as opposed to courts of law. There is no reason why the Circuit Court could not apply doctrines of equity in deciding equitable defenses, or why the Chancery Court, if that court were given sole jurisdiction by the new code, could not apply the legal doctrine of damages in ascertaining the amount of the award. As a practical matter, this is what actually happens when a case involving equitable issues is transferred to Chancery or when the parties waive the transfer and the Circuit Court determines all the issues. The confinement of the proceeding to a single court would seem to hasten the adjudication of condemnation matters, and this would benefit the public generally while not proving harmful to landowners.

E. Transfer to Chancery Court.

As we have seen, transfer to Chancery Court is proper when equitable issues are raised in condemnation proceedings, and when a case is transferred to Chancery, the Court will have jurisdiction to determine all questions, both legal and equitable, including the measure of damages.[66] A Chancery Court also has jurisdiction to determine whether or not the taking is arbitrary, not in good faith, or discriminatory;[67] the necessity of taking;[68] and the right to condemn.[69] If both sides proceed to trial in the law court, transfer to equity is waived, and when waived the judgment will be tested on appeal on equitable

principles.[70]

There need be no reiteration of the previous comments that delay and confusion could be corrected by the handling of all issues, both legal and equitable, in a single court.

F. Proceedings in Chancery Court.

In order to give a court of equity jurisdiction to prevent the taking of property, the property owner must allege that he has no adequate remedy at law.[71] Moreover, the Chancery Court will not issue an injunction against a landowner in favor of a condemning agency to prevent the landowner from interfering with construction where there has been no condemnation proceeding covering the land in question.[72]

The Chancery Court has jurisdiction to determine whether the taking is necessary,[73] whether private property is being taken for private use,[74] and the right to condemn.[75]

Several cases involve the deposit of a bond by the Highway Commission. Before the Highway Commission can contest the taking of the bond by the landowner, it must contest the order of deposit of the bond; and by failing to appeal from the order, the Commission is deemed to have lulled the landowner into a feeling of security and to have waived its right to raise the question.[76] Where the Highway Commission has accepted benefits of a condemnation order, it is estopped to claim that the Chancery Court erred in requiring bond. The general rule is that one cannot accept the benefits of a decree and then question its validity.[77]

The problem as to equity jurisdiction would be cured by a provision that the entire case be heard in a specific court. Also, a specified statutory procedure in condemnation cases would eliminate any question with respect to failure to contest orders of the court or failure to appeal from certain orders.

G. Pleadings.

If the only issue to be adjudicated in a condemnation suit is that of market value of the land, there is no need for the landowner to file an answer since that issue is raised by the filing of the petition for condemnation and assessment of damages.[78] It is the general rule that the landowner is not obliged, and in some states not even permitted, to file an answer or other pleading upon the question of damages,[79] although it is generally permissible for him to file the answer. If the landowner is claiming special damages, he should file an answer containing appropriate pleadings to support his claim.[80] Moreover, if title to the land is in dispute, and a bill of interpleader is filed,[81] each adverse claimant must file an answer setting forth his claim to the property, and a party failing to do so will be held in default.[82]

The question of when to file an answer and what the answer should contain has provided some sources of litigation in Arkansas. A person whose land was taken by a railroad corporation was held not required to allege, as special damages, injury caused by the construction of the railroad if there is no contention that the roadbed was constructed negligently since damages caused by skillful and proper construction come within the general prayer for damages.[83] It was also held that where land condemned is a part of a larger tract used as a farm, the use as a farm provides notice that injury to a part of the land destroys the value of the whole, and it was not necessary for the owner to file an answer setting forth the extent of the land for which he claimed severance damages.[84] On the other hand, certain allegations must be made in order to allow the other party to defend against such allegation, and where the question arose as to whether a right-of-way had been created, this evidence had to be mentioned affirmatively in the pleadings.[85]

Nichols concludes that the filing of an answer is in many cases the better practice.[86] Obviously, under the Arkansas cases it is the better practice unless the landowner simply wants to adjudicate the question of damages. The rule in Arkansas that failure to file an answer still leaves the question of damages to be adjudicated by the court does not vary from the usual Arkansas rule in personal injury suits or property damage situations, in which default by the defendant still leaves the plaintiff with the burden of proving his damages. Certainly, if any affirmative allegations are to be made which defendant wishes to rely upon during the trial of the case, or if affirmative or equitable defenses to the proceeding are to be asserted, an answer should be filed setting forth these defenses. It would seem to be fairly easy to set out in the code the effect of failure to plead and the necessity of pleading affirmative or equitable defense. This would remove any doubt as to the effect of failure to plead or as to whether an answer was required. As for the rule to be followed, the present rule seems to be a sound one. Failure to plead still leaves the question of value of the land or damages to be adjudicated; but if any affirmative defenses are to be asserted, they must be raised, if at all, in the answer.

Moreover, it would be well to specify in the code what the petition for condemnation should include. Generally, it should include a description of the land to be condemned; the name of the owner or owners of said land (if such names are known or can be reasonably ascertained through a diligent examination of the county records, or if same cannot be ascertained, a statement to that effect); a general statement as to the purpose of the condemnation and use sought; a statement as to the value of the property, with verified appraisals attached to the petition as exhibits; a statement as to any disability the owner or owners of said land may be under; and such other matters as may be appropriate to the proceedings.

Here again, what is recommended is simply a detailed statutory procedure whereby both condemnor and condemnee may readily litigate their rights and ascertain the procedure to be followed.

Generally speaking, the customary civil procedure of the State should be followed as much as possible in condemnation proceedings. Pre-trial discovery procedure should be available to all parties. In addition, it might be well to require that each party submit to the other within a certain length of time prior to the trial date a list of witnesses to be used during the trial of the case. This would at least put an end to the "shopping around" for expert witnesses in which some defendants engage up to the date of the trial.

H. Necessary and Proper Parties.

Arkansas follows the general rule that the owner of properties sought to be condemned and all persons having any interest therein are necessary and proper parties defendant in the condemnation proceeding.[87] This includes tenants in common, life tenants, remaindermen, lessees, and any person having an interest in the land.[88] If any person having an interest is omitted from the suit, the proceeding is thereby rendered nugatory as to such person.[89] The necessity of the parties may be waived by the condemnor if no objection is made before the trial proceeds.[90] Initiation of a condemnation action is an admission that the named defendants are owners of the property and those defendants cannot be compelled to testify regarding title.[91]

All property interests should be determined in a single trial.[92] Thus, persons having a distinct interest in property may proceed jointly to recover compensation for land taken.[93] Generally, all persons whose property is taken or injured may be joined in one proceeding.[94] Where title to land is in dispute, it is proper to join all possible claimants as defendants, have compensation assessed, and leave the contending claimants to settle the issue of title.[95]

Some problem in this area is created by persons who are part of a class or are under some particular disability. For example, it has been held in Arkansas that where property being condemned is subject to a deed of trust, the trustee may represent the various lienholders under the trust deed.[96] On the other hand, it has been held that if no administrator has been appointed and the estate owes no debts, the widow and heirs may sue for injury to or taking of the intestate's property.[97] Where land is subject to a mortgage, the mortgagee should be a party.[98] Persons of unsound mind must be represented by a guardian or guardian ad litem.[99] Owners of reversionary interests are entitled to compensation and should be parties or should be represented.[100] Upon death of the landowner, his cause of action passes to his personal representative.[101] A sale of land pendete lite after accrual of the right to compensation does not destroy the defendant's right to compensation for the property taken.[102] Land is condemned when the judgment is entered ordering condemnation, and the rights of the owner to compensation arise at this time so that a subsequent conveyance does not necessarily transfer the cause of action.[103] On the other hand, the cause of action may be specifically assigned by the original landowner, and the assignee will be entitled to the compensation to which the assignor would have been entitled.[104]

If the wrong party is named as landowner and the true landowner establishes ownership in a collateral lawsuit, it is proper to enter judgment for the true landowner against the Highway Commission and judgment for the Highway Commission against the party erroneously receiving the amount deposited.[105]

The code should state generally that all persons having an interest in the property in question are necessary and proper parties to the proceedings and that their interests will not be deemed to be foreclosed unless adjudicated. Members of a class should be permitted to be represented by the proper legal representative of the class (such as a trustee representing lienholders or other such beneficiaries of a trust). It would be wise, however, to avoid too much specificity in dealing with this problem in the code since the code probably could not cope with all specific problems which might arise, and the enumeration of some might amount to an improper exclusion of others.

The code should encourage joinder in all instances except those which would create a palpable injustice. Where it is possible to join, in a single action, the condemnation of tracts similarly situated within a common area, the efficient and expeditious conduct of such proceedings would seem to make joinder reasonable and desirable. The code should not, however, deprive the trial judge of his discretion in such matters since particular situations may in some instances militate against joinder. In a situation, however, in which there are conflicting claimants to ownership of property, or in which there are a mulitiplicity of interests involved, the rights of the various interests represented or the title to the property should be determined in a single proceeding.

I. Due Process of Law -- General Provisions.

Under Art. 2, Sec. 22, of the Arkansas Constitution, the procedure for ascertaining the value of the property sought to be condemned and the making of reasonable provision for payment of compensation is a matter for the legislature.[106] There is apparently no limitation on the legislature except for the fundamental rule that no man may be deprived of his property without just compensation and without due process of law. The legislature may prescribe the manner in which compensation shall be determined, provided only that the tribunal is impartial and that the parties have an opportunity to be heard.[107] One old Arkansas case held that proceedings to condemn need not be addressed to the courts, and that the legislature might determine directly the mode and occasion and exercise of the power; and further that when provision had been made to give the landowner just compensation, the expression of the legislature's desire to take the property amounted to due process.[108]

The code should provide a judicial procedure for the condemnation of property which would amount to an effective delegation from the legislature to the courts. Secondly, the Arkansas cases dealing with due process of law present minimal standards at the most, and in this

supposedly enlightened day and age, our concepts of what constitutes due process are much more highly developed than the Arkansas condemnation cases reflect. Under the circumstances, the outlining by the code of a mandatory procedural method of condemning property will take care of the deficiencies presented by the cases from the standpoint of procedural due process.

J. Notice to Landowners.

This topic has been discussed previously in connection with county court condemnation proceedings initiated by the State Highway Commission.[109] The same comments are appropriate here and are incorporated by reference.

Under Ark. Stats. Sec. 76-917, a County Court may condemn land for roads and highways without giving formal notice to the landowner. This statute was challenged as a denial of due process in Sloan v. Lawrence County.[110] In that case, the Court conceded that the statute was probably defective but refused to hold it unconstitutional on the ground that the necessity of the taking was a political question and that a hearing on that issue is not essential to the validity of a condemnation proceeding. However, the Court did hold that any proceeding which undertook to assess the amount of compensation to be awarded, without notice to the landowner and an opportunity to be heard, would be unconstitutional. We have previously commented that the code should provide a standard procedure for condemnation proceedings by which the landowner would be notified of the pendency of the proceedings in much the same manner as he is notified in any other civil case. This would eliminate the ill effects of Sloan v. Lawrence County. In this connection, a 1941 case held that the power of eminent domain may be exercised by the State without notice to interested landowners, and in condemning land for highway purposes a hearing on the necessity is not essential since the proceeding is essentially one in rem.[111] This is the type of rule which should be corrected by the code. The power of eminent domain should not be exercised by the State without notice to interested landowners, and use of the argument that it is simply a proceeding in rem does not obviate the need for appropriate standards of due process. Moreover, in every other type of in rem proceeding in the Arkansas Statutes notice of some type is given, even though it be notice by publication. The mere fact that the question of compensation may not be determined without giving notice[112] is not sufficient protection nor sufficient compliance with commonly accepted, modern standards of due process. The statement in Sloan v. Lawrence County[113] that a landowner has a right to a day in court on the question of appropriation of land only if a statute requires it should be corrected by the passage of a statute requiring it -- the code. Similarly, the canard that a statute which contains no notice provisions on the subject of the taking would be constitutional, while a statute which contains no notice provisions on the subject of fixing compensation would be unconstitutional,[114] should be abandoned. The fact that the Arkansas cases hold that actual entry supplies the required notice[115] does not cope with the procedural problem involved.

The Arkansas cases supply various instances in which notice or lack of notice has been discussed. With respect to actual entry supplying notice, it was held that improvement of an existing road is not sufficient notice of additional taking to set in motion the one-year statute of limitations for filing claims.[116] There was not sufficient notice where a condemnation order added 10 feet to either side of an existing right-of-way, but the additional footage was never occupied by the Highway Commission and no notice was ever published.[117] An act[118] providing for service of process on non-residents of the County by publication of notice and allowing the non-resident 10 days from the date of final publication in which to appear was held to be constitutional.[119]

Similar problems arise in connection with the process for determining compensation. It has been held that the legislature may determine the process for ascertaining compensation,[120] and if compensation is to be determined by assessment and no assessment is placed on a particular tract, this amounts to notice that no damages will be paid.[121] This is a questionable policy to follow, to say the least. It may effectively deprive a landowner of his rights without due process.

The interaction of Sloan v. Lawrence County and Amendment 10 to the Arkansas Constitution (prohibiting a County Court from paying compensation on any claim except out of the revenues of the year in which the claim arose) provides a difficult situation. Ark. Stats. Sec. 76-917, which allows condemnation by a County Court without formal notice, and the fact that actual entry upon the condemned land is often not made immediately after the condemnation order, provide additional difficulty. This situation is discussed in the Arkansas Eminent Domain Digest.[122] This is one of the greatest deficiencies in condemnation procedure in Arkansas and is one of the greatest problems for a landowner. 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.

K. Taking as Notice to Landowners.

This problem was discussed to some extent in the previous section but will be discussed more specifically here. As to what constitutes sufficient notice of taking under Ark. Stats. Sec. 76-917, this problem may be divided into two classifications: (1) those situations in which a County Court condemns a right-of-way over virgin territory and the State or County subsequently constructs a new highway across the right-of-way; and (2) those situations in which the County Court widens an existing right-of-way. In the first situation, the Highway Department

will prevail, on the ground that this original taking amounts to sufficient notice to the landowner that a portion of his land is being taken and that he must file a claim for compensation with the County Court within one year. Failure to do so will result in the claim being barred by reason of the statute of limitations. In the second situation, the landowner will generally prevail in the absence of some positive proof that compensation has been paid or that the Highway Department has performed some overt act which would reasonably indicate to the landowner that additional land was being taken.

In connection with the second situation, improving or paving an existing road is not sufficient notice to the landowner.[123] It has also been held that the act of taking is not complete when the judgment of condemnation is rendered, and since such judgment may be without notice, the legislature must have had in mind an order of condemnation followed by entry on the land.[124] A taking occurs when the owner can no longer use the land in question for normal and natural purposes, and such taking amounts to notice.[125] The mere driving of stakes in a field is not an act sufficient to constitute a taking of the land nor to require the landowner to cease using the land for its normal and natural purposes.[126] Where a County Court entered a condemnation order without notice to the landowner, but the Highway Commission entered upon the property a month later and removed fences and cleared the right-of-way, the landowner is charged with notice.[127] The statute of limitations for filing claims begins to run from the time of taking,[128] which would be from the time of entry or the time the landowner could no longer use his property for normal purposes.

There is no need to elaborate on the earlier conclusion that a statutory procedure in all cases which would provide notice of the filing of the condemnation petition would be desirable and would eliminate the problem. Anything less is bad not only from the standpoint of the landowner but also of the State. Too many cases have resulted from the question of whether a taking has occurred or whether a landowner can use his property for its normal and natural purposes. Service of notice on the landowner at the outset would eliminate the problem. This is certainly the trend in Arkansas. The current circuit court procedure, as set forth in Ark. Stats. Sec. 76-533, provides for notice of the hearing on the petition.

L. Use and Occupation as Notice.

One case held that where a County Court order called for a 110-foot right-of-way and the Highway Commission entered and constructed a road and occupied only 80 feet of the right-of-way, the landowner was nevertheless charged with notice of taking of the entire width of right-of-way.[129] The Court said that the entry upon the land is not notice of the extent of taking but is notice that an order of condemnation has been made.

This case again serves to illustrate the need of making the landowner a party from the outset in all condemnation proceedings. If

the landowner had been served with notice and had been a party to the proceeding, there would have been no argument about the amount of land taken, because the petition would have set forth that fact. Secondly, the argument over notice would have been non-existent. The landowner's rights would have been protected; the State would have been saved the time and expense connected with litigating the matter through the Supreme Court; and the end result would have better served the interests of both parties in a manner consonant with due process.

M. Withdrawal of Condemnor without Prejudice.

Arkansas holds that a condemnor may withdraw from condemnation proceedings at any time before the rights of the parties mutually vest, and our Court has held that rights do not vest until such time as compensation has actually been made.[130] Nichols comments that the right to discontinue rests in the sound discretion of the court upon a showing of just cause although such applications are generally granted.[131] Nichols also states that unless the right to discontinue is statutorily made absolute and unconditional, the court may grant the application upon such terms, including payment of costs and attorneys' fees, as it sees fit.[132]

In Arkansas, when the condemnor withdraws from the proceeding in good faith, it is not liable to the landowner for his expenses incurred in the defense of the action, including attorneys' fees.[133] However, where a railroad entered upon land under condemnation proceedings and withdrew, it was held that the landowner could recover damages for the rental value of the land for the time it was used by the railroad, for depreciation in value because of acts done thereon by the railroad, and for flooding or overflow during the time of occupancy.[134]

In the states in which condemnation is effected by judicial proceedings, it is almost universally held that the mere fact that compensation has been assessed does not prevent a discontinuance of the proceedings.[135] Nichols states that one of the strong arguments in favor of this is that public policy requires that the cost of improvements be ascertained before it can finally be determined that it is advisable to undertake the work, and that this cannot be done until the compensation for the land has been assessed by the court.[136] There is conflict in this area, however. In some states it is held that after the proceedings have gone to judgment or the award has been confirmed, the owner's right to compensation has vested and a subsequent discontinuance of the proceedings cannot impair that right.[137] On the other hand, in many states in which it is required that a deposit be made in advance, it has been held that the right to compensation is not absolute until the taking is complete and that, in the absence of any statutory provision to the contrary, it may be defeated even after judgment by a discontinuance of the proceedings at any time before payment is made or possession of the property is taken.[138] Arkansas provides (in circuit court proceedings) that title vests upon the making of the deposit.[139]

The code should properly address itself to this situation and establish a time after which the proceeding cannot be dismissed, discontinued, or subject to withdrawal by the condemnor. The actual time set is possibly not as important as the procedural necessity for same. It would seem to be procedurally correct to provide that the condemnation proceedings may be dismissed, abandoned, or withdrawn from at any time up to the rendition of a judgment. The court could presumably determine damages before entering judgment, and the State would then have the option to withdraw rather than suffer a judgment. Once the judgment is entered, however, the rights of the parties should be concluded, subject to the right of either to appeal. If there has been an actual entry or taking in the meantime, or loss suffered by the landowner by reason of a prior vesting of the title, withdrawal by the State would still subject it to payment of damages caused by the entry or vesting or the deprivation of the landowner from use of his land. It would seem to be appropriate, moreover, to provide that a withdrawal after the defendant has appeared, but prior to the rendition of judgment, would subject the State to payment of attorneys' fees and other expenses incurred by the landowner. It is only just that the landowner be placed in the same position he would have been in had he not been forced to defend this action. This is, after all, a different type of proceeding from that in which the landowner becomes embroiled through some act or omission in a legal dispute. In the condemnation situation, the landowner finds himself in court through no fault, act, or omission on his part, but due to the purely unilateral act of the condemning authority, and if the proceeding causes him to incur expenses needlessly, the landowner has been innocently damaged thereby.

N. Statute of Limitations.

As we have seen, when a condemnation order is entered by the County Court, proceeding under Ark. Stats. Sec. 76-917, the landowner must file a claim for damages within 12 months after receiving notice of the order.[140] If the landowner is not notified of the order, the statute does not begin to run until the property has been taken.[141] Such actual notice is as fully binding as if the landowner had been served with process.[142] Upon entry, the landowner is charged with notice of the taking and must file his claim within 12 months.[143] Uncertainty as to damages does not toll the statute of limitations.[144]

Under Ark. Stats. Sec. 35-1103, a landowner has 10 days from receipt of a summons, or the day of the last publication of notice, in which to file exceptions to the appraisers' report on the land being condemned. In a situation in which an award of $600.00 was made to the landowners for the value of the land, and the landowners failed to file exceptions to the award within the 10 days provided, they are not entitled to have a judgment rendered.[145]

The code will presumably eliminate many of the problems presented in this connection. By making the landowner a party to the action and serving him with notice or publishing notice at the outset, many of the statute of limitations problems will be eliminated. This has been

discussed at length previously, and there is no need to comment further.

O. Appeals.

The general statute for appeals from county court judgments is Ark. Stats. Sec. 27-2001, under which the appeal shall be granted as a matter of right to circuit court at any time within six months after the rendition of judgment.[146] Ark. Stats. Sec. 76-915 gives landowners a right of appeal to circuit court from a final county court decision for a new county road, if notice of appeal is filed during the term of county court in which the decision was rendered and an appeal bond is executed and approved by the county clerk.[147] Arkansas Stats. Sec. 32-205, which purports to give railroads 30 days in which to pay damages assessed or lose all rights in the property, has been interpreted to mean 30 days after damages have been finally determined on appeal if an appeal is taken.[148] The legislature cannot deny railroads the right to appeal.

Some questions involve what may be considered on appeal. It has been held that while a railroad cannot question the title of the defendants whose land it sought to condemn, the State and its agencies may recover voluntary payments which were made in error.[149] In another case, assurances to the landowner that a ditch would not be dug at the proposed location before the expiration of the time for appeal estopped the commissioners of the drainage district from asserting the 30-day statute of limitations when an appeal was filed late.[150]

Generally speaking, appeals in condemnation proceedings should be handled under the general statutes providing for appeals as in all other types of matters. There is no reason why an appeal from the Circuit or Chancery Court should not go to the Supreme Court in the same manner as other civil appeals and as provided in the appropriate general statute. Similarly, appeals from county court to circuit or chancery court should be handled as in the case of all other appeals from county court.

In connection with this subject, we should mention writs of prohibition, which are not appeals and which test only the jurisdiction of the lower court. If a petition for a writ of prohibition be treated as one for certiorari, the rule is that certiorari will not lie unless the trial court exceeded its jurisdiction in making the order in question.[151] The usual law with respect to writs of prohibition and certiorari appears to be followed and should be followed in highway cases, and there would appear to be no necessity for dealing separately with these writs in the code.

P. Procedure for Assessing Compensation.

In the absence of a constitutional provision prescribing how compensation shall be ascertained, there is no limitation on the legislature except the provision that no man may be deprived of his property

without due process of law and that the landowner must receive just compensation. The legislature may prescribe the manner of determining compensation which it deems appropriate, provided only that the tribunal is impartial and that the interested parties have an opportunity to be heard.[152] The constitutional guarantee of a jury trail[153] applies only to condemnation by a private corporation.

While the rule is far from unanimous, the rule in a majority of jurisdictions is that the burden of establishing the value of the property is on the landowner.[154] In Arkansas, in circuit court condemnation proceedings instituted by the State Highway Commission, the Commission makes an initial determination of the value of the land by depositing a sum of money estimated to be just compensation for the property taken.[155] If the landowner feels that the amount deposited is insufficient, he is entitled to a hearing on the subject.[156] This procedure seems to be a good one, and should be continued with some modification. Properly, an initial burden is on the Highway Commission to ascertain the value for purposes of the deposit. Burden of proof then shifts to the landowner to show that the amount deposited is insufficient, and in the trial of the case, the burden is on the landowner to establish the amount of compensation to which he is entitled.

In circuit court condemnation proceedings, there is a provision for trial by jury.[157] One commentator states that "not infrequently, the statute in conformance with the constitutional mandate, provides that the damages be determined by a court without a jury".[158] Clearly, under permissible constitutional provisions, the assessment of damages may be delegated to a court or judge.[159] There is normally no constitutional right to a jury trial and a failure to provide for a jury trial does not constitute a violation of due process.[160] As has been stated earlier in this paper, the use of juries in Arkansas more often than not leads to abuse in this type of proceeding. Compensation could more justly be assessed by a court, with the aid of a statutory procedure assuring a fair and thorough appraisal of the property involved. In Arkansas, an appropriate court for jurisdiction in condemnation matters would be the Chancery Court, which customarily handles problems relating to land.

Q. Assessment in State Condemnation Proceedings.

There is no constitutional provision for a jury trial for assessing compensation in condemnation proceedings by improvement districts.[162] Although compensation may be assessed when the tax assessments are made in a local improvement district, where the lands are not taken or damaged at the time the assessment for tax purposes was made, compensation must be paid out of the funds of the district or county.[163] A statute requiring the appointment of three disinterested citizens of the county as viewers[164] does not permit appointment of the father-in-law and brother of the petitioner as viewers.[165]

R. Assessment in Private Condemnation Proceedings.

The constitutional guarantee of a jury trial[166] applies to condemnation proceedings by private corporations.[167] This provision prohibits the taking of property by any corporation until compensation shall first be made to the owner, and it has application only to condemnation by private corporations.[168] Railroad corporations, which were chartered before the Arkansas Constitution of 1868, may take land without compensation; the remedy of the landowner being the right to petition the Circuit Court to appoint five commissioners to assess compensation.[169] The same case held that this procedure is not an assignable franchise and cannot be invoked by a corporation which purchased the assets of the original corporation during receivership proceedings.

The cases clearly indicate that in providing for the handling of condemnation proceedings by a court, without use of a jury, the code must provide separately for a jury trial in the case of private corporations in order not to run afoul of the State Constitution.

III. PROPERTY INTERESTS SUBJECT TO EMINENT DOMAIN.

It is reasonable to assume that the Arkansas Supreme Court would sanction the taking of any privately held property or interest therein. The Court has impliedly approved the taking of real property, contract rights, licenses, and franchises from the State; and the interests in property which the Court has permitted to be taken range from fee simple absolute to temporary easement. There is no necessity to go into the numerous cases on this subject. In drafting the code, if the subject of property interests is to be considered at all, it should be made clear that all property interests except those not subject to taking as a result of provisions of the Federal or State Constitutions, are subject to eminent domain. In short, the scope of property subject to being taken should be as broad as possible.

One Arkansas case stated a very broad scope for the power when it held that the exercise of the power does not interfere with the obligation of contracts since all property is held by tenure from the State and all contracts are made subject to the power of eminent domain.[1]

IV. EXTENT OF INTEREST ACQUIRED BY CONDEMNOR.

The general rule is that only such an estate in the property sought may be taken as is reasonably necessary to accomplish the purpose of the condemnor.[1] There is a marked contrast between voluntary conveyances and property acquired by condemnation, however. In voluntary conveyances the grantee is allowed the greatest interest possible whenever it is necessary to construe the conveyances, while in eminent domain the rule of construction leaves the owner with the greatest possible estate.[2] However, in the absence of a statutory declaration to that effect, the title acquired by condemnation is construed to be a fee by virtue of the sovereign supremacy.[3] In some instances, the condemnor has been forced to pay for a fee where he gets less than the fee, although in other cases it has been held that the condemnor acquires an interest commensurate with that for which compensation is made, and if he pays for a fee he gets a fee.[4] Of course, the condemnor cannot be permitted to condemn more than is necessary, and when an easement will satisfy the purpose, the power to condemn the fee will not be included in the grant.[5] Unless there is a constitutional inhibition upon the power of the legislature, the legislature has the power to determine what shall be acquired both as to the amount and quality of the estate.[6] Of course, the condemnor could not acquire an excess amount of land.[7]

Arkansas holds that a fee simple can never vest in a private corporation exercising the power of eminent domain, because when the purpose for which the right-of-way was taken has been completed, the possession and all other incidents of ownership would revert to the original owner.[8] Although the necessary use for land condemned may be of such a nature as to preclude any possession except that of the condemnor, and to that extent an estate in the nature of a fee would be acquired, where a corporation condemns land for right-of-way for power lines, it has exclusive right to possession only during construction and during times of necessary maintenance, and the owner has the right to enter the land at all reasonable times for purposes not inconsistent with the easement.[9] Once a private corporation acquires a right-of-way, it may be used in any manner its needs may require, and there is no liability for its conduct or compensable injury to the owner's property.[10] A right-of-way may be granted over a homestead without the concurrence of the wife of the owner since the right-of-way is only an easement.[11]

While it is true that a private corporation should not be granted a fee when a right-of-way will accomplish its purpose, there is no sound reason why a private corporation should not be entitled to a fee simple in a situation in which a fee simple is required. Whenever construction of permanent facilities upon property is necessitated, the corporation should be granted a fee simple since such appurtenances will merge with realty.

A. As Affected by Necessity.

It has been held in Arkansas that the Highway Commission has no

right to take a right-of-way for any purpose other than for use as a highway.[12] Similarly, no more private property and no greater interest therein may be taken than is absolutely necessary.[13] One case held that a city condemning part of a railroad right-of-way for a city street acquired only a right-of-way.[14]

B. Fee Simple Absolute.

On the other hand, if a lesser estate is not sufficient to satisfy the purpose of the taking, a fee simple may be acquired.[15] Moreover, a statute giving a municipal corporation the power to enter upon and take property to construct sewers and drains[16] is sufficiently broad to enable the city to obtain a fee simple title.[17]

These Arkansas cases are manifestly proper. Where more than an easement is needed, there should be no inhibition at all on the condemning agency's acquisition of a fee.

C. Easement.

A temporary easement may be condemned, and the condemning agency must pay the fair rental value of the property during the time of its use.[18] Where a permanent easement is condemned, however, the condemnor must pay the full value of the land as though a fee simple had been taken.[19] This is based on the theory that the condemnor has a right to make complete use of the land, thereby leaving no valuable use for the owner after the taking. The better rule would seem to be that where land is acquired for highway purposes, the condemnor acquires an interest commensurate with that for which compensation is paid, and if the condemnor pays the same as it would pay for a fee, it should receive a fee.[20]

The rule followed in Arkansas is that acquisition of an easement carries with it the right to construct such reasonable facilities thereon as may be necessary.[21] However, where a permanent easement is condemned, the owner receives the full value as if a fee simple absolute had been taken, whether a private corporation[22] or the State[23] is involved. Where land is dedicated for a highway or street, the public merely acquires an easement.[24]

There is no sound reason why, if a condemning agency pays for a fee, it should not receive a fee.

D. When Title Vests.

Where the Highway Commission is condemning property for Highway purposes, it may file a declaration of taking and make a deposit of the estimated value of the land.[25] It is provided by statute that title to the property passes to the Highway Commission upon the making of the deposit.[26] Railroad corporations have been held to have no right to

take possession unless a deposit be made under order of the court pursuant to Ark. Stats. Sec. 35-206.[27] Moreover, in the case of railroads, the landowner does not part with title until compensation has been made.[28]

There is some problem with respect to the time title vests as compared to when action may be discontinued or dismissed without prejudice by the condemnor. Earlier, it was stated that the condemnor should be able to discontinue or dismiss at any time up until final judgment is rendered. If title is to vest upon the making of a deposit, the action should not be discontinued after that time, unless it is provided that in the event of discontinuance after the making of the deposit and vesting of title, title will revert to the original landowner and, further, that the landowner will be compensated for any loss sustained while title was in the Commission. There is good reason for title to vest upon the making of the deposit since the Highway Commission might have immediate need for the land. However, the landowner should be recompensed for any damage resulting from loss of use of the land or from the temporary loss of title, in the event of discontinuance prior to the entering of a final judgment.

E. Rights of Abutting Owner in Condemned Property.

Where an easement is taken, the landowner retains the right to continue using the surface for farming or other purposes not inconsistent with the easement.[29] A problem arises with respect to additional servitudes. Since the owner is not deprived of his fee, use of the property for any other purpose will constitute an additional servitude for which the owner must be compensated, such as the construction of poles and power lines along a highway right-of-way.[30] Where land is condemned for use as a right-of-way for power lines, the company has exclusive right to possession only during construction and during times of maintenance; although in this situation, no additional servitude is involved.[31]

In the situation involving use of the same right-of-way for additional servitudes, the landowner may eventually collect more money than the land is worth. However, this is probably a "necessary evil" if we are to proceed under the rule that a condemnor can only acquire such title or interest as is necessary to effect its purposes. The best practice in such a situation is to require the condemning agency to pay only the reasonable amount of the easement or other interest acquired, which would seem to amount to less than the cost of the fee.

V. COMPENSATION.

Arkansas follows the general rule that private property may not be damaged or taken for public use by any private corporation or agency, whether state or local, without just compensation to the owner.[1] As we have previously noted, although the State may condemn private property without notice, it may not determine compensation without giving the landowner notice and an opportunity to be heard.[2] Should there be an inability to pay the compensation due to lack of funds, a Chancery Court can enjoin the taking of the property until compensation is made.[3] Damage to land constitutes a taking, in that the value of the land is reduced and the owner is entitled to compensation for this reduction in value.[4]

A. Constitutional Provisions and Requisites.

Article 2, Sec. 22, of the Arkansas Constitution provides that private property shall not be damaged or taken for public use without just compensation. Any statute which contradicts this rule is unconstitutional, and this includes statutes establishing arbitrary rules limiting compensation.[5] However, a statute which provides for the exercise of eminent domain but does not provide a method for determining compensation is not void since the constitutional provision mentioned previously must be read into the statute.[6]

B. When Compensation Must Be Made.

The taking of property by a state or subdivision need not be accompanied or preceded by payment, the requirement of just compensation being satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge.[7] This is in accordance with the general rule.[8] It has been held that a corporation may obtain an order of condemnation even if at the time the order is obtained by the company, it does not have enough assets to pay the compensation assessed, as long as the company cannot take possession of the land until compensation has been paid.[9] We again encounter the problem, however, that if county court condemnation proceedings are involved, the landowner must file his claim and the Court must refuse to make payment before the County will be prevented from taking the property in question.[10]

There is no need to comment again on the problem created by the County Court condemnation procedure as this has been discussed previously at length. These cases illustrate a necessity to fix a uniform time for the taking and payment of compensation. Where the deposit is made by the State at the time the suit is filed, there seems to be less difficulty with respect to payment of compensation. Certainly, compensation should be made before the landowner is deprived of the use of his property. And following the order of condemnation, the landowner should

not be compelled to wonder whether he will be paid or whether he will have to obtain an injunction in Chancery Court to prevent the taking.

C. Security of Payment before Taking.

Under the more modern statutory procedure in Arkansas,[11] the Arkansas Highway Commission acquires the right of entry upon land being condemned upon filing the declaration of taking and depositing with the clerk of the Circuit Court the estimated compensation due the landowner. The landowner has a right to withdraw this deposit. If the compensation finally awarded is more than the amount of the deposit, the State pays the additional amount necessary; and if the amount of the deposit withdrawn by the landowner exceeds the compensation finally awarded, the landowner pays interest on the difference between the deposit and final award. The Court has the power to order the Highway Commission to make an additional deposit if it determines that the initial deposit will be inadequate to cover the amount of the final award although, under Act 99 of 1963, this additional deposit cannot be withdrawn by the landowner but remains in the registry of the Court until final adjudication. The 1963 act renders moot some recent cases.[12]

If the State Highway Commission names the wrong party as owner of the land, and said party withdraws the deposit, the Commission is liable to the true landowner for the compensation and may sue the party erroneously receiving the deposit.[13]

A statute permitting the Highway Commission to enter property without first making compensation or a deposit is violative of the State Constitution.[14]

The more recent statutory procedure with respect to the handling of eminent domain cases in circuit court is so far superior to the older county court condemnation procedure that it is somewhat difficult to criticize it. With regard to those statutes pertaining to deposit, moreover, it seems eminently proper to require a deposit at the beginning of the action. Certainly, such is essential if the Highway Commission expects to exercise any prerogative over the land in question in the meantime. Also, if the law is going to treat the title as having vested at the time of the deposit, the landowner should be permitted to withdraw the deposit. Act 99 of 1963 seems questionable. If the landowner is to be permitted to withdraw the original deposit, and if the Court in the exercise of its discretion deems the original deposit to be inadequate and has ordered an additional deposit, why should the landowner not be permitted to withdraw that also? Certainly, the landowner does so to some extent at his peril. If he has use of money which rightfully is not his during the period pending final adjudication, he should properly pay interest on the use of that money and return it at the conclusion of the litigation. At the same time, however, there would seem to be no sound reason why the landowner should not be permitted to have full use of the deposit, including the amount added.

Much of the statutory procedure with respect to circuit court condemnation proceedings can be incorporated in the code. However, that procedure should be polished and modified as necessary, and two recommended changes, if adopted, would result in the changing of Act 99 of 1963 and the elimination of jury trials. The latter would be automatic if Chancery Court were given jurisdiction over condemnation proceedings.

D. Time of Fixing Compensation.

Nichols states that there is a diversity of opinion as to the time of assessing compensation -- some states assessing as of the date of taking, and some states assessing before the taking is made.[15] Since Arkansas does not use an administrative proceeding in most instances, the market value of the land is generally held to be measured as of the time of the filing of the petition.[16] However, it has been held that when the Highway Commission obtains an order of condemnation without notice, the assessment of the compensation is to be made as of the time of the actual taking by the Commission.[17] A peculiar situation arose in one case in which the parties agreed upon a date at which the market value should be assessed, and valuable minerals were discovered after the agreed-upon date. The Court stated that the compensation for the minerals should be included in the assessment since the value was there at the time the agreement was actually made, and the owner should receive the actual value of the land and not merely the known value.[18]

It would appear that the difficulty raised in these cases could be solved by providing that the time of fixing compensation will be as of the date the petition is filed. Since notice will be given almost contemporaneously with the filing of the petition, this will be in accord with the general rule in a situation of this type.

E. Taking or Damage as a Basis for Compensation.

The owner of a valuable property right is entitled to compensation when his property right is adversely affected by condemnation proceedings. Thus, a light-and-power company acquires a valuable property right when it obtains a franchise from a city to place its poles and lines along streets, and if the Highway Commission compels the company to relocate its poles, it must do so in exercise of the power of eminent domain and must pay compensation in the form of expenses incurred in such relocation.[19] There need be no plan to use the property on the part of the condemning agency; it is sufficient if the property is actually damaged or taken for public use.[20] To subject property located in an improvement district to claims of the creditors of the district in excess of the benefits of the property derived from the improvement constitutes a taking of property without just compensation.[21] There is no reason why this set of rules should be disturbed by the code since these rules are eminently fair and are founded on the basic concept of the power of eminent domain.

F. Real Property, Freehold and Expectant Estates; Leaseholds; Easements and Servitudes; Contract Rights; Licenses and Franchises; and Mineral Interests.

A person holding a remainder in real property is entitled to recover just compensation for injury or condemnation to his expectant estate. This is true both in the case of a vested remainder and a contingent remainder.[22]

Where condemned property is subject to a leasehold interest, both the lessor and lessee are entitled to compensation for their separate interests. The interests of the various parties should be determined in a single trial,[23] but it is proper for the jury to return separate verdicts for the lessor and lessee.[24] The measure of compensation is the value of the separate interest, not the value of the land had the lease not been made.[25] This is all good law, and there is no reason for the code to have any effect upon it.

The holder of an easement is entitled to compensation for impairment of that easement by condemnation.[26]

The exercise of the power of eminent domain does not interfere with the inviolability of contracts, because all property is held by tenure from the State and all contracts are made subject to eminent domain.[27]

A franchise which is granted from year to year should not be considered a vested right, and a landowner who has a ferry franchise should not be compensated for loss of the ferry rights.[28]

The market value of a tract of land containing minerals cannot be shown by mutliplying the yards or tons of the material by price per unit, because this formula fails to take into consideration factors such as the cost of excavation, processing, overhead, and the market for the finished product. The market value is the price that would be agreed upon by a willing buyer and a willing seller in an arm's length transaction.[29]

The foregoing cases reveal that a landowner is entitled to compensation for a fixed interest in land, and they also reveal the methods adopted by the Arkansas Court in dealing with this problem. We must necessarily consider whether the code will specifically designate those interests for which compensation shall be granted and the measure of damages in each instance. It would appear that such would be a mistake, for the simple reason that in the enumeration of interests in property for which compensation should be awarded, it is always possible to omit an interest, the taking of which would be construed to be included in Constitutional provisions and a part of the commonly recognized scope of eminent domain provisions. Moreover, if the expression of the measure of damages or method of determining damages was such that the Court did not feel that just compensation was being awarded as a result of the measure stated, the Court could invalidate that portion of the code as being violative of the Constitution. It would therefore seem to be the

best policy to make no more than general statements in the code concerning the interests which are compensable and the measure of damages, and such statements should be in accord with commonly accepted legal concepts.

G. Covering Property with Earth, Sewage, or Water.

A landowner is not ordinarily entitled to compensation for injury to his land caused by overflow resulting from the fact that his lands are left between the levee and the river. However, an exception to this rule is that when the property so situated is in fact used by a levee district as a "cushion" to slow down the waters of the river during a flood and protect the levee, this amounts to a taking for which compensation must be made.[30] If a levee blocks the normal flow of a stream and causes water to overflow onto private property, this amounts to a taking of property.[31]

Where the construction of a railroad embankment causes injury to land due to flooding, this injury is compensable in a subsequent condemnation proceeding dealing with the railroad right-of-way.[32]

H. Removal of Earth from Property.

The removal of earth from private property is a compensable injury to land.[33] Here again, we are simply dealing with compensable damage or taking, and there is no need to reiterate that the code should not go into detail on this point.

I. Interference with Existing Easements.

An easement is a valuable property right, and injury to it constitutes a taking for which the owner should be compensated. If an electric power-and-light company which has a franchise to place poles along city streets is compelled to relocate poles, it is entitled to compensation, as we have mentioned previously.[34] The construction of power lines along a street is not an additional servitude on the fee of the street, and abutting owners have no claim for damages,[35] but this is an additional servitude on the fee of the owners abutting a highway right-of-way, and a taking of property for which compensation must be made.[36] Aside from the fact that this is a rather strange interpretation on the part of the Court and there seems to be no logical reason why streets should be distinguished from highways or vice-versa, this again would seem to be an area the code can deal with only generally.

It has also been held that the flooding of land in which a pipeline company has an easement is a taking of property from the pipeline company.[37] Also, constructing a city street across a railroad right-of-way is an impairment of the railroad easement for which compensation must be made.[38]

Basically, this is an area the Court rather than the code must concern itself with in determining the compensability of various types of interests.

J. Compensation for Property Not Physically Taken.

When property is damaged, its value is reduced; and this reduction in value amounts to the taking of property to the extent thereof, so that the owner whose property has been damaged but not physically taken has the same right to demand compensation as the owner whose property has been occupied and taken. The injury, however, must be direct, substantial, and peculiar to the landowner and not one suffered by the general public.[39]

K. Interference with Ingress and Egress.

The owner of property abutting on a street or highway has an easement in such way for the purpose of ingress and egress which attaches to his property and in which he has a property right as fully as in the lot itself. Thus, any impairment of this assessment is a damage to the abutting property for which the owner is entitled to compensation. Interference with ingress and egress is to be distinguished from alteration of traffic flow, which does not constitute the taking or damaging of a property right.[40]

L. Change in Grade of Streets and Highways.

A landowner whose property is damaged by the change in grade of a highway or city street is entitled to compensation for the injury. A city is liable for injuries to abutting property by reason of changing the established grade of a street but is not liable for damage caused by establishing the grade of the street in the first instance.[41]

M. Business Income.

Loss suffered in business cannot be allowed as an element of damages under a theory of a taking of private property without compensation. Thus, a dairy farmer was not entitled to damages for injury to his business resulting from the discharge of sewage into a stream by a sewer district.[42]

N. Personal Property and Moving Expense.

The expense of moving from a leasehold which is being condemned is not compensable because the lessee would have had to move upon termination of the lease anyway.[43] Neither is the cost of moving personal property from land being condemned compensable.[44]

the common and necessary use of the property so serious as to interfere with the rights of the owner to an extent greater than mere temporary inconvenience. Such interruption of the use of the property can consist of regulations against hunting at all times on certain property,[53] or the use of the landowner's property as a "cushion" against the current of a river as a means of protecting a levee behind the property.[54]

V. Damages Not Compensable.

Damages to property which are not compensable include those occasioned by the relocation of a highway[55] and those caused by the initial establishment of a grade of a city street.[56] The State Highway Commission is not liable for the expense of moving power poles on a highway right-of-way where the power company had located its poles there initially with permission of the Highway Commission and pursuant to Ark. Stats. Sec. 35-301(a).[57]

A levee district will not be liable to a landowner whose lands are left between the levee and the river.[58] A drainage district is not liable for damage to crops caused by poison accidentally drifting into a nearby field.[59]

Property owners whose land abuts highways and railroads cannot recover for noise, dust, and similar inconveniences incident to these modes of public transportation.[60]

Where a condemnor has instituted a condemnation proceeding which goes to trial but subsequently withdraws from the proceedings in good faith, it will not be liable to the landowner for his legal expenses in connection with the trial.[61] This rule should be changed since it works an undue hardship on the landowner.

If a landowner plants crops on land after the proceedings to condemn the land are completed, he does so at his own risk, and the condemnor is not liable for destruction of the crops.[62]

W. Damages Caused by Negligence.

Improvement districts are not liable for the torts of their employees or contractors.[63] This immunity of public agencies, however, does not necessarily apply to private corporations. A railroad is not liable for unavoidable injury to adjoining property following the construction of the road, but if the construction itself results in the flooding of adjoining property, or if the roadbed is negligently constructed, damages for these injuries are assessed in the condemnation proceeding along with damages for the taking.[64] The rule apparently is that if construction of the road precedes the condemnation proceedings, damages caused by the construction should be included when determining the amount of compensation due the landowner, but if the condemnation proceedings precede construction, the landowner must sue in tort to recover for subsequent damage caused by negligence or unskillful

construction.

* * * * *

The determination of the type of damages which are compensable, or the type of interests for which compensation must be paid, should be left to the discretion of the Supreme Court of Arkansas as far as specifics are concerned. To attempt to enumerate these interests would run the danger of omitting otherwise compensable interests, unless a broad, all-inclusive provision was inserted along with the other specific enumerations. If the code makes any statement as to the types of interests which are compensable, it should be broad enough to include not only those interests of which we may presently have knowledge, but also interests which may develop in the complexities of the future. The best policy would seem to be to leave these specific situations to the State Supreme Court.

VI. MEASURE OF COMPENSATION.

The measure of compensation, where a portion of a person's land is taken for highway purposes, is the market value of the land plus the damages to the land not taken, less any special benefits to the remaining land.[1] If the condemnor acquires an easement, but theoretically has the right to make complete use of the land (as in the case of a landing strip, a pipeline, etc.), he must pay the full value of the land as though a fee simple absolute had been taken.[2] It is improper for the jury to return a quotient verdict as to the amount of compensation due which has been computed by arriving at an average figure mathematically ascertained from the testimony of the various witnesses.[3]

A. Definition of Market Value.

The market value of property is the sum that the property would reasonably be worth on the market for a cash price, in the hands of a prudent vendor at liberty to fix the time and conditions for the sale.[4] By a "cash price" is meant a sum payable in money as distinguished from an exchange of property.[5] The price should be what a reasonable buyer would pay for the highest and best use of the land -- for example, the price one seeking a plant nursery would pay for land on which the plants were growing.[6]

In connection with definitions of market value, an oft-cited Arkansas case is Little Rock Junction Ry. v. Woodruff, 49 Ark. 381, 5 S.W. 792 (1887), the language of which is relied upon by treatises in this field.[7] Orgel notes that one of the greatest problems in defining market value is the "willing buyer-willing seller" word picture presented by various courts and implicit in the definition. He states that perhaps the most serious question concerns the possibility that this concept may be used to bridge the gap between the value of the property to the landowner and the price at which it can be sold to anyone else.[8]

B. The "Before and After" Rule.

Where part of a man's land is taken, the measure of compensation is the difference between the market value of the whole tract before the taking and of the market value of the remainder after the taking.[9] However, where a portion of a person's property is being taken, but the landowner is not claiming severance damages or damages to the remainder, it is not necessary that the "before and after" rule be followed. In such a case, the measure of compensation is the market value of the property taken.[10] (The "before and after" rule is applicable to an easement situation, also. Thus, if a lake is constructed over a pipeline, the damage is the difference in the cost of maintenance of the land before the lake was built and the cost after it was built.[11])

Orgel comments that, literally interpreted, the "before and after"

rule is advantageous because it requires a consideration of all elements of damage and benefit and resolves the troublesome problems of delimiting damages and setting off benefits that confront the courts when they attempt to apply the formula of "value plus damages".[12] It is stated that one might be led to assume that emphasis on the value of the remainder after the taking would rule out all factors except those that clearly affect market value. However, these theoretical advantages have not always followed from the acceptance of the "before and after" rule.[13] Nonetheless, Orgel concludes that the formula which measures just compensation by use of the "before and after" rule is "theoretically more acceptable" and is definitely superior to the "value plus damages" rule. Arkansas therefore departs from the formula accepted in the majority of jurisdictions -- value of the part taken plus damages to the remainder -- but follows the more theoretically sound formula to the extent that the landowner claims severance damages or damages to the remainder.

Since the obvious conclusion is that Arkansas should continue to follow the "before and after" rule, the question arises as to whether it should be embodied in the code. Orgel mentions only one state which has given it statutory approval,[15] the other states which follow this rule having adopted it through decisions. Statutory embodiment of the rule would have the advantage of limiting the court in straying from it in the future although it might have the drawback of unduly restricting the court if overly specific. Our present problem, however, seems to be that the rule is not fully applied, as will be discussed further, and the conclusion is that it should be expressed in the code in a more broad and comprehensive manner.

C. Damages to Remainder of a Single Tract.

If the land being condemned is a portion of land which has heretofore been used as a unit, the landowner is not limited to severance damages for the portion involved, but may recover for injury to the tract as a whole.[16] But in Lazenby v. Arkansas State Highway Comm'n,[17] the Court goes to great lengths to explain that the "before and after" rule has no application where the landowner is seeking only to recover the value of the land actually taken. There seems to be confusion in the cases as to which rule to apply and when. Apparently, the "before and after" rule is followed in cases in which a part of a person's property is taken and the landowner claims severance damages or damages to the remainder; but in cases in which no such claim is made, the market value per acre is computed. The code should provide that the "before and after" rule is to be followed in all situations. Theoretically, there is no reason why the "before and after" rule should not encompass all types of damages which the landowner might sustain with respect to the taking of a part of his property. Moreover, the landowner should not be forced to claim severance damages or damages to the remainder in order to have the advantage of the "before and after" rule. Automatic application of the rule would be fair to all parties concerned and would clarify much of the confusion existing in this area today.

The following injuries to land have been considered as elements of damage in determining compensation due: when a portion of the land is taken, inconvenience in traveling from one part to the other;[18] the rendering of the remaining land less adaptable for subdivision into building lots;[19] increased fire hazard caused by a railroad;[20] and the sounding of railroad bells and whistles in a situation peculiar to the property involved.[21]

Properly, these elements which diminish the value of the land remaining after the taking can be covered under the "before and after" rule, and there would appear to be no need to consider them except as they are component elements in the mathematical problem of determining the value of the land after the taking. They are elements which go to reduce further the value of the property remaining.

It therefore appears clear that the enunciation of a general standard, in the form of the "before and after" rule, could and should eliminate many of the problems which arise in litigation in Arkansas and thereby result in benefit to both landowners and condemning agencies.

D. The Highest and Best Use.

In determining the market value of land, the landowner is entitled to be reimbursed on the basis of the best and most valuable use for which the land is suited.[22] The possibility of its use for all purposes, both present and prospective, for which it is adapted and to which it might in reason be applied, must be considered, and the value of the land for the use to which men of reason and adequate means would devote the property if owned by them must be taken as the ultimate test.[23] Thus, the market value is the value of the property at its best use and not necessarily the present use.[24] The best use can include historical purposes.[25]

If the "before and after" rule is to be embodied into the code, a general statement of the "highest and best use" rule should also be incorporated. This is a good rule, commonly accepted in the United States, and is a proper element to be considered in determining market value. Of course, in some instances the application of this rule may serve to increase the amount of recovery since the taking may destroy the highest and best use for which the property can be used and greatly diminish the value after the taking as compared to the value prior to the taking. However, it seems only fair that the highest and best use of the property be applied, even though the present use is less lucrative. In fairness to the condemning agency it should be required that the owner first show: (1) that the property is adaptable to the other use; (2) that it is reasonably probable that it will be put to this other use within a reasonable time; and (3) that the market value has been enhanced by this other use for which it is adaptable.

E. Value to Taker.

Orgel states that the problem of value to the taker is "one of the most confusing aspects of the theory of valuation."[26] The problem presents the issue of whether the availability of the property for the taker's use must be considered in estimating just compensation. The courts have uniformly denied that value to the taker is an appropriate measure of compensation.[27] But the problem does not end here. Orgel goes on to point out that the actual market value may be affected somewhat by value to the taker.[28]

Arkansas has stated that a condemnor should not be required to pay an enhanced price for land which its demand alone has created.[29] But if the porperty is so well adapted to the use for which it is being taken as to add something to its value in the minds of prospective buyers, that element may be considered in estimating market value.[30] And thus the owner of land peculiarly adapted for use as a dam site,[31] or as a roadbed for a railroad,[32] or as a bridge,[33] must be compensated for the land on the basis of its highest and best use, which in these cases is the use to which the condemnor intends to put it. The land thereby pulls up its value "by its bootstraps," so to speak, due to the taking.

The drafters of the code should consider the possibility of limiting this type of situation. No one with rural land, even though allegedly it may be peculiarly subject to adaptation for use as a dam site or railroad bed or other such public purpose, should receive additional compensation because of the sheer accident which led to the taking of the land for that purpose. This should be outside the pale of the "highest and best use" rule. The "highest and best use" rule should be limited to the highest and best use of the land for purposes other than those to which it will be put by the taker, unless the taker's use is similar to the highest and best private use to which the land could be put (such as a housing agency condemning land for which the obviously best private use is for residential purposes.) An appropriate definition of this rule in the code would seem to correct this deficiency.

F. Value to Owner.

The value of land to the owner is not the measure of compensation in Arkansas, and it is immaterial except insofar as it is relevant to the market value of the property.[34] Orgel writes that when property is taken, the value to the owner is the only strictly relevant value and that market value is intended to be a rough approximation of the value to the owner.[35] Difficulty arises when the market value is practically nil, but the value to the owner is great. Orgel states that in these cases the courts will abandon the market value theory and use as an alternative measure "value to the owner," "value in use," "value for the use to which the property is devoted," "actual value," or some similar nomenclature.[36] This does not mean, however, that sentimental value will be a factor.[37] Thus, in summation, it may be fairly stated that where economic forces have temporarily created abnormal market

conditions or where the property has no market value of its own, consideration will be given to the value to the owner.[38] Probably this would be true in Arkansas also, despite the language in the case cited previously.

If the code undertakes to define market value or to delineate the manner of measuring compensation, it should make some allowance for abnormal situations in which "value to the owner" may be taken into account, while at the same time clearly indicating that such value will not normally be considered. It may be necessary to express this in the code in order to avoid omission of such situations by inference, thereby creating an injustice to landowners.

G. Buildings, Structures, and Fixtures.

Buildings and machinery or equipment which have become fixtures on real property and which add to the market value of the property must be paid for as part of the realty when determining the before and after value.[39] Replacing fences, shrubs, and flowers, the loss of trees, and rewiring and replumbing a house after moving it are also proper factors to be considered in determining compensation.[40] In this connection, it is proper to admit evidence of the kind of materials used in constructing the building.[41]

Of course, this rule coincides with the property maxim that the words "land" and "real estate" refer to the soil and everything attached to it, and it matters not whether such were affixed by nature or by artificial means.[42] Of course, a statute could provide for removal of buildings, with the landowner to be compensated for the cost of removal and relocation.

It will probably not be necessary for the code to specifically mention buildings, structures, fences, etc. These should be covered by the general language contained in the code. The Arkansas law on this point is standard and is proper, and no departure is warranted.

H. Growing Things.

The value of timber or crops at the time of taking are taken into consideration in determining damages, and the same is true of the replacement cost of shrubs, flowers, nursery plants, and the like.[43] This is the general rule.[44]

I. Mineral Deposits.

The market value of land containing minerals is the value with the minerals intact. It is not permissible to multiply the quantity of minerals by a price per unit, because this does not take into consideration excavation costs, overhead, cost of processing, and the available market.[45] Orgel comments that the mineral deposits may enhance

the market value of the land, but the award may not be reached by separately evaluating the land and the minerals.[46] There seems to be no need to disturb the existing Arkansas law on this point, which appears to be soundly based.

J. General.

Improvements made on property by the condemnor or its assignor before institution of condemnation proceedings are not taken into account in estimating damages to be paid the landowner.[47] With respect to easements, the test seems to be the extent with which the condemnation interferes with the easement. Thus, where land which was subject to a pipeline easement was condemned for the purpose of constructing a lake, the measure for damages was the difference in the cost of maintenance before and after the construction of the lake.[48]

Arkansas follows the majority rule in not requiring the condemnor to pay for its own improvements when they have been made prior to the act of condemnation.[49] New York allows compensation where the condemnor has previously made improvements without the consent of the owner.[50] There seems to be no reason for Arkansas to depart from the general rule, and in fact the condemnor should not be allowed to make improvements prior to the act of condemnation.

VII. EVIDENCE OF MARKET VALUE.

A. General.

Generally, any testimony which will tend to show the market value of the land sought to be condemned is competent.[1] In this evaluation, the law takes into consideration any and all uses to which the land is reasonably adapted and might with reasonable probability be applied.[2]

B. Sufficiency of Evidence to Support Award.

In testing the sufficiency of evidence in eminent domain proceedings, the same rules apply as in a common law action. The evidence is viewed in a light most favorable to the appellee, and if the verdict is sustained by competent evidence, it will not be overturned.[3] In this connection, Nichols observes that more discretion is allowed the trial court in passing upon the admissibility of evidence of value, and there is a modern tendency to restrict the reversal of verdicts for errors which do not cause substantial injustice.[4] Similarly, Arkansas holds that a jury verdict should be set aside only when it is not supported by proof, or when it is so excessive as to indicate passion, prejudice, or incorrect application of the law to the case.[5] The trend in these cases seems entirely proper, and there would seem to be no reason for the code to alter or depart from this trend.

Despite this broadening trend, there are some specific limitations on testimony, some of which have been previously mentioned. In addition, testimony for which no reasonable basis is given has been held to be insubstantial.[6] A jury verdict must generally fall within the range of the highest and lowest estimates made by knowledgeable witnesses who base their opinions on facts, in order for the verdict to be upheld.[7]

Nichols states that evidence must be competent, relevant, and material and must be of such nature that it would motivate a prospective purchaser and seller in fixing a price.[8] Evidence of peculiar value to the owner or special value to the taker are equally inadmissible. Nichols also comments that a view by the jury of the premises taken or damaged is almost, if not absolutely, essential to an intelligent understanding of the case, and in every jurisdiction a view is either authorized or required by statute.[9] This is certainly the better practice, and the jury should also be permitted to view surrounding land in order that they may note the elements which affect the value of the land taken and how the land not taken will be improved or damaged. At common law, the question as to whether the jury could view the land was within the discretion of the Court, subject to review only in case of abuse.[10] The code should make provisions for the jury (unless use of juries is terminated as recommended earlier) to view the land condemned and immediately surrounding land, subject to regulation but not denial of this privilege by the Court.

C. Opinion Evidence.

Arkansas has said that the question of whether the witness has sufficient knowledge concerning the value of property to give him a definite opinion on the subject is a matter to some extent within the sound discretion of the trial judge, and the Supreme Court will not reverse unless an abuse of discretion is apparent.[11] One of the recognized exceptions to the general rule that witnesses must state facts and not opinions is that the issue of market value is determined by the testimony of those who have knowledge of or are familiar with the property in question.[12] This is in accord with the general rule.[13] Moreover, if a portion of a witness's testimony is admissible, all of it need not be stricken.[14]

Lay witnesses, including landowners, may testify regarding the value of land if their testimony shows they are familiar with such matters.[15] Similarly, intelligent men who have resided for a long time at a place and are acquainted with the land being condemned and who claim they know its value are competent even though they have never bought or sold land in the area.[16] There is a split among the jurisdictions as to whether a witness may give his opinion of the extent of damage suffered by the owner, with Arkansas and some jurisdictions holding such testimony admissible and others holding it not admissible.[17] The better view would be to allow lay testimony, as Arkansas does, but with sufficient safeguards imposed to assure some semblance of accuracy. This is particularly true if the jury system is abandoned. This type of evidence is less dangerous in trials before a judge sitting without a jury than in cases involving a jury. Nichols states that it should be shown that a witness has some peculiar means of forming an intelligent, correct judgment as to the value of the property in question which is beyond that means possessed by men generally. In that connection, one who has resided or done business in the vicinity of the property in question for a sufficient length of time to have familiarized himself with the facts upon which its value depends is considered competent to testify.[18] This seems to be a reasonable conclusion.

With respect to expert testimony, the expert witness must establish his qualifications and his familiarity with the land in question and then is ordinarily in a position to state his opinion. Thus, a person who has been established as an expert need not, on direct examination, state the facts on which his opinion is based, according to the Arkansas case law.[19] This rule as to expert witnesses varies from the rule as to non-expert witnesses, who must give the basis for their opinion. While real estate experts are quite common in eminent domain proceedings, due to their supposed special knowledge of conditions upon which value depends, and are qualified because of their supposedly particular skill in that field, their testimony is often looked upon with distrust by courts due to the element of selection and payment by the opposing parties. However, without such testimony the Court could not make an informed judgment as to land values, and there seems to be no real alternative.[20] This situation might be helped by requiring that expert witnesses, as well as non-expert witnesses, give the basis of their opinion on direct examination along with their

qualifications. Moreover, the code should develop more stringent qualifications and more properly define what constitutes an expert. Under the present situation in Arkansas, it is far too easy to qualify as an "expert."

The landowner may be allowed to testify regarding the market value of his land if his testimony shows that he is familiar with such matters,[21] but if he has no experience in real estate business and gives no basis for his opinions, his testimony is entitled to little weight.[22] The general rule is that the owner may express his opinion although the weight to be given his testimony is to be determined by the Court.[23] Some states hold that mere ownership does not render a person competent to give an opinion, unless he is familiar with facts that give the property value.[24] The better rule would seem to be to permit the landowner to give such testimony but require him to state the basis for his opinion in order that it may be weighed in its proper light by the Court.

D. Basis for Opinion.

It is generally held that qualification as an expert witness in itself does not qualify one to give an opinion of value. One must possess in addition such general knowledge and have had such dealings as to have become acquainted with values in the vicinity of the land in question, and must be familiar with the property itself or at least have examined the property at or around the time of taking.[25] In this connection, Arkansas has held that a mere statement by a witness of the "before" and "after" value of land being condemned without a statement or consideration of the related factors upon which the opinion is based is no evidence of damages.[26] This holding has been modified to apply to a non-expert witness but not to an expert witness. A non-expert witness must give the basis for his opinion,[27] but a qualified expert witness need not give the basis for his opinion on direct examination[28] although his testimony may be discredited on cross-examination by showing that he is not versed on the physical facts concerning the property involved.[29] This should be corrected by the code to provide that all witnesses shall 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 can give an opinion without stating the basis of it. Nichols states that although there is authority to support the proposition that an opinion witness need not state 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 his opinion.[30] A provision requiring a statement as to the basis of opinions of expert witnesses would remove the presently existing ambiguity in the Arkansas law on the point.

E. Income from a Business on the Property.

Arkansas holds that in arriving at the "before" and "after" value in determining the market value of commercial property, it is not proper to consider profits from a business conducted on the property.[31] This is in accord with the general rule, under which it is well settled that an owner is not entitled to recover the anticipated profits of his business which are lost by the taking of the land upon which it is located.[32] Evidence of profits may be considered, however, in determining market value where the profits are attributable to the character of the land rather than to the character of the operator.[33] An exception to the general rule that profits from a business are not admissible is found with respect to profits from a farm. Evidence as to farm profits is admissible.[34] While there is some tendency to admit testimony as to farm profits, this evidence is often admitted simply to "shed light upon reasonableness of the value fixed by the evidence,"[35] or as a means of measuring production.[36] The decision in these cases is "so much eyewash." If the rationale of the rule which excludes evidence of profits from a business is proper in the case of non-farm property, it should also be proper in the case of farm property. 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.[37] Despite the existence of agricultural price supports, this same rule should be no less true (at least from an academic standpoint) in connection with farm property. This does not of course eliminate the possibility that the character of the land is such that independently of the skill or knowledge of the owner, it lends itself to a particular use, thereby making relevant the profits from a business inducted thereon.[38] Thus, the drafters of the code should consider whether to exclude the profits altogether with the exception of the situation involving a peculiar adaptation of the land for a certain use. The alternative seems to be to make admissible testimony as to business income for whatever weight the Court may wish to give it. It may be that substantial consideration should be given to this possibility. Why should profits not be an element to be considered in determining market value? Why is not the Court qualified to consider profits, taking into account the fact that these are transitory and cannot necessarily be viewed as "fixed"? If we are to follow the general view, however, such testimony would remain inadmissible.

F. Rental Value of Property.

Nichols states that as a safe working rule, if property is rented for the use to which it is best adapted, the actual rent reserved, capitalized at the rate which local custom adopts for the purpose, forms one of the best tests of value.[39] Evidence of the rent actually received at a time reasonably near the time of the taking should be admitted. This is predicated on the assumption that the rent is received by reason of the best available use to which the property may be put. This general rule is followed in Arkansas, which admits testimony as to rent

solely for the purpose of determining market value.[40] Fair rental value has been held to be not determinative where no amount was provided in the lease for rent but payment was to be made on a commission per gallon of gasoline sold.[41] This latter situation begins to get into the profits area and would seem to be proper under the prevailing rule. Again, however, it might be well to ask: If the amount of rent paid is admissible, then why should profits not be admissible?

G. Sales of Other Nearby Property.

Evidence of the price paid for similar lands sold voluntarily near the time of the taking is admissible in most jurisdictions,[42] and this is true in Arkansas. However, before sales of other property in the vicinity will be admitted in evidence in Arkansas, it must be shown that the other property is in fact similar or comparable to the property in question. Factors considered in establishing similarity are location, size, sales price, conditions surrounding the sale of the property (such as the date and character of the sales), business and residential advantages or disadvantages, and the extent of improved and unimproved lands.[43] If none of these criteria is present, the evidence of the other sale would be inadmissible. Sales of land and other commercial areas of a city which are regarded as comparable in value to the land in question have been admitted with other factors bearing on market value.[44]

H. Reproduction Cost and Cost of Improvements.

Reproduction cost is not admissible as a measure of damages in Arkansas. Thus, where buildings and fixtures are located on land, the measure of compensation is the value of the land with the buildings and other fixtures on it, and if the buildings and fixtures do not increase the value of the land, the owner receives nothing for them.[45] The cost of the property and the improvements may be admissible as an aid in determining market value, although not as a replacement for market value, where there is no readily ascertainable market value for the particular use to which the property is being put.[46] The Arkansas rule on this seems to be in accord with the general rule.[47]

I. Restoration Costs.

Evidence of the cost of improvements for restoration purposes and of relocation costs is admissible, but such prospective costs are not the measure of damages and are only an aid in determining the difference in the "before" and "after" value of the property.[48] Arkansas seems more conservative on this point than the general rule. Nichols states that when damage to the owner's property can be avoided by repairs, and the reasonable cost of such work is less than the decrease in the market value, such costs form the measure of damages.[49] Despite the semantics used in Arkansas, this is probably the practical result. In any event,

there seems to be little doubt that restoration and relocation costs would be admissible whether they be viewed as "the measure of damages" or simply as being of assistance in determining the "before and after value."

J. Removal Cost.

Removal cost is properly admissible in arriving at the "before" and "after" value -- e.g., replacing a fence, loss of trees, replacement of shrubs and flowers, moving a house back from the right of way, replumbing, rewiring, and so forth.[50] An exception to this rule is that injury to personal property and the cost of removing same are not to be considered as elements of damage.[51] Also, the expense of removal of a lessee's property is not a proper element to be considered.[52] The same distinction is made in the United States generally although cost of removal is considered along with other elements as bearing upon the market value and not as an independent item of damages.[53]

In a minority of states, recovery for removal of personal property has been based upon specific statutory authorization therefor. Certainly, such is an erosion of the market value concept. However, in all fairness to the landowner, it is only proper that he be placed in the same position that he would have been in, had it not been for the taking (which is nothing less than the theory of compensatory damages). Consequently, the drafters of the code should consider the possibility of an additional element of damage other than market value, which would be the removal cost of the personal property. The market value concept could be sustained even in this situation by providing that removal cost of personal property would be an item of evidence having a bearing upon the proof of fair market value and not an independent item to be added to the value of the land.

K. Assessment for Taxation.

By statute in Arkansas,[54] evidence of the assessed valuation for tax purposes may be admitted in a condemnation proceeding brought for highway purposes. However, this evidence is not conclusive and is merely to be considered with the other evidence.[55] Evidence of valuation placed on property by a tax assessment is not admissible in a condemnation proceeding instituted by a railroad corporation, for the reason that the valuation, being for a different purpose, is not a fair criterion of market value.[56] Although these railroad cases are old cases, the statute seems to be confined to highway condemnation proceedings. There seems to be no reason why the statutory procedure should not be continued in Arkansas, keeping in mind that Arkansas property is assessed at approximately 20 per cent of its true value. Arkansas is contrary to the general rule, however, in this situation. It is the rule in most jurisdictions that the value placed upon a parcel for tax purposes is no evidence of its value for any other purpose.[57] Of course, Arkansas should not go beyond simply providing for the admissibility of this type of evidence as an element to be

considered in determining market value. It should not be conclusive.

L. Offers to Purchase.

Arkansas follows the absolute exclusion rule, which is to the effect that evidence of an unaccepted offer to purchase property is not admissible to show market value. In a case on this point, however, the Court discussed the "Illinois Rule" which admits the evidence if the proponent thereof can show that it was a bona fide offer for cash and was made by a person able to comply with the offer.[58] The general rule seems to be one of exclusion,[59] and a great deal of abuse could creep in if there were much departure from the rule of exclusion in this connection. The danger of "trumped-up" testimony is greater than the advantage from admitting testimony as to such offers.

M. Owner's Purchasing Price.

The price that the owner paid for land being condemned has some bearing on the present market value, if the purchase was not too remote in time.[60] Nichols views this type of evidence as one of the most important aids in determining present market value if the sale was recent and was a voluntary transaction, and there have been no significant market fluctuations since then.[61] With these qualifications, such evidence should certainly be admitted.

N. Purchase Price Paid by Condemnor for Other Property in the Vicinity.

The price paid by the condemnor for other land in the same vicinity is held not competent evidence in Arkansas.[62] This is the general rule.[63] The rationale is that such payments are not indicative of market value. This seems to be an appropriate rule although some difficulty arises in separating testimony as to the value of other similarly located property and the testimony of the purchase price paid by the condemnor for other similarly located property. The purchase price paid by the condemnor for such other property serves to fix the value of it and thereby has an indirect effect on the land being condemned. Admittedly, however, the price paid by the condemnor for other similarly located lands may vary considerably, and the rationale for the rule seems a proper one. The right of the landowner to judge compensation should not be measured by the necessity, generosity, fear of litigation, or other factors which may have influenced the sale of adjoining or nearby property.

O. Maps and Plats Showing Intended Use of Property.

Maps and plats of residential property which is being condemned which show the property divided into lots are admissible only to show that the highest and best use of the property is for residential purposes and for showing the location of the improvements thereon.[64] However, where property which is being condemned is suitable for

subdivision into residential lots but is not being so developed or used, it is error to admit in evidence a map or plat showing such division.[65] This is somewhat stricter than the rule cited in Nichols, which states that the owner may present plans showing a possible scheme of development for the purpose for which the land in question is most available.[66] He cannot go further, however, and describe a speculative enterprise for which the land might be used.[67]

The general rule would seem to be preferable. As long as the use of the map or plat is not entirely speculative, there would seem to be no reason for prohibiting its introduction to illustrate the highest and best use of the land.

P. Cost of Fencing.

Cost of new fences required by the construction of a railroad is a proper element for consideration in determining depreciation and market value of severed tracts of land.[68] This is in accord with the general rule that inability to make the most advantageous use of the remaining land without precautions that will cause additional expense is a proper element of damage.[69] The additional fencing may be considered so far as it affects the market value of the remaining area, unless the land is so valueless as not to deserve fencing or may be utilized to its fullest and most advantageous use without fencing. This matter should properly be keyed to market value.

Q. Remote and Speculative Items.

The possible uses of land which are to be considered in fixing value must be so reasonably probable as to have an effect on the present market value of the land, and a speculative use cannot be considered.[70] This is the general rule. To warrant admission of testimony as to value for purposes other than that to which the land is being put, the landowner must show: (1) That the property is adaptable to the other use, (2) that it is reasonably probable that such a use will be made of it in the near future, and (3) that the market value has been enhanced by the other use for which it is adaptable.[71]

R. Highest and Best Use.

A landowner may show every advantage that his property possesses, both present and prospective, in order that the Court may determine the price for which it could be sold on the market.[72] The uses considered must be so reasonably probable as to have an effect on the present market value of the land, however, and speculative values cannot be considered.[73] As a general rule, the landowner may show every fact concerning his property that he would be naturally disposed to show in order to place it in an advantageous light if he were attempting to sell it to a private individual.[74] The highest and best use doctrine is that the Court may consider the value for the use to which men of

prudence and wisdom, having adequate means, would devote the property if owned by them.[75] This doctrine is followed generally in the United States. The Arkansas law on this point appears to be proper.

S. Other Considerations.

Various other considerations are often presented. Arkansas has held that the amount of deposit made by the Highway Commission prior to entry is not admissible in evidence at the trial although it may be used to impeach a witness if the witness was the appraiser who set the deposit.[76] This presumably means that the Highway Department must be extremely cautious in presenting the testimony of the appraiser who set the deposit if the appraiser is going to testify that the land is actually worth less than the amount deposited. The general rule is that payment of deposit into court has no bearing upon the amount of the just compensation ultimately paid, and the condemnor may introduce evidence of a sum less than that originally estimated and is not bound by the earlier declaration of estimated value.[77] The better practice would be to hold such deposit inadmissible even for the purpose of impeaching the appraiser. Such deposit is merely made in compliance with a statutory requirement and does not constitute an admission against interest.[78] The Arkansas Court's conclusion that the deposit may be used for such purpose is, therefore, erroneous and should be changed by the code.

Both the general rule[79] and the Arkansas rule[80] is that evidence of a compromise offer by the condemnor is not admissible.

The general rule is that cost of construction is not material and is inadmissible where the improvements do not increase the market value; but where the improvements do enhance the market value, the cost of construction would aid the jury in arriving at the market value, and such evidence would be admissible.[81] Arkansas, however, has held that evidence of the cost of construction of the highway is not admissible for the purpose of showing enhanced value of the remaining property,[82] and in this respect departs from the general rule. In this situation, it would appear that Arkansas is correct and the majority rule is wrong. The cost of the highway construction has no direct relationship to the enhancement of land values. If in a situation involving a major arterial highway, connecting such points as Little Rock and Dallas, the cost of construction was reduced through use of asphalt or asphaltic cement, rather than concrete, it cannot be said that the value of the adjoining landowners is in any manner diminished. Certainly, if the road were graveled rather than paved, the value to the landowner is less, but this is not because of the cost of construction, but because of the different mode of construction. The cost of construction of the highway could actually become a confusing figure, and if court or jury attempted to apply a mathematical formula in connection with it, disaster would result. Since such cost items can only breed confusion, the best thing is to leave them out.

As a general rule, the market value of a tract of land containing

valuable minerals cannot be determined by estimating the amount of minerals present and multiplying the estimate by a fixed price per unit. However, where the fee owner had leased the property for a per-yard rental, this computation should be admitted.[83] Of course, the existence of mineral deposits may be considered in determining market value although the mere possibility or known existence of mineral deposits is not enough to warrant consideration, unless they exist in quantity sufficient enough to justify commercial exploitation.[84] This appears to be a good rule. Value of the minerals should definitely be considered although it should be considered in the context of the total market value, rather than as a separate item. Certainly, however, the witness testifying should not be so constricted that he cannot talk in terms of the quantity of minerals present, the current market price for such minerals, the commercial possibilities for the tract of land in question, the difficulty of extraction of the minerals, and such other factors which enter into a consideration of market value of the entire tract.

Arkansas holds that it is within the discretion of the trial judge to permit the jury to view the property being condemned[85] and that it is proper for the trial judge to view the property involved in order to enable him to better understand and evaluate the testimony of witnesses.[86] This is true in every jurisdiction, and it is the better practice to allow the judge or jury to view the surrounding land also.[87]

The value of timber growing on land is a proper element to be considered in arriving at market value,[88] and this Arkansas view is in accord with the view generally that all natural assets of real property should be considered in determining market value.[89]

VIII. BENEFITS.

A. General and Special Benefits.

The courts draw a distinction between general and special benefits, placing in the "special" category those benefits which result in increases in value of particular properties directly affected by the taking and classifying as "general" those benefits that accrue generally to the public at large.[1] Arkansas holds that special benefits accruing to the land of a particular owner may be set off against the damages to the land.[2] However, general benefits should not be considered in assessing damages since it would be unjust to charge the owner whose property has been taken with benefits he receives in common with other landowners whose property is not taken.[3] The question of whether the benefits are "special" or "general" is a question of fact.[4] This seems to be a reasonable and fair manner of dealing with the problem.

B. Property Taken by the State.

Where the public use for which a portion of land is taken so enhances the value of the remainder as to make it of greater value than the whole was before the taking, the owner thereby receives his just compensation and benefits. The benefits which fall into such category, however, must be those which are local, peculiar, and special to the owner's land in order for this doctrine to apply.[5] An exception to this rule is that Art. 12, §§ 9, of the Arkansas Constitution contemplates that benefits will not be considered when a private corporation is condemning land.[6]

C. Property Taken by Local Improvement District.

Where property is taken for a proposed public improvement which is purely a local improvement and is to be paid for by special assessments, Arkansas holds that there should not be a deduction of benefits to the remainder of the owner's property.[7] The reason for this is that the owner would be paying for benefits by the assessments which are levied against his property anyway. To credit them against his compensation would amount to a deprivation of just compensation.

D. Property Taken by Private Corporations.

As mentioned previously, where private property is condemned by a private corporation, the Arkansas Constitution requires that benefits not be subtracted from the consideration.[8] The landowner must be paid in money and cannot be compelled to accept the estimated enhancement in value of his remaining property.[9]

IX. INTEREST AND COSTS PAYABLE ON AWARD.

A. Interest.

When payment of damages is postponed, the right to interest from the time payment ought to have been made until it is actually made is a generally recognized right. There is no right of interest where compensation is made before the taking. There must be a fixed point of time when the interest begins to accrue, and this point of time is generally fixed by statute although the point of time cannot be later than the time of actual disposition.[1]

In Arkansas, a landowner may recover interest on a judgment from the date of entry upon the land by the Highway Commission until the judgment is paid, the calculation of interest being based on the value of the land.[2] Our statute in Arkansas provides that in cases of condemnation by the State Highway Commission, the landowner shall be paid interest at the rate of six per cent on the amount finally awarded as the value of the property.[3] This interest is to extend from the date of surrender to the date of payment but is not allowed on money paid into court. Neither the cases nor the statute expressly say that interest should be allowed on damages incurred other than through the actual taking of property.[4] The rule which allows the landowner interest from the date of the filing of the condemnation proceedings applies only where property is actually taken.[5]

Arkansas holds that if a landowner compels the Highway Commission to deposit more money than the land is ultimately determined to be worth, and the landowner withdraws the deposit, the State may charge six per cent interest for the use of the excess money.[6] This type of case has probably been rendered moot, however, by Act 11 of the Arkansas Acts of 1963, which provides that the landowner may not withdraw any additional deposit that the Highway Commission is compelled to make over and above the amount of the original deposit. Conceivably, the original deposit could be excessive, but this seems unlikely.

Certainly, the landowner should receive interest on the judgment from the date he loses use of his land. If the code is to provide for entry on the land prior to judgment, the interest should run from that date as the Arkansas cases hold. Otherwise, interest should run from the date of the judgment itself. There seems to be no sound reason why the landowner should not have use of the full amount deposited, but it is only fair that he pay interest on the excess in the event of a judgment for less than the total amount of the deposit if he has had use of it.

B. Costs.

The allowance of costs is purely statutory, and in the absence of a statute the fees of expert witnesses cannot be charged against the losing party.[7] When the only issue is the value of the land, the owner

should not be compelled to pay the cost of a proceeding brought for the purpose of taking his property. However, in an unsuccessful contest of the validity of the taking, the cost may be taxed against the landowner.[8] Where a landowner wrongfully demands and obtains a judgment for fees or expenses to which he is not entitled, the cost of appeal may be taxed against him.[9]

The general rule is that these matters are purely statutory with respect to the award of costs although it is often held that the owner may be compelled to pay costs where he unsuccessfully contests the validity of the taking.[10] Arkansas is in accord with the general rule. Looking toward the code, it has previously been stated that costs and attorneys' fees should be assessed against the State in situations in which the condemnation proceeding is discontinued after it is begun but before judgment. The Arkansas cases are proper in stating that the owner should not be compelled to pay the cost where the only issue is land value, but that the landowner should have to pay the cost where he contests the validity of the proceeding and loses.

X. REMEDIES OF LANDOWNER WHEN COMPENSATION IS NOT TENDERED.

A. Limitations.

The Statute of Limitations for an action for damage to real property is important only when an entity subject to suit has taken or damaged the land. Thus, if the action is to recover for damage caused by a levee or drainage district, the Statute of Limitations is one year.[1] An action for damage caused by a sewer district must be brought within three years.[2] An action against a railroad corporation (and presumably any private corporation) must be brought within seven years.[3] Where the State or an agency thereof has taken the property, the landowner may not sue for damages.[4] The landowner's remedy is by injunction,[5] and the action must be brought before the agency has made substantial improvements.[6]

The code should provide a uniform Statute of Limitations for suits against improvement districts, private corporations, and the like. A three-year statute of limitations would seem appropriate.

B. Actions for Damages.

A landowner cannot bring suit against the Highway Commission for damages since such a proceeding would be a suit against the State and prohibited by Art. 5, § 20 of the Arkansas Constitution. The landowner is limited to filing an administrative claim for relief.[7] He may, however, enjoin the State or Commission from taking or injuring his property until damages have been paid or provision for payment made.[8] It has also been held that the State cannot be made a defendant in a mortgage foreclosure proceeding, where a portion of the mortgaged premises had been taken by the Highway Commission without notice or proceedings in favor of the mortgagee.[9] These rules, however, do not prevent the Highway Commission from suing in condemnation proceedings, which makes it subject to the same restrictions as a private individual and permits judgment to be entered against it.[10]

The rules with regard to the State do not apply, however, to improvement districts. Actions for damages may be brought against improvement districts.[11]

Since the State's constitutional prohibition against suits by the landowner against the State cannot be corrected in the Highway Code, there seems to be no need to consider this further from the standpoint of the code. By proper administrative procedure for condemnation matters, which would be applicable to the State and all agencies, districts, towns, subdivisions, etc., there would seem no need to be concerned about the rights of landowners to sue. Under such a procedure, a prescribed method of condemnation would be followed, and no land could be taken without affording an adequate remedy to the landowner.

With respect to private corporations, an Arkansas Statute[12] gives a landowner the right to sue railroads which have taken land without paying compensation, by bringing suit at any time before the seven-year statute of limitations has run.[13]

C. Ejectment and Estoppel.

If a railroad takes more land than it can legally take, the landowner's remedy is an action for ejectment from the excess.[14] Ejectment may be maintained at any time before title is acquired by adverse possession or continued acquiescence on the part of the landowner amounts to estoppel.[15] One difficulty in this area is the estoppel rule, which is that if a landowner fails to assert his right to prohibit the Highway Commission from taking his property until payment of compensation and permits the State to occupy his property before compensating him, he is estopped to coerce compensation by retaking the property.[16] Moreover, one who permits a railroad corporation to construct a road bed is estopped to eject the company and is restricted to an action for damages.[17] These difficulties can be cleared up by providing a mandatory procedure to be followed in eminent domain situations.

D. Injunctions.

Although the State is immune from suits for damages, a landowner may enjoin the State from taking or injuring his property until damages have been paid or provision for payment made.[18] An injunction will not lie, however, after property has been taken and substantial improvements made thereon.[19] We have previously commented in this paper on the difficulty in connection with counties. To maintain an injunction in a situation involving the county procedure, the landowner must allege and prove that the county is insolvent and cannot pay the damages suffered.[20] Injunctive relief may also be obtained against private corporations unless the petition is filed too late.[21]

E. Mandamus.

A writ of mandamus may not be used to compel the Highway Commission to institute condemnation proceedings since such a proceeding would simply have the object of forcing the Highway Commission into a position where a claim for damages could be asserted against it, which is directly prohibited by Art. 5, § 20 of the Arkansas Constitution.[22] Mandamus will lie, however, to force a Court to exercise jurisdiction where the Court has made an erroneous decision of law, and there is no specific remedy by appeal.[23] Writs will also lie to compel the State auditor to pay compensation assessed in condemnation proceedings.[24]

The rule is universal that a State, by virtue of its sovereignty, is immune from suit unless it consents thereto. Its susceptibility to suit is ordinarily predicated upon a contractual obligation. The

tortious acts of its agents do not subject it to liability.[25]

There is no difference, however, in the liability of a municipal corporation and a private corporation where the injury amounts to a taking and where the statutes authorizing such injury do not provide a remedy. The same is true where injury to property is incidental to activity authorized by the Legislature, even though landowners are injured and the injury is of such character as to constitute an actionable nuisance at common law as between landowners. Where the Legislature fails to provide a remedy, a landowner may have the taking enjoined or may recover the land by ejectment or may recover damages in an action for trespass.[26]

It is generally well settled that where land is wrongfully taken, under the color of eminent domain, the owner may recover possession in an action of ejectment.[27]

Many jurisdictions treat the passive submission of a landowner to the erection of valuable improvements upon his land as a waiver of his constitutional right to exclusive use of his property.[28] Nichols says that an unfortunate result of the constitutional requirement that compensation be paid in advance and condemnation proceedings be followed is that these proceedings have been abandoned in many jurisdictions, resulting in the waiver mentioned.[29] Nichols believes that a corporation should be held to have acted at its peril in all situations where it acquires property and that the ultimate effect of requiring corporations to comply with the law and to respect the property rights of ordinary individuals cannot fail to be more beneficial to the public interest than the continued existence of a public work.[30]

It is the universal rule that where an unlawful entry upon private land is undertaken or threatened, and the landowner has no opportunity to contest such entry, a court of equity will restrain the entry.[31] Where there is, in a constitutional sense, a taking of land without legislative provision for compensation and without exercise of eminent domain by a corporation, an injunction will issue as a matter of course. Where there is a constitutional provision that compensation shall be paid in advance, the taking is enjoined until this deficiency is overcome.[32]

The Arkansas law on this point is fairly orthodox, and the main problem seems to be to provide an administrative procedure which negates the necessity for consideration of the problems of injunction, estoppel, waiver, and the like. The possibility of a corporation's ignoring this procedure could be eliminated by a statement in the code that any property acquired in a manner contrary to the procedure provided therein would not be effective to pass title and that waiver, estoppel, laches, and adverse possession would not apply to deprive the landowner of his rights.

CONCLUSION

This paper illustrates that the legal decisions involving eminent domain in Arkansas are fairly orthodox, for the most part, and in fact some Arkansas decisions are leading cases in this field. The greatest problem in eminent domain in Arkansas, and the one to which the code can best direct its attention, is the procedural problem with regard to condemnation suits. Arkansas' statutes present a patchwork of different condemnation proceedings which may be pursued by different bodies or agencies, with different modes or procedure and different statutes of limitation. There is no sound reason why there should not be a single procedure applicable to all condemnation proceedings, regardless of the agency or body involved. The only possible exceptions to this rule are created by the Arkansas Constitution, in that (1) jury trials are required in condemnation proceedings brought by private corporations, and (2) the constitutional provision granting county courts exclusive original jurisdiction over roads may necessitate alternate jurisdiction in the County Court over County condemnation actions although this provision has been held not to apply to condemnation. It would be preferable to require the County to proceed in the same Court as the State, but if it is concluded that the County should still be permitted to proceed in the County Court, then the condemnation provisions for that Court should be identical to the regular code provisions. The constitutional provision itself (Art. 7, § 28) should be repealed.

The procedure adopted should be one which makes the landowner a party and gives adequate notice to him in the very beginning. It should bear some similarity to the procedure in other civil actions in which the defendant is served with summons and given a period of time in which to respond. We have previously discussed certain specific allegations which should be contained in the petition (description of the land involved, the owners, the purpose of the action, the value of the property, any disability -- such as incompetency -- the owners may be under, and other appropriate statements). The defendants should be served with notice. The defendants should be required to assert, within a given period of time, any defenses they may have. A deposit should be made by the condemnor, subject to increase by the Court. The code should provide for the time when title vests and entry may be made (subject to the right of the Court to enjoin in the event an issue is raised such as the right to condemn or condemnation for a private purpose or the like). Without elaborating on other details mentioned previously in this paper, suffice it to say that a mandatory procedure should be developed which affords adequate notice to landowners and sufficiently protects the rights of landowners while making ample provision for the condemnor to accomplish its purposes in an expeditious and efficient manner.

It is recommended that as a part of this procedure, jury trials be abandoned in condemnation cases except as constitutionally required in the case of a private corporation. Whether the Court which decides these cases is the Circuit or Chancery Court is not as important as the necessity for obtaining a fair adjudication of the award, based upon an

impartial evaluation of the evidence. This is not effectively being accomplished by juries at the present time.

Where condemnation proceedings are instituted, an answer is filed, and the proceedings are discontinued prior to final judgment, the landowner involved should recover his costs and attorneys' fees. Moreover, no discontinuance should be allowed following the entering of final judgment. Appeals would be handled as in all other civil cases.

The establishment of a uniform procedure would eliminate many problems, the foremost being those with respect to notice and lack of procedural due process and those problems created by the inability of the landowner to obtain payment of compensation. If an adequate deposit were made in the very beginning, this difficulty would not exist.

The code should also spell out the manner in which compensation is to be measured and the various elements to be taken into consideration. Fair market value should be the general standard, and the "before and after rule" should be followed in all situations involving a partial taking. We will not again go into the various elements to be considered in determining value, but everything which may afford an appropriate indication of the true worth of the property should be taken into account, while those elements which are speculative, misleading, or irrelevant should be discarded.

In summation, the major problems in the Arkansas law of eminent domain are created by procedural defects rather than substantive errors. The code can best address itself to correction of this type of situation and at the same time codify the best of the substantive rules pertaining to the measurement of value. In so doing, the code can provide a major service to the people of Arkansas.

FOOTNOTES

I.

1 - Young v. Gurdon, 169 Ark. 399, 275 S.W. 890 (1925)

2 - Cairo & Fulton R.R. v. Turner, 31 Ark. 494 (1876)

3 - Ex parte Martin, 13 Ark. 198 (1853)

4 - 1 Nichols, Eminent Domain, p. 52

5 - Art. 2, § 22; Art. 2, § 23; Art. 12, § 9

6 - 1 Nichols, pp. 30-31

7 - 1 Nichols, pp. 33-34

8 - Little Rock Junction R.R. Co. v. Woodruff, 49 Ark. 381, 5 S.W. 792 (1887)

9 - 1 Nichols, p. 34

10 - 1 Nichols, pp. 38-39

11 - 1 Nichols, § 1.3, p. 50

12 - Art. II, § 23

13 - Munn v. Illinois, 94 U.S. 113 (1876); Taylor v. The Governor, 1 Ark. 27 (1837)

14 - 1 Nichols, § 3.12, p. 201

15 - Georgia v. Chattanooga, 264 U.S. 472, 68 L. Ed. 796, 44 S. Ct. 369 (1924)

16 - Mitchell v. Harmony, 13 How. 115, 14 L. Ed. 75 (1851); Hooe v. U.S., 218 U.S. 322, 54 L. Ed. 1374, 33 S. Ct. 1019 (1910); 1 Nichols § 3.2 pp. 203-204

17 - 1 Nichols, § 3.21, pp. 207-209

18 - Hogue v. Housing Authority of N.L.R., 201 Ark. 263, 144 S.W.2d 49 (1940)

19 - McClintock v. Bovay, 163 Ark. 388, 260 S.W. 395 (1924); 1 Nichols, § 3.222, p. 250

20 - Little Rock Junction R.R. v. Woodruff, 49 Ark. 381, 5 S.W. 792 (1887); 1 Nichols, § 3.23, p. 260

21 - McClintock v. Bovay, 163 Ark. 388, 260 S.W. 395 (1924)

22 - Gregory v. Oklahoma - Miss. R. Products Lines, Inc. 223 Ark. 668, 267 S.W.2d 953 (1954); 1 Nichols § 3.23, p. 264

23 - Patterson Orchard Co. v. Southwest Ark. Utility Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929); 1 Nichols, § 3.23 (3), p. 267

24 - Newport Levee Dist. v. Price, 148 Ark. 122, 229 S.W. 12 (1921); 1 Nichols, § 3.211 p. 217

25 - Arkansas State Hwy. Comm'n v. Saline County, 205 Ark. 860, 171 S.W.2d 60 (1943); 1 Nichols § 3.21, pp. 213-215

26 - City of Little Rock v. Sawyer, 228 Ark. 516, 309 S.W.2d 30 (1958); See similarly, City of Tacoma v. Taxpayers of Tacoma, 307 P.2d 567 (1957)

27 - Clear Creek Oil & Gas Co. v. Ft. Smith Spelter Co., 148 Ark. 260, 230 S.W. 897 (1921); Lakehead Pipe Line Co. v. Dehn, 64 N.W.2d 903 (1954) (Mich.)

28 - 2 Nichols, § 7.1 p. 418 et seq.; Cloth v. Chicago R. I. & Pac. Ry. Co., 97 Ark. 86, 132 S.W. 1005 (1910)

29 - 2 Nichols, § 7.1, p. 422, lists eight states.

30 - 2 Nichols, § 7.1, pp. 421-422

31 - 2 Nichols, § 7.1, pp. 423-428

32 - Railway Company v. Petty, 57 Ark. 359, 21 S.W. 884 (1893)

33 - Hampton v. Arkansas State Game & Fish Comm'n, 218 Ark. 757, 238 S.W.2d 950 (1951); See similarly, 2 Nichols, § 7.1, p. 429

34 - 2 Nichols, § 7.2 pp. 430-433

35 - Cloth v. Chicago R. I. & P. Ry. Co., 97 Ark. 86, 132 S.W. 1005 (1910) Ozark Coal Co. v. Pennsylvania Anthracite R.R. Co., 97 Ark. 495, 134 S.W. 634 (1911)

36 - 2 Nichols, § 7.2 (2), pp. 433-437

37 - 103 Ark. 452, 146 S.W. 110 (1912)

38 - 2 Nichols, § 7.2 (3), pp.437-438

39 - 169 Ark. 399, 275 S.W. 890 (1925)

40 - 2 Nichols, § 7.4 (1), pp. 470-472

41 - 2 Nichols, § 714 (1), pp. 474-475

42 - Butler Co. R.R. Co. v. St. Louis, Lennett & S. R.R. Co., 132 Ark. 426, 200 S.W. 1007 (1918); Cloth v. Chicago R. I. & Pac. Ry. Co., 97 Ark. 86, 132 S.W. 1005 (1910); 2 Nichols, § 7.222, p. 447

43 - Nichols, § 4.11, p. 373, citing among other cases, Greene County v. Hayden, 175 Ark. 1067, 1 S.W.2d 803 (1928)

44 - 1 Nichols, § 4.11 (2), pp. 377-380

45 - 1 Nichols, § 4.11 (3), p. 383, citing McKennon v. St. Louis, I. M. & So. Ry. Co., 69 Ark. 104, 61 S.W. 383 (1901)

46 - Gray v. Ouachita Creek Watershed Dist., 234 Ark. 181, 351 S.W.2d 142 (1961)

47 - Burford v. Upton, 232 Ark. 456, 338 S.W.2d 929 (1960)

48 - Gregory v. Okla. - Miss. R. Products Lines, Inc., 223 Ark. 668, 267 S.W. 2d 953 (1954); Wollard v. Arkansas State Hwy. Comm'n, 220 Ark. 731, 249 S.W.2d 564 (1952)

49 - 1 Nichols, § 1.42, p.66

50 - Treigle v. Acme Homestead Assn., 297 U. S. 189, 80 L. Ed. 575, 56 S. Ct. 408 (1936); 1 Nichols, § 1.42, pp. 68-69

51 - Arkansas State Hwy. Comm'n v. Union Planters National Bank, 231 Ark. 907, 333 S.W.2d 904 (1960)

52 - Arkansas State Hwy. Comm'n v. Anderson, 184 Ark. 763, 43 S.W.2d 356 (1931)

53 - Shellnut v. Arkansas State Game & Fish Comm'n, 222 Ark. 25, 258 S.W.2d 570 (1953)

54 - West Helena v. Bockman, 221 Ark. 677, 256 S.W.2d 40 (1953); City of Little Rock v. Sun Building & Development Co., 199 Ark. 333, 134 S.W.2d 582 (1939)

55 - City of Ft. Smith v. Van Zandt, 197 Ark. 91, 122 S.W.2d 187 (1938)

56 - Kansas City So. Ry. Co. v. Mena, 123 Ark. 323, 185 S.W. 290 (1916); St. Louis & S. F. Ry. v. Fayetteville, 75 Ark. 534, 87 S.W. 1174 (1905)

57 - Farris v. Arkansas State Game & Fish Comm'n, 228 Ark. 776, 310 S.W.2d 231 (1958)

58 - West Helena v. Bockman, 221 Ark. 677, 256 S.W.2d 40 (1953)

59 - Murray v. Menefee, 20 Ark. 561 (1859)

60 - Arkansas State Hwy. Comm'n v. Anderson, 184 Ark. 763, 43 S.W.2d 356 (1931)

61 - 1 Nichols, § 1.42, p. 70

62 - 1 Nichols, § 1.42 (7), p. 75

63 - Waldrop, Collector v. Kansas City So. Ry., 131 Ark. 453, 199 S.W. 369 (1917)

64 - 1 Nichols, § 1.41 (2), p. 62

65 - Tennessee Gas Transmission Co. v. State, 232 Ark. 156, 335 S.W.2d 312 (1960)

66 - Lindwood & Auburn Levee Dist. v. Arkansas, 121 Ark. 489, 181 S.W. 892 (1915)

67 - Schmidt v. Drainage Dist. # 17, 140 Ark. 541, 215 S.W. 614 (1919)

68 - Stockton v. Baltimore & N. Y. R. Co., 140 U. S. 699; 35 L. Ed. 603, 11 S. Ct. 1028 (1891); U. S. v. Forty Acres of Land, 24 F. Supp. 390 (1938)

69 - I Nichols, § 2.22, p. 166

70 - Schmidt v. Drainage Dist. No. 17, 140 Ark. 541, 215 S.W. 614 (1919)

71 - St. Louis & S. F. Ry. v. Fayetteville, 75 Ark. 534, 87 S.W. 1174 (1905)

72 - 1 Nichols, § 2.22, p. 132

II.

1 - 6 Nichols, § 24.1, pp. 1-2

2 - Beedeville Special School Dist. #28 v. Bone, 218 Ark. 253, 236 S.W.2d 65 (1951); 6 Nichols, § 24.1 (1), p. 3

3 - Beedeville Special School Dist. #28 v. Bone, 218 Ark. 253, 236 S.W.2d 65 (1951); 6 Nichols, § 26.1, p. 105. The Bone case states that the only issue is the value of the property.

4 - Lindwood & Auburn Levee Dist. v. State, 121 Ark. 489, 181 S.W. 892 (1915); State ex rel. Arkansas W. Ry. v. Rowe, 69 Ark. 642, 65 S.W. 463 (1901)

5 - 6 Nichols, § 24.1 (1), p. 4

6 - Beedeville Special School Dist. #28 v. Bone, 218 Ark. 253, 236 S.W.2d 65 (1951)

7 - McClintock v. Bovay, 163 Ark. 388, 260 S.W. 395 (1924)

8 - St. Louis, I. M. & So. Ry. v. Faisst, 99 Ark. 61, 137 S.W. 815 (1911)

9 - Brown v. Wyandott & So. E. Ry., 68 Ark. 134,56 S.W. 862 (1900)

10 - Bentonville R.R. v. Stroud, 45 Ark. 278 (1885)

11 - McClintock v. Bovay, 163 Ark. 388, 260 S.W. 395 (1924)

12 - Ark. Stats. Sec. 35-801 et seq.

13 - Ark. Stats. Sec. 35-702

14 - Ark. Stats. Sec. 35-901 et seq.

15 - Ark. Stats. Sec. 35-1101 et seq.

16 - Ark. Stats. Sec. 35-1201 et seq.

17 - Ark. Stats. Sec. 35-1101 et seq.

18 - Ark. Stats. Sec. 35-301 et seq.

19 - Ark. Stats. Sec. 35-601 et seq.

20 - Ark. Stats. Sec. 35-501 et seq.

21 - Ark. Stats. Sec. 35-901 et seq.

22 - Ark. Stats. Sec. 35-601 et seq.

23 - Ark. Stats. Sec. 35-601 et seq.

24 - Ark. Stats. Sec. 35-1001 et seq.

25 - Ark. Stats. Sec. 35-401 et seq.

26 - Ark. Stats. Sec. 35-201 et seq.

27 - Ark. Stats. Sec. 35-201 et seq.

28 - Ark. Stats. Sec. 35-208 et seq.

29 - State ex rel. Arkansas W. Ry. v. Rowe, 69 Ark. 642, 65 S.W. 463 (1901)

30 - 6 Nichols, § 26.52, p. 210; See Ark. Stats. Sec. 76-533

31 - State v. Rowe, 69 Ark. 642, 65 S.W. 463 (1901)

32 - Road Dist. #6 of Laurence County v. Hall, 140 Ark. 241, 215 S.W. 262 (1919)

33 - Cazort v. Road Imp. Dist. #3, 175 Ark. 570, 299 S.W. 1014 (1927)

34 - Ark. Stat. Sec. 76-917

35 - See Miller County v. Beasley, 203 Ark. 370, 156 S.W.2d 791 (1941), for the rule discussed.

36 - See Miller County v. Beasley, 203 Ark. 370, 156 S.W.2d 791 (1941)

37 - State Hwy. Comm'n v. Hammock, 201 Ark. 927, 148 S.W.2d 324 (1941)

38 - Dowdle v. Raney, 201 Ark. 836, 147 S.W.2d 42 (1941)

39 - Madison County v. Nance, 182 Ark. 775, 32 S.W.2d 1073 (1930)

40 - Greene County v. Knight, 174 Ark. 618, 297 S.W. 861 (1927)

41 - Independence County v. Lester, 173 Ark. 796, 293, S.W. 743 (1927)

42 - Justice v. Greene County, 191 Ark. 252, 85 S.W.2d 728 (1935)

43 - Ark. Stats. Sec. 76-510 and 76-511

44 - Arkansas State Hwy. Comm'n v. Palmer, 222 Ark. 603, 261 S.W.2d 772 (1953)

45 - Arkansas State Hwy. Comm'n v. Pulaski County, 205 Ark. 395, 168 S.W.2d 1098 (1943)

46 - Arkansas State Hwy. Comm'n v. Croom, 225 Ark. 312, 280 S.W. 2d 887 (1955)

47 - Hot Spring County v. Bowman, 229 Ark. 790, 318 S.W.2d 603 (1958); Arkansas State Hwy. Comm'n v. Palmer, 222 Ark. 603, 261 S.W.2d 772 (1953)

48 - Arkansas State Hwy. Comm'n v. Means, 192 Ark. 628, 93 S.W.2d 314 (1936)

49 - Arkansas State Hwy. Comm'n v. Palmer, 222 Ark. 603, 261 S.W. 2d 772 (1953)

340

50 - Arkansas State Hwy. Comm'n v. Dobbs, 232 Ark. 541,/S.W.2d 283 (1960)

51 - Arkansas State Hwy. Comm'n v. Cook, 233 Ark. 534, 345 S.W.2d 632 (1961)

52 - Arkansas State Hwy. Comm'n v. Cook, 233 Ark. 534, 345 S.W.2d 632 (1961)

53 - Arkansas State Hwy. Comm'n v. Dobbs, 232 Ark. 541, 350 S.W.2d 283 (1960)

54 - Arkansas State Hwy. Comm'n v. Bollinger, 230 Ark. 877, 327 S.W.2d 381 (1959)

55 - Fulton County v. Barham, 181 Ark. 593, 27 S.W.2d 87 (1930)

56 - State Hwy. Comm'n v. Saline County, 205 Ark. 860, 171 S.W.2d 60 (1943)

57 - Wollard v. Arkansas State Hwy. Comm'n, 220 Ark. 731, 249 S.W.2d 564 (1952)

58 - Arkansas State Hwy. Comm'n v. Pulaski County, 205 Ark. 395, 168 S.W.2d 1098 (1943)

59 - See the strong language on notice in 1 Nichols, § 4.103 and 4.103 (1) et seq., p. 329 et seq.

60 - See Craig v. Greenwood Dist. of Sebastian County, 91 Ark. 274, 121 S.W. 280 (1909)

61 - Beedeville Special School Dist. #28 v. Bone, 218 Ark. 253, 236 S.W.2d 65 (1951)

62 - Arkansas State Hwy. Comm'n v. Palmer, 222 Ark. 603, 261 S.W.2d 772 (1953)

63 - Gregory v. Okla. - Miss. R. Products Lines, Inc., 223 Ark. 668, 267 S.W.2d 953 (1954)

64 - City of El Dorado v. Kidwell, 236 Ark. 905, 370 S.W.2d 602 (1963)

65 - Greene County v. Hayden, 175 Ark. 1067, 1 S.W.2d 803 (1928)

66 - Gregory v. Okla. - Miss. River Products Lines, Inc., 223 Ark. 668, 267 S.W.2d 953 (1954)

67 - Beedeville Special School Dist. #28 v. Bone, 218 Ark. 253, 236 S.W.2d 65 (1951)

68 - Selle v. City of Fayetteville, 207 Ark. 966, 184 S.W.2d 58 (1944)

69 - Gilbert v. Shaver, 91 Ark. 231, 120 S.W. 833 (1909)

70 - City of El Dorado v. Kidwell, 236 Ark. 905, 370 S.W.2d 602 (1963)

71 - Wilson v. Interstate Construction Co., 178 Ark. 482, 10 S.W.2d 908 (1928)

72 - Dickson v. Board of Directors of Long Prairie Levee Dist., 151 Ark. 22, 235 S.W. 45 (1921)

73 - Gray v. Ouachita Creek Watershed Dist., 234 Ark. 181, 351 S.W.2d 142 (1961)

74 - Butler County R.R. Co. v. St. Louis, Kennet & S.E. R. R., 132 Ark. 426, 200 S.W. 1007 (1918)

75 - Mountain Park Terminal Ry. v. Field, 76 Ark. 239, 88 S.W. 897 (1905)

76 - Arkansas State Hwy. Comm'n v. Bollinger, 230 Ark. 877, 327 S.W.2d 381 (1959)

77 - Arkansas State Hwy. Comm'n v. Marlar, 236 Ark. 385, 366 S.W.2d 191 (1963)

78 - Ft. Smith & Van Buren Dist. v. Scott, 103 Ark. 405, 147 S.W. 440 (1912); See also Bentonville R.R. v. Stroud, 45 Ark. 278 (1885); St. Louis I. M. & So. Ry. v. B. Faisst Co., 99 Ark. 61, 137 S.W. 815 (1911)

79 - 6 Nichols, § 26.13, pp. 149-150

80 - Bradley v. Keith, 229 Ark. 326, 315 S.W.2d 13 (1958)

81 - See Ark. Stat. § 35-906 (Repl. 1957)

82 - Bradley v. Keith, 229 Ark. 326, 315 S.W.2d 13 (1958)

83 - Arkansas Central R.R. v. Smith, 71 Ark. 189, 71 S.W. 947 (1903)

84 - Fayetteville & L. R. Ry. v. Hunt, 51 Ark. 330, 11 S.W. 418 (1888)

85 - Urban Renewal Agency of Harrison v. Hefley, 237 Ark. 39, 371 S.W.2d 141 (1963)

86 - 6 Nichols, § 26.13, pp. 150-151, citing among other cases, Selle v. Fayetteville, 207 Ark. 966, 184 S.W.2d 58 (1944)

87 - Arkansas State Hwy. Comm'n v. Thomas, 231 Ark. 98, 328 S.W.2d 357 (1959) ; For the general rule, see 6 Nichols, §26.1132, p. 132 et seq.

88 - Hare v. Ft. Smith & W. R. R. Co., 104 Ark. 187, 148 S.W. 1038 (1912)

89 - Hare v. Ft. Smith & W. R. R. Co., 104 Ark. 187, 148 S.W. 1038 (1912)

90 - Arkansas State Hwy. Comm'n v. Thomas, 231 Ark. 98, 328 S.W.2d 357 (1959)

91 - Bentonville R. R. v. Stround, 45 Ark. 278 (1885)

92 - Arkansas State Hwy. Comm'n v. Thomas, 231 Ark. 98, 328 S.W. 2d 357 (1959)

93 - Missouri and North Ark. R. R. v. Chapman, 150 Ark. 334, 234 S.W. 171 (1921)

94 - 6 Nichols, § 24.4, p. 44

95 - Bentonville R. R. v. Stroud, 45 Ark. 278 (1885)

96 - White River Bridge Corp. v. State, 192 Ark. 485, 92 S.W. 2d 856 (1936)

97 - Madison County v. Nance, 182 Ark. 775, 32 S.W. 2d 1073 (1930)

98 - Board of Directors of St. Francis Levee Dist. v. Home Life & Accident Co., 176 Ark. 558, 3 S.W. 2d 967 (1928)

99 - Hare v. Ft. Smith & W. R. R. Co., 104 Ark. 187, 148 S.W. 1083 (1912)

100 - Little Rock & Ft. Smith R. R. v. Allister, 68 Ark. 600, 60 S.W. 953 (1901)

101 - Louisville N. O. & Texas R. R. v. Jackson, 123 Ark. 1, 184 S.W. 450 (1916). This case appears to be contrary in part, to Madison County v. Nance, 182 Ark. 775, 32 S.W.2d 1073 (1930)

102 - Little Rock & Ft. Smith R. R. v. Allister, 68 Ark. 600, 60 S.W. 953 (1901)

103 - Johnson v. Washington County, 179 Ark. 1116, 20 S.W.2d 179 (1929)

104 - Johnson v. Washington County, 179 Ark. 1116, 20 S.W.2d 179 (1929)

105 - Arkansas Real Estate Co., Inc. v. Arkansas State Hwy. Comm'n, 237 Ark. 1, 371 S.W.2d 1 (1963)

106 - Cannon v. Felsenthal, 180 Ark. 1075, 24 S.W.2d 856 (1930)

107 - Road Dist. #6 of Laurence County v. Hall, 140 Ark. 241, 215 S.W. 262 (1919)

108 - Cribbs v. Benedict, 64 Ark. 555, 44 S.W. 707 (1897)

109 - See notes II - 50 through 54, supra.

110 - 134 Ark. 121, 203 S.W. 260 (1918)

111 - Arkansas State Hwy. Comm'n v. Hammock, 201 Ark. 927, 148 S.W.2d 324 (1941); See also, Crawford County v. Simmons, 175 Ark. 1051, 1 S.W.2d 561 (1928); Cf., Arkansas State Hwy. Comm'n v. Cook, 233 Ark. 534, 345 S.W. 2d 632 (1961)

112 - State Life Insurance Co. of Indianapolis v. Arkansas State Hwy. Comm'n, 202 Ark. 12, 148 S.W.2d 671 (1941)

113 - 134 Ark. 121, 203 S.W. 260 (1918)

114 - Greene County v. Hayden, 175 Ark. 1067, 1 S.W.2d 803 (1928)

115 - Arkansas State Hwy. Comm'n v. Cook, 233 Ark. 534, 345 S.W.2d 632 (1961)

116 - Arkansas State Hwy. Comm'n v. Dean, 236 Ark. 488, 367 S.W.2d 107, (1963)

117 - Arkansas State Hwy. Comm'n v. Anderson, 234 Ark. 774, 354 S.W.2d 554 (1962)

118 - See Ark. Stats. Sec. 35-1101---35-1109

119 - Young v. Red Fork Levee Dist., 124 Ark. 61, 186 S.W. 604 (1916)

120 - Dickson v. Board of Directors of Long Prairie Levee Dist., 151 Ark. 22, 235 S.W. 45 (1921)

121 - Schmidt v. Drainage Dist. #17, 140 Ark. 541, 215 S.W. 614 (1919)

122 - Arkansas Eminent Domain Digest, § 2.83

123 - Arkansas State Hwy. Comm'n v. Dean, 236 Ark. 488, 367 S.W.2d 107 (1963)

124 - Arkansas State Hwy. Comm'n v. Dobbs, 232 Ark. 541, 340 S.W.2d 283 (1960)

125 - Hot Spring County v. Fowler, 229 Ark. 1050, 320 S.W.2d 269 (1959)

126 - State Hwy. Comm'n v. Holden, 217 Ark. 466, 231 S.W.2d 113 (1950)

127 - Hot Spring County v. Fowler, 229 Ark. 1050, 320 S.W.2d 269 (1959)

128 - Hot Spring County v. Fowler, 229 Ark. 1050, 320 S.W.2d 269 (1959)

129 - Arkansas State Hwy. Comm'n v. Cook 233, Ark. 534, 345 S.W.2d 632 (1961)

130 - Selle v. City of Fayetteville, 207 Ark. 966, 184 S.W. 58 (1944). See also Reynolds v. Louisiana, A. & M. Ry., 59 Ark. 171, 26 S.W. 1039 (1894)

131 - 6 Nichols, § 26.4 pp. 183-184

132 - 6 Nichols, § 26.4, pp. 184-185

133 - Selle v. Fayetteville, 207 Ark. 966, 184 S.W. 58 (1944)

134 - Pine Bluff & Western Ry. v. Kelly, 78 Ark. 83, 93 S.W.562 (1906)

135 - See 6 Nichols, § 26,42, p. 189

136 - 6 Nichols, § 26.42, p. 190

137 - 6 Nichols, § 26.42, p. 191

138 - 6 Nichols, § 26.42, p. 191

139 - Ark. Stats. Sec. 76-536

140 - See Hempstead County v. Gilbert, 182 Ark. 280, 31 S.W.2d 297 (1930)

141 - Hot Spring County v. Fowler, 229 Ark. 1050, 320 S.W.2d 269 (1959)

142 - Arkansas State Hwy. Comm'n v. Cook, 233 Ark. 534, 345 S.W. 632 (1961)

143 - Hot Spring County v. Fowler, 229 Ark. 1050, 320 S.W.2d 269 (1959)

144 - Hot Spring County v. Fowler, 229 Ark. 1050, 320 S.W.2d 269 (1959)

145 - Caladera v. Little Rock, Pulaski Drainage Dist. #2, 215 Ark. 167, 219 S.W.2d 759 (1949).

146 - See Carter v. Randolph County, 146 Ark. 221, 225 S.W. 297 (1920)

147 - See Nemier v. Bramlett, 103 Ark. 209, 146 S.W. 486 (1912)

148 - Arkansas, La. & Gulf Ry. v. Kennedy, 84 Ark. 364, 105 S.W. 885 (1907).

149 - Arkansas Real Estate Co., Inc. v. Arkansas State Hwy. Comm'n, 237 Ark. 1, 371 S.W.2d 1, (1963).

150 - Protho v. Williams, 147 Ark. 535, 229 S.W. 38 (1921)

151 - Arkansas State Hwy. Comm'n v. Light, 235 Ark. 808, 363 S.W.2d 134 (1962)

152 - Road District No. 6 of Lawrence County v. Hall, 140 Ark. 241, 215 S.W. 262 (1919)

153 - Art. 12, § 9, Ark. Const. of 1874

154 - Jahr, Eminent Domain, pp. 359-360

155 - See Ark. Stats. Sec. 76-535---76-538

156 - Ark. Stats. Sec. 76-541 (1963 Supp.)

157 - Ark. Stats. Sec. 76-533

158 - Jahr, p. 365

159 - 6 Nichols, § 26.51, p. 209

160 - 6 Nichols, 26.52, p. 210; Jahr, p. 367

161 - For a discussion of the function of the court in such a situation, see Jahr, pp. 365-366.

162 - Young v. Red Fork Levee District, 124 Ark. 61, 186 S.W. 604 (1916)

163 - Greene County v. Knight, 174 Ark. 618, 297 S.W. 861 (1927)

164 - Ark. Stat. Sec. 76-905

165 - Beck v. Biggers, 66 Ark. 292, 50 S.W. 514 (1899)

166 - Art. 12, § 9, Ark. Const. of 1874

167 - Young v. Red Fork Levee District, 124 Ark. 61, 186 S.W. 604 (1916)

168 - Dickerson v. Tri-County Drainage Dist., 138 Ark. 471, 212 S.W. 334 (1919)

169 - Little Rock & Ft. Smith R. R. v. McGehee, 41 Ark. 202 (1883)

III.

1 - Fulton Ferry & Bridge Co. v. Blackwood, 173 Ark. 645, 293 S.W. 2 (1927)

IV.

1 - 3 Nichols, § 9.2, p. 163, citing among other cases, Young v. Gurdon, 169 Ark. 399, 275 S.W. 890 (1925)

2 - 3 Nichols, § 9.2, pp.164-165

3 - 3 Nichols, § 9.2, p. 165

4 - 3 Nichols, § 9.2, pp. 165-166

5 - 3 Nichols, § 9.2 (2), pp. 168-169

6 - 3 Nichols, § 9.2 (1), pp. 166-167

7 - Jahr, p. 52

8 - Patterson Orchard Co. v. Southwest Ark. Utilities Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929)

9 - Patterson Orchard Co. v. Southwest Ark. Utilities Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929)

10 - Bracey v. St. Louis, S. F. & N. O. R. R., 79 Ark. 124, 95 S.W. 151, (1906)

11 - St. Louis & S. F. Ry. v. Tapp, 64 Ark. 357, 42 S.W. 667 (1897)

12 - Cathey v. A. P. & L. Co., 193 Ark. 92, 97 S.W.2d 624 (1936)

13 - Young v. Gurdon, 169 Ark. 399, 275 S.W. 890 (1925)

14 - St. Louis & F. F. Ry. Co. v. Fayetteville, 75 Ark. 534, 87 S.W. 1174 (1905)

15 - Hopewell School Dist. v. Rush, 179 Ark. 316, 15 S.W.2d 985 (1929)

16 - Ark. Stat. Sec. 19-2313

17 - Young v. Gurdon, 169 Ark. 399, 275 S.W. 890 (1925)

18 - Mobley Construction Co. v. Fox, 201 Ark. 646, 146 S.W.2d 905 (1941)

19 - State v. Earl, 233 Ark. 348, 345 S.W.2d 20 (1961)

20 - See Nichols, § 9.2 pp. 165-166

21 - Padgett v. A. P. & L. Co., 226 Ark. 409, 290 S.W.2d 426 (1956)

22 - Arkansas P. & L. Co. v. Morris, 221 Ark. 576, 254 S.W.2d 684 (1953)

23 - State v. Earl, 233 Ark. 348, 345 S.W.2d 20 (1961)

24 - Taylor v. Armstrong, 24 Ark. 102 (1863)

25 - See Ark. Stats. Secs. 76-734-540

26 - Ark. Stat. Sec. 76-536

27 - Arkansas, La. & G. Ry. v. Kennedy, 84 Ark. 364, 105 S.W. 885 (1907)

28 - Organ v. Memphis & L. R. R. R., 51 Ark. 235, 11 S.W. 96, (1888)

29 - Arkansas P. & L. Co. v. Morris, 221 Ark. 576, 254 S.W.2d 684 (1953); Texas, Ill. Natural Gas Pipeline Co. v. Lawhon, 220 Ark. 932, 251 S.W.2d 477 (1952); Patterson Orchard Co. v. Southwest Utilities Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929)

30 - Cathey v. Arkansas P. & L. Co., 193 Ark. 92, 97 S.W.2d 624 (1936); Southwestern Bell Tel. Co. v. Biddle, 186 Ark. 294, 54 S.W.2d 57 (1932). See also Padgett v. Arkansas P. & L. Co., 226 Ark. 409, 290 S.W.2d 426 (1956)

31 - See Patterson Orchard Co. v. Southwest Utilities Corp., 179 Ark. 1029, 18 S.W.2d 1028 (1929)

V.

1 - Young v. Gurdon, 169 Ark. 399, 275 S.W. 890 (1925); Madison County v. Nance, 182 Ark. 775, 32 S.W.2d 1073 (1930); See Nichols, § 8.1, p. 2

2 - State Life Ins. Co. of Indianapolis v. Arkansas State Hwy. Comm'n, 202 Ark. 12, 148 S.W.2d 671 (1941)

3 - Arkansas State Hwy. Comm'n v. Hammock, 201 Ark. 927, 148 S.W.2d 324 (1941)

4 - Arkansas State Hwy. Comm'n v. Kincannon, 193 Ark. 450, 100 S.W.2d 969 (1937)

5 - Board of Directors of St. Francis Levee Dist. v. Morledge, 231 Ark. 815, 332 S.W.2d 822 (1960); Staub v. Mud Slough Drainage Dist. No. 1, 216 Ark. 706, 227 S.W.2d 140 (1950)

6 - Fenolio v. Sebastian Bridge Dist., 133 Ark. 380, 200 S.W. 501 (1918)

7 - Joslin Mfg. Co. v. Providence, 262 U. S. 668 (1922); Cannon v. Felsenthal, 180 Ark. 1075, 24 S.W.2d 856 (1930)

8 - 3 Nichols, § 8.71, p. 121

9 - Southwestern Water Co., Inc. v. Merit, 224 Ark. 499, 275 S.W.2d 18 (1955)

10 - Justice v. Greene County, 191 Ark. 252, 85 S.W.2d 728 (1935). See also Miller County v. Beasley, 203 Ark. 370, 156 S.W.2d 791 (1941)

11 - Ark. Stats. Sec. 76-536 -- 76-541

12 - Rendered moot are: Arkansas State Hwy Comm'n v. Rich, 235 Ark. 858, 362 S.W.2d 429 (1962) and Arkansas State Hwy. Comm'n v. Light, 235 Ark. 808, 363 S.W.2d 134 (1962)

13 - Arkansas Real Estate Co., Inc. v. Arkansas State Hwy. Comm'n, 237 Ark. 1, 371 S.W.2d 1 (1963)

14 - Arkansas State Hwy. Comm'n v. Partain, 192 Ark. 127, 90 S.W.2d 968 (1936)

15 - 3 Nichols, § 8.5, pp. 17-26. Nichols cites Arkansas cases to support both views.

16 - Keith v. Drainage Dist., 183 Ark. 384, 36 S.W.2d 59 (1931); Missouri & N. Ark. R. R. v. Chapman, 150 Ark. 334, 234 S.W. 171 (1921)

17 - Caldarera v. Little Rock - Pulaski Drainage Dist. #1, 215 Ark. 167, 219 S.W.2d 759 (1949)

18 - City of Little Rock v. Moreland, 231 Ark. 996, 334 S.W.2d 229 (1960)

19 - Arkansas State Hwy. Comm'n v. Arkansas P. & L. Co., 235 Ark. 227, 359 S.W.2d 441 (1962), 231 Ark. 307, 330 S.W.2d 77 (1959)

20 - Watson v. Harris, 214 Ark. 349, 216 S.W.2d 784 (1949)

21 - Thibault v. McHaney, 119 Ark. 188, 177 S.W. 877 (1915)

22 - 2 Nichols, § 5.22 (2), pp. 31-32

23 - Arkansas State Hwy. Comm'n v. Thomas, 231 Ark. 98, 328 S.W.2d 367 (1959)

24 - Arkansas State Hwy. Comm'n v. Cochran, 230 Ark. 881, 327 S.W.2d 733 (1959). See also 2 Nichols, § 5.23, pp. 35-41

25 - Arkansas State Hwy. Comm'n v. Fox, 230 Ark. 287, 322 S.W.2d 81 (1959)

26 - St. Louis & S. F. Ry. Co. v. Fayetteville, 75 Ark. 534, 87 S.W. 1174 (1905). See also 2 Nichols, § 5.72, pp. 70-72

27 - Fulton Ferry & Bridge Co. v. Blackwood, 173 Ark. 645, 293 S.W.2d (1927)

28 - Desha v. Independence County Bridge Dist. #1, 179 Ark. 561, 18 S.W.2d 337 (1928)

29 - Arkansas State Hwy. Comm'n v. Stanley, 234 Ark. 428, 353, S.W.2d 173 (1962)

30 - Watson v. Harris, 214 Ark. 349, 216 S.W.2d 784 (1949)

31 - Keith v. Drainage Dist. #7, 183 Ark. 384, 36 S.W.2d 59 (1931)

32 - Springfield & Memphis Ry. v. Henry, 44 Ark. 360 (1884)

33 - North Arkansas Hwy. Imp. Dist. #1 v. Greer, 163 Ark. 141, 259 S.W. 380 (1924)

34 - Arkansas State Hwy. Comm'n v. Arkansas P. & L. Co., 235 Ark. 277, 359 S.W.2d 441 (1962); Arkansas State Hwy Comm'n v. Arkansas P. & L. Co., 231 Ark. 307, 330 S.W.2d 77 (1959)

35 - Padgett v. Arkansas P. & L. Co., 226 Ark. 409, 290 S.W.2d 426 (1956)

36 - Cottey v. Arkansas P. & L. Co., 193 Ark. 92, 97 S.W.2d 624 (1936)

37 - W. R. Wrape Stave Co. v. Arkansas State Game & Fish Comm'n, 215 Ark. 229, 219 S.W.2d 948 (1949)

38 - St. Louis & S. F. Ry. Co. v. Fayetteville, 75 Ark. 534, 87 S.W. 1174 (1905)

39 - Sewer Imp. Dist. #1 of Wynne v. Fiscus, 128 Ark. 250, 193 S.W. 521 (1917)

40 - Arkansas State Hwy. Comm'n v. Bingham, 231 Ark. 934, 333 S.W.2d 729 (1960)

41 - Van Buren v. Smith, 175 Ark. 697, 300 S.W. 397 (1927)

42 - El Dorado v. Scruggs, 113 Ark. 239, 168 S.W. 846 (1914)

43 - Arkansas State Hwy. Comm'n v. Fox, 230 Ark. 287, 322 S.W.2d 81 (1959)

44 - Kansas City So. Ry. v. Anderson, 88 Ark. 129, 113 S.W. 1030 (1908)

45 - Kansas City So. Ry. v. Anderson, 88 Ark. 129, 113 S.W. 1030 (1908)

46 - See Arkansas State Hwy. Comm'n v. Bingham, 231 Ark. 934, 333 S.W.2d 728 (1960); Arkansas Hwy. Comm'n v. Union Planters National Bank, 231 Ark. 907, 333 S.W.2d 904 (1960)

47 - Tuggle v. Tribble, 177 Ark. 296, 6 S.W.2d 312 (1928)

48 - Arkansas Hwy. Comm'n v. Union Planters National Bank, 231 Ark. 907, 333 S.W.2d 904 (1960)

49 - Arkansas State Hwy. Comm'n v. Ptak, 236 Ark. 105, 364 S.W.2d 794 (1963)

50 - Campbell v. Arkansas State Hwy. Comm'n, 183 Ark. 780, 38 S.W.2d 753 (1931)

51 - Sewer Improvement Dist. #1 of Sheridan v. Jones, 199 Ark. 534, 134 S.W.2d 551 (1939)

52 - Sewer Improvement Dist. #1 of Wynne v. Fiscus, 128 Ark. 250, 193 S.W. 521 (1917)

53 - Shellnut v. Arkansas State Game & Fish Comm'n, 225 Ark. 25, 258 S.W.2d 570 (1953)

54 - Garland Levee Dist. v. Hutt, 207 Ark. 784, 183 S.W.2d 296 (1944)

55 - Collom v. Van Buren County, 223 Ark. 525, 267 S.W.2d 14 (1954)

56 - Van Buren v. Smith, 175 Ark. 697, 300 S.W. 397 (1927)

57 - Arkansas State Hwy. Comm'n v. Arkansas P. & L. Co., 235 Ark. 277, 359 S.W.2d 441 (1962)

58 - Sharp v. Drainage Dist. #7, 164 Ark. 306, 261 S.W. 923 (1924)

59 - St. Francis Drainage Dist. v. Austin, 227 Ark. 167, 296 S.W.2d 668 (1956)

60 - Campbell v. Arkansas State Hwy. Comm'n, 183 Ark. 780, 38 S.W.2d 753 (1931)

61 - Selle v. Fayetteville, 207 Ark. 966, 184 S.W.2d 58 (1944)

62 - Alexander v. Temple, 172 Ark. 611, 290 S.W. 63 (1927)

63 - St. Francis Drainage Dist. v. Austin, 277 Ark. 167, 296 S.W.2d 668 (1956)

64 - Newgass v. St. Louis, Ark. & Tex. R.R., 54 Ark. 140, 155 S.W. 188 (1891)

VI.

1 - Scott v. State, 230 Ark. 766, 326 S.W.2d 812 (1959)

- Clark County v. Mitchell, 223 Ark. 404, 266 S.W.2d 831 (1954)

Hempstead County v. Huddleston, 182 Ark. 276, 31 S.W.2d 300 (1930)

See also 4 Nichols, § 12.2, p. 41, et seq; Jahr, § 71, p. 102.

2 - State ex. rel. Publicity and Parks Comm. v. Earl, 223 Ark. 348, 345 S.W.2d 20 (1961)

3 - Arkansas State Hwy. Comm'n v. Kennedy, 234 Ark. 89, 350 S.W.2d 526 (1961)

4 - Lazenby v. Ark. State Hwy. Comm'n, 231 Ark. 601, 331 S.W.2d 705 (1960); Baucum v. A. P. & L. Co. 179 Ark. 154, 15 S.W.2d 399 (1929); See also, Orgel, Valuation Under Eminent Domain, § 20, pg. 90, et seq.

5 - Baucum v. A. P. & L. Co., 179 Ark. 154, 15 S.W.2d 399 (1929)

6 - Arkansas State Hwy. Comm. v. Hood, 237 Ark. 202, 372 S.W.2d 387 (1963)

7 - This case is cited at length in 1 Orgel, § 20, p. 90; 4 Nichols, § 12.2 [1] p. 49; Jahr, § 70, p. 99.

8 - Orgel, § 20, p. 95

9 - Arkansas State Highway Comm'n v. Bryant, 233 Ark. 841, 349 S.W.2d 349 (1961)

10 - Lazenby v. Arkansas State Hwy. Comm'n, 231 Ark. 601, 331 S.W.2d 705 (1960)

11 - Magnolia Pipe Line Co. v. Arkansas State Game & Fish Comm'n, 218 Ark. 932, 240 S.W.2d 857 (1951)

12 - 1 Orgel, § 64, p. 290

13 - 1 Orgel, § 64, p. 291

14 - 1 Orgel, § 65, pp. 300-302

15 - 1 Orgel, § 64, p. 292. The state is Ohio: Ohio General Code, § 1053.

16 - Kansas City So. Try. v. Boles, 88 Ark. 533, 115 S.W. 375 (1908)

17 - Lazenby v. Ark. State Hwy. Comm'n, 231 Ark. 601, 331 S.W.2d 703 (1960)

18 - Arkansas State Hwy. Comm'n v. Union Planters Nat'l Bank, 231 Ark. 907, 333 S.W.2d 904 (1960); Malvern & Ouachita River R.R. v. Smith, 181 Ark. 626, 26 S.W.2d 1107 (1930)

19 - Herndon v. Pulaski County, 196 Ark. 284, 117 S.W.2d 1051 (1938)

20 - Texas & St. Louis Ry. v. Cella, 42 Ark. 528 (1884)

21 - Little Rock, Miss. R. & Tex. Ry. v. Allen, 41 Ark. 431 (1883)

22 - State ex rel. Publicity & Parks Comm'n v. Earl, 223 Ark. 348, 345 S.W.2d 20 (1961)

23 - 4 Nichols, § 12.314, p. 140 et seq.

24 - Buford v. Upton, 232 Ark. 456, 338 S.W.2d 927 (1960)

25 - Scott v. State, 230 Ark. 766, 326 S.W.2d 812 (1959)

26 - Orgel, § 81, p. 351

27 - Orgel, § 81, p. 353

28 - Orgel, § 83, p. 355 et seq.

29 - Ark. State Hwy. Comm'n v. Cochran, 230 Ark. 881, 327 S.W.2d 733 (1959)

30 - Scott v. State, 230 Ark. 766, 326 S.W.2d 812 (1959)

31 - Burford v. Upton, 232 Ark. 456, 338 S.W.2d 927 (1960)

32 - Gurdon & Ft. Smith R. R. v. Vaught, 97 Ark. 234, 133 S.W. 1019 (1911)

33 - Ft. Smith & Van Buren Dist. v. Scott, 103 Ark. 405, 147 S.W. 440 (1912)

34 - Desha v. Independence County Bridge Dist. #1, 176 Ark. 253, 3 S.W.2d 969 (1928)

35 - 1 Orgel, § 37, §. 172

36 - 1 Orgel, § 38, pp. 175-176

37 - 4 Nichols, § 12.1 [5], p. 40, and § 12.22 [2], p. 70

38 - 4 Nichols, § 12.22 [2], p. 71

39 - Ark. State Hwy. Comm'n v. Richards, 229 Ark. 783, 318 S.W.2d 605 (1958); Kansas City Southern Ry. v. Anderson, 88 Ark. 129 133 S.W. 1030 (1908)

40 - Ark. State Hwy. Comm. v. Carpenter, 237 Ark. 46, 371 S.W.2d 535 (1963)

41 - Kansas City Southern Ry. v. Boles, 88 Ark. 533, 115 S.W. 375 (1908)

42 - See 2 Nichols, § 5.81, p. 201

43 - Ark. State Hwy. Comm'n v. Carpenter, 237 Ark. 46, 371 S.W.2d 535 (Oct. 14, 1963); State Hwy. Comm'n v. Holden, 217 Ark. 466, 231 S.W.2d 113 (1950)

44 - 2 Nichols, § 5.81, p. 201; § 5.81 [3], p. 204

45 - Ark. State Hwy. Comm'n v. Stanley, 234 Ark. 428, 353 S.W.2d 173 (1962)

46 - 1 Orgel, § 165, p. 672

47 - State ex rel. Publicity & Parks Comm'n v. Earl, 223 Ark. 348, 345 S.W.2d 20 (1961)

48 - Magnolia Pipe Line Co. v. Ark. State Game & Fish Comm'n, 218 Ark. 932, 240 S.W.2d 857 (1951)

49 - 1 Orgel, p. 409

50 - 1 Orgel, § 95, p. 409

VII.

1 - Desha v. Independence County Bridge Dist. #1, 176 Ark. 253, 3 S.W.2d 969 (1928)

2 - 5 Nichols, § 18.11 p. 142

3 - Malvern & Ouachita River R. R. v. Smith, 181 Ark. 626, 26 S.W.2d 1107 (1930)

4 - 5 Nichols, § 18.1 [3], pp. 134-135

5 - Ark. State Hwy. Comm'n v. Muswick Cigar & Beverage Co., 231 Ark. 265, 329 S.W.2d 173 (1962)

6 - Ark. State Hwy. Comm'n v. Stanley, 234 Ark. 428, 353 S.W.2d 173 (1962)

7 - Collum v. Van Buren County, 223 Ark. 525, 267 S.W.2d 14 (1954). In this case two witnesses stated that the benefits to the landowner's remaining land for exceeded all damages, and the jury after viewing the land by consent of the parties decided the landowner should receive no damages. This was upheld on appeal.

8 - 5 Nichols, § 18.11, p. 146

9 - 5 Nichols, § 18.3, p. 165

10 - Ibid.

11 - Ark. State Hwy. Comm'n v. Kennedy, 223 Ark. 844, 349 S.W.2d 132 (1961)

12 - Bridgeman v. Baxter County, 202 Ark. 15, 148 S.W.2d 673 (1941)

13 - See 5 Nichols, § 18.4, p. 183

14 - Urban Renewal of Harrison v. Hefley, 237 Ark. 39, 371 S.W.2d 141 (1963)

15 - Lazenby v. Ark. State Hwy. Comm'n, 231 Ark. 601, 335 S.W.2d 705 (1960)

16 - City of Little Rock v. Sawyer, 228 Ark. 516, 309 S.W.2d 30 (1958)

17 - 5 Nichols, § 18.4, p. 183 et seq.

18 - 5 Nichols, § 18.4 [4], p. 204

19 - Ark. State Hwy. Comm'n v. Johns, 236 Ark. 585, 367 S.W.2d 436 (1963)

20 - See a discussion of this in 5 Nichols, § 18.41, p. 220

21 - Ark. State Hwy. Comm'n v. Covert, 232 Ark. 463, 338 S.W. 2d 196 (1960)

22 - Hot Spring County v. Prickett, 229 Ark. 941, 319 S.W.2d 213 (1959)

23 - 5 Nichols, § 18.4 [2], p. 198

24 - 5 Nichols, § 18.4 [2], p. 201

25 - 5 Nichols, § 18.42, p. 234

26 - Feibleman v. Truckline Gas Co., 234 Ark. 277, 351 S.W.2d 447 (1961)

27 - Ark. State Hwy. Comm'n v. Stanley, 234 Ark. 428, 353 S.W.2d 173 (1962)

28 - Ark. State Hwy. Comm'n v. Johns, 236 Ark. 585, 367 S.W.2d 436 (1963)

29 - Ark. State Hwy. Comm'n v. Ptak, 236 Ark. 105, 364 S.W.2d 794 (1963)

30 - 5 Nichols, § 18.42 [1], pp. 240-241

31 - Ark. State Hwy. Comm'n v. Hood, 237 Ark. 202, 372 S.W.2d 387 (1963)

32 - 4 Nichols, § 13.3, p. 439

33 - See foot note 32, supra.

34 - Ark. State Hwy. Comm'n v. Addy, 229 Ark. 768, 318 S.W.2d 595 (1958), citing 1 Orgel, § 167 and 5 Nichols, p. 225. The citation to Nichols is erroneous. The Orgel citation refers to "Scattering decisions" and is more limited than the Arkansas Court indicates.

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

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

37 - See 4 Nichols, § 13.3 [1], p. 443 and § 13.3 [2], p. 449

38 - 4 Nichols § 13.3 [2], pp. 449-450

39 - 4 Nichols, § 12.3122, p. 127

40 - Desha v. Independence County Bridge Dist. #1, 176 Ark. 253, 3 S.W.2d 969 (1928)

41 - Ark. State Hwy. Comm'n v. McHaney, 234 Ark. 817, 354 S.W.2d 738 (1963)

42 - 4 Nichols, § 12.311 [3], p. 89. Nichols considers this a good rule.

43 - Ark. State Hwy. Comm'n v. Witkowski, 236 Ark. 66, 364 S.W.2d 309 (1963)

44 - Ark. State Hwy. Comm'n v. Carder, 228 Ark. 8, 305 S.W.2d 330 (1957)

45 - City of Little Rock v. Sawyer, 228 Ark. 516, 309 S.W.2d 30 (1958); Ark. State Hwy. Comm'n v. Richards, 229 Ark. 783, 318 S.W.2d 605 (1958)

46 - Ark. State Hwy. Comm'n v. Richards, 229 Ark. 783, 318 S.W.2d 605 (1958)

47 - 4 Nichols, § 12.313, p. 135 et seq.

48 - Ark. State Hwy. Comm'n v. Ptak, 236 Ark. 105, 364 S.W.2d 794 (1963)

49 - 4 Nichols, § 14.22, p. 520

50 - Ark. State Hwy. Comm'n v. Carpenter, 237 Ark. 46, 371 S.W.2d 535 (Oct. 1963)

51 - Kansas City So. Ry. v. Anderson, 88 Ark. 129, 113 S.W. 1030 (1908)

52 - Ark. State Hwy. Comm'n v. Fox, 230 Ark. 287, 322 S.W.2d 81 (1959)

53 - 4 Nichols, § 14.2471, pp. 653-661

54 - Ark. Stats. Sec. 76-521

55 - Washington County v. Darp, 196 Ark. 147, 116 S.W.2d 1051 (1938)

56 - Texas & St. Louis Ry v. Eddy, 42 Ark. 527 (1854)

57 - 5 Nichols, § 22.1, p. 499

58 - Ark. State Hwy. Comm'n v. Elliott, 234 Ark. 619, 353 S.W.2d 526 (1962)

59 - 4 Nichols, § 12.311 [2], p. 87

60 - Ark. State Hwy. Comm'n v. Snowden, 223 Ark. 565, 345 S.W.2d 917 (1961)

61 - 4 Nichols, § 12.311 [1], p. 85

62 - Yonts v. Public Service Comm'n, 179 Ark. 695, 17 S.W.2d 886 (1929)

63 - 4 Nichols, § 12.3113 [2], p. 107

64 - Ark. State Hwy. Comm'n v. Witkowski, 236 Ark. 66, 364 S.W.2d 309 (1963)

65 - Ark. State Hwy. Comm'n v. Watkins, 229 Ark. 27, 313 S.W.2d 86 (1958)

66 - 5 Nichols, § 18.11 [2], p. 159, pp. 161-162

67 - See footnote 66

68 - St. Louis & Ark. & Tex. R. R. v. Anderson, 39 Ark. 167 (1882)

69 - 4 Nichols, § 14.24321, p. 597

70 - Ark. State Hwy. Comm'n v. Watkins, 229 Ark. 27, 313 S.W.2d 86 (1958); Testimony that pools of water were left on the remainder of a tract being partially condemned, which might cause sickness in animals, was held too speculative in Railway v. Combs, 51 Ark. 324, 11 S.W. 418 (1888)

71 - 4 Nichols, § 12.314, p. 140-152

72 - Ark. State Hwy. Comm'n v. Carder, 228 Ark. 8, 305 S.W.2d 330 (1957)

73 - U. S. v. 620 Acres of Land, 101 F. Supp. 686 (Ark. 1952)

74 - Kansas City So. Ry. v. Boles, 88 Ark. 533, 115 S.W. 375 (1908)

75 - 4 Nichols, § 12.314, p. 140

76 - Ark. State Hwy. Comm'n v. Blakeley, 231 Ark. 271, 329 S.W.2d 158 (1959)

77 - 5 Nichols, § 18.7, p. 316

78 - See footnote 77

79 - 4 Nichols, § 12.311 [2]

80 - City of Little Rock v. Sawyer, 228 Ark. 516, 309 S.W.2d 30 (1958)

81 - 4 Nichols, § 20.1, p. 369

82 - Ark. State Hwy. Comm'n v. Jelks, 203 Ark. 878, 159 S.W.2d 465 (1942)

83 - Ark. State Hwy. Comm'n v. Cochran, 230 Ark. 881, 327 S.W.2d 733 (1959); 4 Nichols, § 13.22, p. 408

84 - 4 Nichols, § 13.22, p. 408

85 - Bridgeman v. Baxter County, 202 Ark. 15, 148 S.W.2d 673 (1941)

86 - City of Fayetteville v. Stone, 194 Ark. 218, 106 S.W.2d 158 (1937)

87 - 5 Nichols, § 18.3, p. 165

88 - City of Little Rock v. Sawyer, 228 Ark. 516, 309 S.W.2d 30 (1958)

89 - 4 Nichols, § 13.2, p. 402

VIII

1 - 1 Orgel, § 7, p. 41

2 - Ross v. Clark County, 185 Ark. 1, 45 S.W.2d 31 (1932)

3 - Little Rock & Ft. Smith R.R. v. Allister, 68 Ark. 600, 60 S.W. 953 (1901)

4 - Bridgeman v. Baxter County, 202 Ark. 15, 148 S.W.2d 673 (1941)

5 - Weideneyer v. Little Rock, 157 Ark. 5, 247 S.W.2d 62 (1923)

6 - City of Paragould v. Milner, 114 Ark. 334, 170 S.W. 78 (1914)

7 - Gregg v. Sanders, 149 Ark. 15, 231 S.W. 190 (1921)

8 - Little Rock & Ft. Smith R.R. v. Allister, 68 Ark. 600, 60 S.W. 953 (1901)

9 - St. Louis, Ark. & Tex. R.R. v. Anderson, 39 Ark. 167 (1882)

IX.

1 - 3 Nichols, § 8.63, p. 104-109

2 - Ark. State Hwy. Comm. v. Stupenti, 222 Ark. 0 257 S.W. 2d 37 (1953)

3 - Ark. Stats. Sec. 76-536

4 - See Ark. State Hwy. Comm'n v. Stupenti, 222 Ark. 0 257, S.W.2d 37 (1953)

5 - Donaghey v. Lincoln, 171 Ark. 1042, 287 S.W. 407 (1926)

6 - Ark. State Hwy. v. Rich, 235 Ark. 837, 362 S.W.2d 425 (1962)

7 - Ark. State Hwy. Comm'n v. Union Planters Nat'l Bank, 232 Ark. 200, 334 S.W.2d 879 (1960)

8 - Ark. State Hwy. Comm'n v. Union Planters Nat'l Bank, 232 Ark. 200, 334 S.W.2d 879 (1960)

9 - Ark. State Hwy. Comm'n v. Union Planters Nat'l Bank, 232 Ark. 200, 334 S.W.2d 879 (1960)

10 - 3 Nichols, § 8.64, p. 117

X.

1 - Ark. Stats. Sec. 35-1109

2 - Sewer Improvement Dist. of Sheridan v. Jones, 199 Ark. 534, 134 S.W.2d 551 (1939)

3 - Memphis & Little Rock R.R. v. Organ, 67 Ark. 84, 55 S.W. 952 (1899)

4 - Ark. State Hwy. Comm'n v. Partain, 193 Ark. 803, 103 S.W.2d 53 (1937)

5 - Ark. State Hwy. Comm'n v. Palmer, 222 Ark. 603, 261 S.W.2d 772 (1953)

6 - Miller County v. Beasley, 203 Ark. 370, 156 S.W.2d 791 (1941)

7 - Bryant v. Ark. State Hwy. Comm'n, 233 Ark. 41, 342 S.W.2d 415 (1961); See also Watson v. Dodge, 187 Ark. 1055, 63 S.W.2d 993 (1933)

8 - Ark. State Hwy. Comm'n v. Palmer, 222 Ark. 603, 261 S.W.2d 772 (1953)

9 - Federal Land Bank of St. Louis v. Ark. State Hwy. Comm'n, 194 Ark. 616, 108 S.W.2d 1077 (1937)

10 - Ark. State Hwy. Comm'n v. Partain, 193 Ark. 803, 103 S.W.2d 53 (1937)

11 - Sewer Improvement District No. 1 of Sheridan v. Jones, 199 Ark. 534, 134 S.W.2d 551 (1939); Hogge v. Drainage Dist. No. 7, 181 Ark. 564, 26 S.W.2d 887 (1930); See also Dobbs v. Town of Gillett, 119 Ark. 398, 177 S.W. 1141 (1915)

12 - Ark. Stats. Sec. 35-101

13 - Missouri & North Ark. R.R. v. Chapman, 150 Ark. 334, 234 S.W. 171 (1921); Ratcliff v. Adeer, 71 Ark. 269, 72 S.W. 896 (1903)

14 - McKennon v. St. Louis, I.M. & So. Ry. 69 Ark. 104, 61 S.W. 383 (1901)

15 - Reichert V. St. Louis & S.F. Ry., 51 Ark. 491, 11 S.W. 696 (1889)

16 - Federal Land Bank of St. Louis v. Ark. State Hwy. Comm'n, 194 Ark. 616, 108 S.W.2d 1077 (1937)

17 - Warren & O.V.R.R. v. Garrison, 74 Ark. 136, 85 S.W. 81 (1905)

18 - Ark. State Hwy. Comm'n v. Palmer, 222 Ark. 603, 261 S.W.2d 772 (1953)

19 - Miller County v. Beasley, 203 Ark. 370, 156 S.W.2d 791 (1941)

20 - State Life Insurance Co. of Indianapolis v. Ark. State Hwy. Comm'n, 202 Ark. 12, 148 S.W.2d 671 (1941). See also, Independence County v. Lester, 173 Ark. 796, 293 S.W. 743 (1927)

21 - Ark., La. & G. Ry. v. Kennedy, 84 Ark. 364, 105 S.W. 885 (1907) Organ v. Memphis & Little Rock R.R., 51 Ark. 235, 11 S.W. 96 (1888)

22 - Bryant v. Ark. State Hwy. Comm'n, 233 Ark. 41, 342 S.W.2d 415 (1961)

23 - Gilbert v. Shaver, 91 Ark. 231, 120 S.W. 833 (1909)

24 - Grise v. Auditor, 17 Ark. 572 (1856)

25 - 6 Nichols, § 30.1, p. 446

26 - 6 Nichols, § 32.1, p. 552

27 - 6 Nichols, § 28.32, p. 410

28 - 6 Nichols, § 28.321, p. 414

29 - See Footnote 28, supra.

30 - 6 Nichols, § 28.321 [1], pp. 416-417

31 - 6 Nichols, § 28.22, p. 378

32 - 6 Nichols, § 28.22 [3], p. 388