

Notes

BENEFIT AS LEGAL COMPENSATION FOR THE TAKING OF PROPERTY UNDER EMINENT DOMAIN

Man's great progress in the development of the mechanical arts and scientific research have caused innumerable legal problems to arise. With the great advance of the automobile industry came the pressing demand for larger smooth-surfaced highways; the great development of steam and electric railroads has necessitated rights of way for the tracks; the progress of the oil industry has resulted in the construction of long pipe lines through which oil is transported for hundreds of miles; the increased functions and burdens of governmental agencies have increased the need for public buildings. The new conveniences of man are often concerned with great problems of public interest. Roads, tracks, pipe lines, and municipal buildings are all so affected with public interest that their establishment is demanded, even if the rights and wishes of a minority must be partially disregarded. The power of eminent domain lends itself to aid the public in this respect. However, the rights of the minority should not be entirely disregarded, and ample safeguards must be given to protect them from the possibility of unreasonable action on the part of the majority. A conflict between the rights of the minority and the wishes of the public generally has arisen in the question of benefits accruing to the residue of an owner's land by reason of a public improvement, after a part of that parcel has been taken for the public improvement. The landowner resents an assertion by the public generally that he should not retain these benefits, and feels that the forced relinquishment of part of his land should be fully compensated for in money. The public, on the other hand, attempts to convince the landowner that the enhancement of the value of his remaining land is not due to any efforts of his own, but merely accrues to him from the chance decision of the public, through its officials, to locate the improvement near his land, and that this benefit accruing to his remaining land should at least be considered when compensation is made to him for the part of the land that is taken. The problem of whether benefits should be held to constitute legal compensation for the taking of property under the power of eminent domain is dealt with in one way or another in every state of the United States. Different conceptions of the nature of rights to property, nature of eminent domain, compensation, and benefits may account for the varied answers to the problem. The true solution of the problem must rest upon a foundation so solid and unimpeachable that worthy criticisms of it cannot be made.

In treating the question of whether benefits can be considered as legal compensation for the taking of property under the power of eminent domain several questions are presented regarding the fundamental conceptions of the ownership of property. The nature of the ownership of property must be carefully considered in this problem because conflicting conceptions of the right to property must be expected to arise whenever the social group attempts to exercise a power over individually owned property. Such a conflict of individual and social interests arises when the power of eminent domain is exercised by the state to deprive an individual owner of all or part of his property. It is true that private property cannot be taken under the power of eminent domain without making compensation to the owner,¹ but the conflict often arises as to the nature of the compensation and whether benefits accruing to the residue of the property after part is taken by reason of the improvement, can be legally set off against the payment of damages for the part taken.²

In order to determine the question as stated, the nature of the right to property ownership must be considered. Uninformed persons often erroneously maintain that ownership of property includes complete and exclusive control of it without limitation. The fiction of this contention is evident when it is considered that property is legally and effectually controlled to a certain degree by the police power, power of taxation, power of eminent domain and other powers inherent in the government of the state. The truth of this is so apparent that a citation of authority for it would be mere superfluity. But the limitations on the ownership of property exercised by the state are not to be carried so far as to result in oppression to the owners of property. Therefore, it is with some justification that the owners of property, part of which is taken from them under eminent domain, raise a doubt as to whether benefits accruing to the residue of the property by reason of the improvement are to be considered as legal compensation to be set off from the damages to which the owner is entitled for the part taken.

In order to arrive at any conclusion on the problem of whether benefits can be considered as legal compensation, the very nature of the power of eminent domain and its effect on the right to hold property must be considered. Mr. John Lewis in his treatise on the LAW OF EMINENT DOMAIN concludes that,

¹ Const. U. S. Amendment V.

The right to just compensation is now guaranteed by the constitutions of practically all of the states, and even in absence of such provision in the organic law, the right to compensation has been recognized by the courts as a fundamental right founded on natural justice. 20 C. J. 643.

² 20 C. J. 813.

Eminent domain is not the nature of any estate or interest in property, reserved or otherwise acquired, but simply a power to appropriate individual property as the public necessities require, and which pertains to sovereignty as a necessary, constant and inextinguishable attribute.³

Reasoning from this well considered definition, it is apparent that the power of eminent domain is absolute in the sovereignty of the state, and as a natural attribute of that sovereignty does operate as an effective limitation on the owner's control of his property. The welfare of the social group is given first consideration even if that practise results in an inconvenience to the individual. The exercise of the power results in a forced taking of property from an owner who may be unwilling to give it up, but this serves to definitely illustrate that the owner's control over his property is not unlimited.

Although the control of an owner over his property is not unlimited, it is also true that limitations are imposed upon the sovereign power of eminent domain by the people themselves. The limitations upon the exercise of the power of eminent domain are usually included in the grant of that power by the people to the legislative department of the government in the general grant of legislative power. The ordinary and typical form of that limitation is that "private property shall not be taken for public use without just compensation,"⁴ but some of the later state constitutions amplify and complicate the simple limitation with special reference to the manner in which the limitation is to operate. North Carolina has no express limitation by constitutional provision on the exercise of the power of eminent domain by the legislature. The right to compensation, however, has been worked out through other provisions in the constitutions of other states which did not have the constitutional limitation, the provision that "no person shall be deprived of life, liberty, or property without due process of law" lending itself for the purpose of requiring that just compensation be given when land is taken for a public purpose.⁵

We are forced to realize that in providing for limitations on the power of eminent domain, the various constitutions which have such limitations, could not adequately define them so as to include and determine every question that might be raised under them. The provision for compensation sometimes merely provides for "just compensation."⁶ The use of that phrase must from its very nature give rise to the issue of just what

³ LEWIS, *op. cit.* 9.

⁴ LEWIS, *op. cit.* 20; see also ftn. 1, above.

⁵ *Ibid.* 23.

⁶ Const. U. S. Amendment V.

is to be included within that term. The term "just compensation" has no technical or purely legal significance,⁷ but, on the other hand, is determined by equitable principles, and its measure varies with the facts.⁸ The legal meaning of the term "just compensation" being held to be so variable in order to include the problems arising from the facts and circumstances of the individual case, the question of whether benefits may or may not be set off against compensation made in damages, determines the question of whether benefits can legally be considered as compensation at all.

Before entering into a discussion of the present status of the law on the principal question, it would probably be helpful to consider the nature of benefits in condemnation proceedings. When a part of a parcel of land is taken for public use, it may happen that the construction and maintenance of the public work will inflict some injury on the remainder of the parcel; or, on the other hand, it may benefit it to such an extent that the market value of the remaining land will be greater than the value of the whole parcel before the public improvement was made.⁹ In order to be considered a benefit which may be set off against damages it must be genuine and capable of estimation in money value, it must result from the particular improvement for which the land was taken, and it must accrue to the same parcel of land from which the part condemned was taken.¹⁰ Benefits to separate and independent tracts of land, other than the one partly taken by the proceeding, cannot be considered as compensation.¹¹ The benefit must attach to the land itself; benefits to the business of the owner cannot be considered.¹² Hence, the term "benefit" as used in eminent domain means a real enhancement to the residue of the land, accruing to that residue from the improvement that necessitated a condemnation of part of the original tract.

Granting that the principal question has been raised because of the great movement for increased public improvements, and having considered some of the principles involved in the very nature of the right to property, the power of eminent domain, and the question of benefits, we will now enter into a consideration of the present status of the law in the United States on the question of whether benefits can be considered as legal compensation for the taking of property under the power of eminent domain.

⁷ *Des Moines Laundry v. Des Moines* (1924) 197 Iowa 1082, 198 N. W. 486.

⁸ *N. Y., O. & W. R. Co. v. Livingston* (1924) 238 N. Y. 300, 144 N. E. 589.

⁹ 10 R. C. L. 158.

¹⁰ 10 R. C. L. 158.

¹¹ 9 L. R. A. (N. S.) 980 *et seq.*

¹² *Hamilton v. Pittsburg R. Co.* (1899) 190 Pa. St. 51, 42 Atl. 369.

ent domain. In our consideration of the present law, we find a conflict on the principal question. Some states by their constitutions absolutely forbid the setting off of benefits from compensation in certain cases and require that the payment of compensation be in money.¹³ In other states the constitutions provide that there must be "just compensation" given for the land taken, but are silent as to allowing the set-off of benefits.¹⁴ In some of the latter states a statute allows the set-off of benefits in certain cases,¹⁵ but statutes of other states prohibit the set-off of benefits when the constitution of the state is silent on that point.¹⁶ Because the scope of this paper will be limited strictly to a consideration of the principal question, no attempt will be made to distinguish between general and special benefits, nor will any of the intricate minor problems which may pertain to the principal question be considered any further than is necessary for a determination of the principal question. With this limitation of the scope of this paper in mind, we will enter into a consideration of the present law of some of the states of the United States regarding the legality of setting off benefits from compensation, with the hope that from the conflict and maze of different rules, we may extract the correct one for discussion.

In some states the constitutions expressly provide that in certain specified cases full compensation shall be made for the land taken, without any deduction on account of benefits accruing to the residue.¹⁷ In some of these constitutions the provision applies only in case of the exercise of the power of eminent domain by certain public service corporations, as in Arkansas,¹⁸ where municipal corporations are not limited by the provision, but in Alabama and some other states the constitutional limitation was applied to municipal corporations as well as public service corporations in their use of the power of eminent domain.¹⁹ A constitutional provision prohibiting the setting off of benefits from compensation is not violated by a statute which authorizes the assessment of the cost of an improvement against abutting property according to the benefit derived by such prop-

¹³ See *ftn. 17, post.*

¹⁴ See *ftn. 28, post.*

¹⁵ See *ftn. 35, post.*

¹⁶ See *ftn. 39, post.*

¹⁷ Alabama, Const. Ala. (1868) art. 13, sec. 5, but see Const. Ala. (1901) art. 1, sec. 23; Arkansas, Const. Ark. art. 12, sec. 9, and Kirby's dig. sec. 2953; California, Const. Cal. art. 1, sec. 14; Iowa, Const. Iowa, art. 1, sec. 18; Kansas, Const. Kan. art. 12, sec. 4; N. Dakota, Const. N. Dak. art. 1, sec. 14; Ohio, Const. Ohio art. 1, sec. 19; S. Carolina, Const. S. Car. art. 9, sec. 20; Washington, Const. Wash. art. 1, sec. 16.

¹⁸ *Paragould v. Milner* (1914) 114 Ark. 334, 170 S. W. 78.

¹⁹ *Faust v. Huntsville* (1888) 83 Ala. 279, 3 So. 771.

erty, where other provisions of the constitution authorize assessments to raise funds for that purpose.²⁰ But Alabama seems to have changed its constitution in respect to the denial of the right to set off benefits, for in Constitution of Alabama (1901) art. 1 sec. 23, provision is made for compensation, but no specific reference is made to the setting off of benefits. Under the Code of Alabama (1923) sec. 7489, provision is made prohibiting the reduction of compensation because of "incidental" benefits which may accrue to the residue of the land. However, the Acts of Alabama (1927) p. 492, provided that even though compensation cannot be reduced because of "incidental" benefits, the condemnation commissioners or jury in fixing the compensation to be awarded in condemnation of public highways, "may" take into consideration the value of the enhancement to the remaining lands of the owner if that enhancement is due to the location of the highway there. A recent case has construed the word "may" to mean "must" in the Alabama act of 1927 so as to prevent inequalities in the administration of the law.²¹ The provision in the Alabama Constitution (1901) art. 14 sec. 235, provides that when municipal and other corporations have exercised the power of eminent domain, the compensation, "to be ascertained as may be provided by law," must be given. Hence, the Code of Alabama (1923) sec. 7489, as amended by the Acts of Alabama (1927) p. 429, seems to be an exercise of the power given to the legislature to provide what should constitute compensation by statute. The amendment of 1927 merely shows a specific exception to sec. 7489 of the 1923 Code of Alabama. The amendment of 1927 was held to be constitutional in a recent case.²² With this review of the change that has taken place in the Alabama law in mind, we may well consider the reasoning upon which the old provision of the Constitution of Alabama of 1868, which forbade the set-off of benefits, was based.

The case of *Alabama and Florida R. R. Co. v. Burkett*²³ was probably an important factor in causing the prohibition of the setting off of benefits to be embodied in the Constitution of Alabama of 1868. When this case was decided, the Alabama Constitution of 1865 was in operation, which merely provided that compensation should be made, no reference then being made to the question of benefits. The Court quoted from *Woodfold v. Nashville R. R. Co.*²⁴ which case held that compensation must

²⁰ *Hutchins v. Hanna* (1917) 179 Iowa 912, 162 N. W. 225.

²¹ *Conecuh County v. Carter* (Ala. 1930) 126 So. 132.

²² *Rudder v. Limestone County* (Ala. 1930) 125 So. 670.

²³ (1868) 42 Ala. 83.

²⁴ (1852) 2 Swan (Tenn.) 422.

be made in money irrespective of any benefits accruing to the land. This Tennessee court said,

If the owner's remaining lands are appreciated, and his facilities of travel and trade increased by the improvement, these are benefits to which he is entitled, with the community in general, and for which he has to pay in common with others in taxes and other burthens. But there can be no good reason why any more should be taken from him than others for these common benefits.

The Tennessee court does not clearly distinguish between general or common benefits and special benefits. This reasoning was adopted by the Alabama court in 1868 and was probably a factor in causing the constitutional provision forbidding the setting off of benefits to be enacted in 1868. The constitution of 1868 remained in force until it was supplanted by the constitution of 1875 which made no reference to the setting off of benefits. The Constitution of Alabama of 1901, the present constitution of that state, is also silent on the question of benefits. It seems, therefore, that so far as constitutional provisions are concerned, Alabama has receded from its position of strictly prohibiting the setting off of benefits by constitutional provision in cases of lands condemned by corporations, and has allowed the legislature to control the question by statute. The amendment of 1927 has at least expressed one exception to the general rule of that state that benefits cannot be set off from damages, that exception being that benefits will be allowed to be set off in case of lands taken for public highways.²⁵

In Arkansas, under a constitutional provision²⁶ which prohibited the setting off of benefits when lands were condemned by corporations, the provision was construed so as not to apply when the taking was by a municipal corporation.²⁷ In the light of this holding it is apparent that the court's interpretation of the constitutional provision involved was not presuming to declare that "benefit" could not be considered as legal compensation for property taken by eminent domain, but was merely expressing a reluctance to give private corporations a power of eminent domain quite as extensive over the property rights of individuals as they were willing to grant to municipal corporations.

Many constitutions provide that "private property shall not be taken for public use without just compensation being made" and contain no provision as to the deduction of benefits in case

²⁵ Ala. Acts 1927, p. 492.

²⁶ See ftn. 17, above.

²⁷ Paragould v. Milner (1914) 114 Ark. 334, 170 S. W. 78.

only a part of the tract is taken and there are such benefits. Under such a provision, it is held in some jurisdictions that the legislature may authorize or the courts may allow the benefits accruing to the residue of the land from the improvement to be set off against the value of the part actually taken or from the entire compensation.²⁸ The State of Texas is typical of a jurisdiction in which special benefits are allowed to be set off against damages made in compensation for the land taken. Revised Civil Statutes of Texas (1925) art. 3265 sec. 3 provides:

Where only a portion of a tract or parcel of a person's real estate is condemned, the commissioners shall estimate the injuries sustained and the benefits received thereby by the owner; whether the remaining portion is increased or diminished in value by reason of such condemnation, and the extent of such increase or diminution, and shall assess the damages accordingly.

In section 4 of this statute it is provided that injuries that the owner sustains or receives in common with the community generally and which are not peculiar to him, shall not be considered by the commissioners. A rather recent decision has put an interpretation upon the Texas statute, holding that benefits, if greater than damages to the land not condemned, cannot be set off against the value of the land condemned.²⁹ This is the present rule in Texas. It differs from the rule which prevailed there not so many years ago. In 1895 it was held that the Bill of Rights of Texas, sec. 17, in providing that "adequate compensation" shall be made for private land taken for public use, requires the payment to the owner of the intrinsic value of the land taken, without reference to the benefits he may derive from the improvement.³⁰ The change of the law of Texas on this point may be significant of a trend in the states to allow a setting off of benefits. The State of Vermont as early as 1851 provided for setting off of benefits by statute. In that state it was held in 1851 that the statute (Rev. St. c. 20 sec. 53; Comp. St. c. 22 sec. 67) which provides that in estimating damages that may be sustained by any person owning or interested in lands by reason of laying out or altering any highway, the benefit which such person may receive thereby shall be taken into consideration, is not repugnant to that article of the constitution of the state (Const. Vt. pt. I art. 2) which provides that whenever any person's property is taken for the use of the public,

²⁸ 20 C. J. 813.

²⁹ *Wilson v. Newton County* (Tex. 1925) 269 S. W. 227.

³⁰ *Travis Co. v. Trogden* (1895) 88 Tex. 302, 31 S. W. 358.

the owner ought to receive an equivalent in money.³¹ Texas and Vermont are indicative of a class of states which allow the setting off of benefits by statute, the constitution of those states being silent on that question.

On the other hand, Indiana has consistently held to the position of not allowing the setting off of benefits and prohibiting such setting off by express statute. The Constitution of Indiana now merely provides that "just compensation" shall be made for the taking of property under power of eminent domain. But a statute in Indiana provides that, "in estimating the damages . . . no deduction shall be made for any benefits that may result from such improvement."³² But this provision prohibiting the setting off of benefits does not apply to municipal corporations in their exercise of the power of eminent domain.³³ The exception to the Indiana statute quoted above probably is indicative of the fact that the statute prohibits the setting off of benefits, not because of any conclusion that benefits are not really legal compensation, but again because of a reluctance to grant to private or public service corporations quite as extensive a power of eminent domain as the legislature is willing to grant to municipal corporations.

In Missouri, the constitutional provision provides: ". . . private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or a board of commissioners of not less than three freeholders in such a manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested."³⁴ Since the constitution does not mention the setting off of benefits, it would be expected that a specific statute would determine whether or not benefits should be set off in the finding of the damages. However, no general statute covering the setting off of benefits in all cases of condemnation of property is found in Missouri. In place of a general statute covering the problem, special statutes treat the question of whether benefits can be set off. When the power of eminent domain is given to a municipal or private corporation by specific statute, that statute provides whether or not benefits can be considered as compensation.³⁵ An example of such a special statute relating to setting off of benefits is found in the St. Louis City Charter art. 21, sec. 6, which, after

³¹ *Livermore v. Town of Jamaica* (1851) 23 Vt. 361.

³² Ind. Stat. (Burns, 1926) sec. 7685.

³³ *Ibid.*, sec. 7681.

³⁴ Const. Mo. art. 2 sec. 21.

³⁵ R. S. Mo. (1929) sec. 7223.

earlier sections of the charter grant to the city a power of eminent domain, provides:

At any time after the commissioners file their report the city may pay into court the amount of damages assessed, less benefits, if any, and thereupon it shall be entitled to take possession of or damage the property . . .

It was held as early as 1857 that under the Missouri constitutional provision providing that "private property could not be taken for public use without just compensation" it was competent for the legislature to declare that, in assessing the compensation, the benefits to be derived by the landowner from the public use of his land should be taken into account.³⁶ This case held that section 17 of article 2 of the general act of 1845 [Rev. Code (1845) p. 974] providing that in assessing the damages sustained by a person by reason of a road's passing over his land "the commissioners shall take into consideration the advantages as well as the disadvantages of the road to such person" is in harmony with the constitution. Missouri decisions have consistently followed the early law that the setting off of benefits was not unconstitutional.³⁷

In Mississippi, judicial decision has construed the constitutional provision to prohibit the giving of anything except money as compensation for the taking of property under the power of eminent domain. These decisions, of course, refuse to consider benefits accruing to the residue of the land as part of the compensation. The Constitution of Mississippi of 1890 provides in article 1, section 17,

Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner thereof in a manner to be prescribed by law . . .

This same provision was found in the Mississippi Constitution of 1832 art. 1, sec. 13. This provision was construed by four early Mississippi cases.³⁸ In *Brown v. Beatty* (cited in fn. 38) a provision of the charter of the Mississippi Central Railroad Company which allowed condemnation commissioners to take benefits into consideration as compensation for lands condemned by the railroad was held to be violative of the Bill

³⁶ *Newby v. Platte County* (1857) 25 Mo. 258.

³⁷ *State ex rel. Farren v. St. Louis* (1876) 62 Mo. 244; *In re North Terrace Park* (1898) 147 Mo. 259, 48 S. W. 860; *Rourke v. Holmes St. Ry. Co.* (Mo. App. 1915) 177 S. W. 1102.

³⁸ *Brown v. Beatty* (1857) 34 Miss. 227; *Isom v. Miss. Cent. R. R. Co.* (1858) 36 Miss. 300; *Penrice v. Wallace* (1859) 37 Miss. 172; *N. Orleans R. Co. v. Maye* (1860) 39 Miss. 374.

of Rights and was unconstitutional. In that case the Court said:

He was entitled to be paid in money. It was clearly as incompetent for the legislature to prescribe in what he should be paid, as to prescribe how much or how little he should receive. Manifestly a party whose property has been taken and appropriated to a public use, in the construction of a railroad, cannot be compelled to receive, as compensation, the estimated enhancement in the value of the remaining property. The cash value and the actual damage are the true standards by which to determine the compensation to which, in such cases, the party is entitled.

The three cases following *Brown v. Beatty* (cited in ftm. 38) affirmed the doctrine of that case. The rule of these early cases is now embodied in a statute of Mississippi which declares:

The defendant is entitled to due compensation, not only for the value of the property to be actually taken as specified in the application, but also for damages, if any, which may result to him as a consequence of the taking; and you are not to deduct therefrom anything on account of the supposed benefits incident to the public use for which the application is made.³⁹

Thus we see that the law in Mississippi is definitely settled on the principal question, the conclusion being that benefits are not to be considered as legal compensation for the land taken under the power of eminent domain.

In the research conducted in the preparation of this work, no constitutional provision was found which expressly authorized benefits to be set off from damages. Quite the opposite was found in some cases, the constitutions of some states having provisions which expressly prohibited the setting off of benefits.⁴⁰ The judicial construction of the Arkansas provision that the prohibition against the setting off of benefits did not apply to the condemnation of property by municipal corporations, and the recent exception to the statutory prohibition of the setting off of benefits in Alabama, along with the change in the position of Texas from prohibition of the setting off of benefits to allowing the setting off of benefits by express statute are significant of a trend toward the recognition of benefits as legal compensation for property taken under the power of eminent domain. It can hardly be said that the principal question—whether or not “benefits” are legal compensation—has been de-

³⁹ Miss. Code (Hemingway, 1927) c. 24 sec. 1571.

⁴⁰ See ftm. 17, above.

terminated in the negative on any general ground of dissatisfaction with the theory that benefits to the residue of the land arising from the public improvement are of substantial nature so as to allow their being set off from the damages given for the land taken. In almost every state here considered in which the result reached was that benefits could not be set off, that holding was due to some special circumstance, and not because of a real objection to considering benefits, as such, as compensation. The case of Mississippi serves to illustrate this point. The constitution provided that "due compensation" must be paid, and early judicial interpretation construed this provision to require payment in money, thus denying that benefits were legal compensation.⁴¹ The decision of *Brown v. Beatty* which held a provision of a railroad charter allowing the set-off of benefits from compensation upon lands condemned by the railroad to be unconstitutional illustrates that a decision in a special kind of condemnation case could definitely shape the policy of the state toward the setting off of benefits generally, for later a statute of Mississippi prohibited the setting off of benefits in any case of condemnation of lands.⁴² No distinction seems to have been shown in that case between the exercise of eminent domain by private corporations organized for gain, as a railroad, and the exercise of that power by municipal corporations. From the special power of eminent domain conferred upon the railroad, the court draws the conclusion that benefits in any case of condemnation cannot be held to be legal compensation, and that decision is now incorporated into a statute.⁴³ But the law in Arkansas and Indiana recognizes a difference between condemnation by a private and a public corporation. Being reluctant to allow private corporations organized for gain to condemn lands without paying full value in money, those states prohibit the setting off of benefits in private corporation cases, but in recognition of the need of greater public improvement generally, municipal corporations are excepted from the provision prohibiting the setting off of benefits. It could not be said that Arkansas and Indiana are, by these provisions, denying that benefits are legal compensation because the provision excepting municipal corporations from the statute is definite recognition that benefits are legal compensation in some cases of condemnation. A stronger argument for the recognition of benefits as legal compensation is shown by the early decisions of the courts of Vermont and Missouri that the setting off of benefits was legal. These states have consistently held to that early view.

⁴¹ *Brown v. Beatty*, above.

⁴² Miss. Code (Hemingway, 1927) c. 24, sec. 1571.

⁴³ See ftn. 42, above.

A brief summary of the development of the law of those states considered here on the principal question will show a trend toward the recognition of benefits as legal compensation in the states that formerly prohibited the setting off of benefits. The recent law of Alabama of 1927⁴⁴ providing for an exception to the general statute against allowing the setting off of benefits is a small breach in the wall that defends the general statutory prohibition. The provision in Arkansas and Indiana excepting municipal corporations from the statute prohibiting the setting off of benefits prevents these statutes from being used as effective arguments for the proposition that benefits cannot be considered as legal compensation. The statute of Mississippi stands alone in the contention that benefits are not legal compensation, but when it is considered that this statute is probably founded upon the reasoning of *Brown v. Beatty* and those cases decided immediately after that case, all of which were cases of railroad condemnation,⁴⁵ it is doubtful whether the statute was really intended to cover the set-off of benefits generally, although the actual wording of the statute would seem to indicate that it did. The change of the law of Texas from prohibition of the setting off of benefits formerly to the present recognition of benefits as legal compensation is an indication of the general trend of the states towards allowing benefits to be considered as legal compensation for taking of property under eminent domain. The general trend of the doubtful states in this direction combined with the early recognition of benefits as legal compensation by Vermont and Missouri seem to clearly indicate that there is no legal basis for an argument that "benefits" are not really compensation for property taken under the power of eminent domain. The question is one of policy, and most jurisdictions have allowed the setting off of benefits in an honest effort to justly distribute the cost of public improvements.

NOEL F. DELPORTE, '31.

⁴⁴ Ala. Acts 1927, p. 492.

⁴⁵ See ftn. 38, above.