Legal Criteria of Damages and Benefits - The Measurement of Taking-Caused Damages to Untaken Property

Albert Tate Jr.
LEGAL CRITERIA OF DAMAGES AND BENEFITS—
THE MEASUREMENT OF TAKING-CAUSED
DAMAGES TO UNTAKEN PROPERTY*

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Whether they be called “severance” damages or “consequential” damages,1 compensable injuries are sometimes caused to property not itself taken by a taking of other property. The present discussion will concentrate on damages caused by partial takings and the legal criteria in Louisiana for measuring such damages.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The present Louisiana Constitution provides in pertinent part “. . . private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid.”2 (Emphasis added.) Every Louisiana constitution since that of 1879 has had similar provisions.

Certain provisions of the Louisiana Civil Code and Revised Statutes regulate “general” expropriation proceedings3—those not made pursuant to a special authorization—such as the highway department “quick-taking” statute.4 These general provisions contain no specific reference to severance damages. However, the Louisiana courts since 1889 have compensated for damages according to a “before and after” test.5

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**Associate Justice, Supreme Court of Louisiana. The writer acknowledges the research and editorial assistance of David E. Soileau, law clerk to the Louisiana Court of Appeal, Third Circuit, 1969-1970, and member of the Calcasieu and Evangeline Parish bars.

1. Technically, severance damages arise only from a partial taking. "Consequential damages" is a broader term which includes all recoverable damages to untaken property resulting from a taking, whether part of the land is taken or not. Some writers further limit "consequential" damages to damages occurring when no part of the subject property is taken. 2 P. NICHOLS, EMINENT DOMAIN § 6.4432 (3d rev. ed. 1953); Comment, 19 LA. L. REV. 491 (1959). See also International Paper Co. v. United States, 227 F.2d 201 (5th Cir. 1955). In Louisiana, however, the courts indiscriminately use "consequential damages" as a term referring to both severance damages and consequential damages in the more limited sense noted. Comment, 19 LA. L. REV. 491-94 (1959).


Pursuant to special constitutional authorization, the state legislature empowered the highway department to take property for highway purposes by *ex parte* orders. By this “quick-taking” statute, the department is required to file a petition in court accompanied by certain formalities, including an estimate of “just and adequate compensation for the taking, showing any estimate of damages as a separate item.” The department takes title to the property upon depositing the amount of this estimate into the registry of the court, rather than after final judgment as in general proceedings.

### SUMMARY OF TYPES OF SEVERANCE DAMAGES ALLOWABLE

As summarized by an authoritative study of Louisiana decisions, severance damages to a remainder caused by a partial taking have been allowed for four principal reasons:

1. The deflation of the market value of this remaining property because of the unattractiveness of the improvement or its permanent interference with the remainder's convenient use (such as the construction of a railway across plantation property);

2. The deflation of the market value of the remainder because of the fear, unfounded or not, of subsequent injury or danger by reason of the taker's use of the acquired portion (such as in the construction of an oil or gas pipeline across subdivision property);

3. The deflation or destruction of the plot value of the parent tract by reason of the acquisition of a part (such as where the best subdivision use of the land is interfered with or where the taking leaves insignificant separated areas);

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11. "Market value" is usually referred to as the theoretical price which should be agreed upon at a voluntary sale between a willing seller and a willing buyer. See, e.g., State v. Central Realty Inv. Co., 238 La. 965, 117 So.2d 261 (1960). The value is that possessed by the property without according any increase that may result from the contemplated improvement. LA. CIV. CODE art. 2633; LA. R.S. 19:9 (1950); State v. Chadick, 226 La. 367, 76 So.2d 398 (1954). But it does take into consideration all the uses to which the property may be reasonably adapted, i.e., the highest and best use of the land in the light of the reasonable expectations of the market place. Parish of Iberia v. Cook, 238 La. 697, 116 So.2d 491 (1959).
(4) the “cost-to-cure” expenses incurred by the owner of the remainder in adjusting his estate to the taker’s occupation of the taken portion (such as relocation of fences or bridging).

**INCIDENTAL OR SPECULATIVE DAMAGES**

Some types of losses sustained by landowners because of a taking have been characterized by the courts as mere “incidental” damages which are held not compensable. Instead, the cost of such damages is to be borne by the property owner as part of the price that every citizen in an organized society must pay to maintain and improve that society. So, in the absence of an effect on market value, a landowner is not entitled to compensation for diversion of traffic, loss of street parking, narrowing of streets, inconveniences of ingress and egress, loss of business and goodwill, moving costs, and mental suffering.

Further, a landowner is not entitled to recover damages which are regarded as merely speculative. Thus, in several cases, severance damages were sought on the basis of the alleged loss of value of property for some special purpose, such as a shopping center, medical and drugstore offices, and facilities opposite a hospital. Such determinations largely involve value judgments by the court as to whether the contemplated improvements are really too remote to be compensable or whether they really do represent a reasonably foreseeable and practical use of the land which actually affords an increment to present market value.

**FORMULAS FOR VALUATION OF DAMAGES**

The 1889 decision which first established the “before and after” test stated that, “in the case of damages the measure of compensation is the diminution in the value of the [remaining] property” caused by the taking. In late 1969, the Supreme Court of Louisiana rendered what may prove to be a leading decision on the question of the correct method to compute severance damages, *State, Dep’t of Highways v. Mason*. A strip

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ten feet wide by 550 feet long was taken from a two and one-half acre service station, cafe, and lounge site to widen a two-lane highway into four lanes. The result was destruction of some parking space and one of the two gasoline pump islands at the service station site. The trial court's award for the value of the land and the "cost-to-cure" by relocating the pump island was approved. However, both the supreme court and the court of appeal[18] disallowed much of the severance damages awarded. The trial court had valued severance damages based upon the alleged loss of income from certain rental units attributed to the reduced parking space through loss of the outside ten-foot strip.

As did the trial court, the supreme court specifically rejected the claim of the landowner for the cost of demolishing and reconstructing the service station property to provide space to restore the identical two pump islands and four traffic lanes available to the service station. The court specifically held the so-called "cost-to-cure" concept inappropriate, remarking:

"It is well settled in our jurisprudence that the damages allowable under Section 2 of Article 1 of the Constitution of 1921, resulting from expropriation of property rights is the difference between the market value of the property for sale or rental purposes immediately before and immediately after the expropriation."[19]

Then the court, citing from Nichols on Eminent Domain, summarized the "before and after" rule as follows:

". . . the measure of compensation when part of a tract is taken is the difference between the fair market value of the whole tract before the taking and the fair market value of what remains after the taking."[20] (Emphasis added.)

The court concluded:

"If. . . the ['cost to cure'] approach has relevance to the measure of [severance] damages, it should only be employed to demonstrate a diminution in market value resulting from the partial taking. . . . save. . . . in special instances

[20] Id. at 1045, 229 So.2d at 93. This version of the "before and after" rule is critically analyzed at pp. 440-43, infra.
where the ascertainment of market value of the facility is not available."21

In Mason, the Supreme Court of Louisiana noted that costs of moving or relocating, being regarded as an injury without legal redress, are not generally recoverable as consequential damages. Replacement costs of a building or other facility may be considered, but only as a factor directly affecting the reduction in market value as a result of the partial taking. Nevertheless, the supreme court expressly approved the recovery of $4,803 for relocating the gas pumps that had been on the strip taken—the "cost-to-cure" their loss because of the expropriation of the land upon which this portion of the facilities was located—but apparently the highway department had admitted that the landowner was entitled to recover this item as "consequential" damages.

Despite the apparent conflict with the rationale limiting severance damages to diminution in market value only, the allowance of "cost-to-cure" defects in the property resulting from the occupation of the acquired portion by the taker is in line with many similar awards.22 Thus, for instance, the cost of constructing culverts to retain for a tract its rail access and availability for industrial purposes23 has been allowed as severance damages, as has the cost of constructing a spur line to industrial property severed from the main railroad by the taking of a service line parallel to the railway track.24

This latest formula reiterated by the Supreme Court of Louisiana in Mason is not necessarily accurate in all instances. As noted, the supreme court based the measure of compensation under the "before and after" rule on the difference between the fair market value of the entire tract before the taking and the market value of the remainder after the taking. But this is not an accurate statement of the Louisiana rule. Louisiana statutory law prohibits the deduction from any award for the property actually taken of "any amount for the benefit derived by the owner from the contemplated improvement or work."25 The statutory prohibition, of course, applies only to deducting benefits from the award for the taking itself; the deduction of

special benefits from severance damages otherwise allowable is sanctioned by our jurisprudence, even though such benefits cannot offset the award for the taking itself.26

For Louisiana purposes, an undoubtedly more accurate statement of the rule for measuring severance damages is set forth in a leading 1960 decision: “The difference between the market value of the remaining property immediately before and its market value immediately after the expropriation.”27 Insofar as determining the severance damages as of the date of the taking, of course, this refers to general expropriation cases, and not highway “quick-takings,” where severance damages by statute are calculated as of the date of the trial.28

Nevertheless, where the remainder receives no special benefits, the Mason formula of valuing the whole before the taking, and then deducting the value of the remainder after the taking, in order to determine the landowner’s total award for the taking and for severance damages, is both an accurate and realistic method of arriving at the landowner’s award. Further, in the event of immediately successive takings, the Mason test provides a check against overlooking items of severance damages properly allowable to the landowner. For instance, two 1960 takings from the same tract were just five days apart. The first took an eighteen-acre strip for a controlled access highway, substantially reducing the per-acre value (by $130 per acre) of the property north of the taking, to which access was now destroyed. In the second taking, the highway department took about seventy acres of land for a borrow pit, but attempted to pay for it at the reduced value which had resulted from the first taking. Using the entire-tract-minus-value-of-remainder approach, the court rejected the department’s approach by which the landowners would have been deprived of $9,000 of pre-taking value of the property merely because of the sequence of the takings.29

SPECIAL AND GENERAL BENEFITS

Louisiana jurisprudence has established the general principle that recovery for severance damages to a remainder caused

26. See the discussion of special and general benefits, pp. 436-40, infra.
28. See the discussion of date of valuation problems, pp. 440-43, infra.
by a taking may be offset by any special benefits the remainder receives as a consequence of the new improvements for which the property is taken. 80 (As earlier noted, these benefits are not available as a deduction against the award for the property actually taken.) Nevertheless, general benefits received by all property in the neighborhood may not be used to offset severance damages. 81

The underlying reason for the refusal to offset damages by general benefits is that a citizen whose property is taken should not bear more of the cost of the public improvements than other property owners whose property is neither taken nor damaged. 82 The underlying reason for permitting special benefits to offset severance damages has been placed on the equitable principle of preventing unjust enrichment, 83 as well as on the simple mathematical fact that one is not “damaged” to the extent that the resultant benefit offsets a taking-caused loss.

The real difficulty is in determining which are “general” benefits not available as an offset and which are “special” benefits. A leading treatise on eminent domain has stated that there is a greater diversity of opinion and more different and inconsistent rules on the question of set-off for benefits than on any other point in the law of expropriations. 84

In 1941, in Louisiana Highway Commission v. Grey, 85 the Supreme Court of Louisiana made perhaps its most definite statement on the question: “General benefits are those which are shared alike by all property owners in the neighborhood or community.” 86 On the other hand: “. . . peculiar or special benefits [are] those affecting a particular estate by reason of its direct relationship with the improvement.” 87

In the Grey case, a new road cut diagonally across a 172-acre farm tract. The severance resulted in a loss of value of

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82. Louisiana Highway Comm’n v. Grey, 197 La. 942, 2 So.2d 654 (1941).
84. 3 P. NICHOLS, EMINENT DOMAIN § 8.62 (3d rev. ed. 1965).
85. 197 La. 942, 2 So.2d 654 (1941).
86. Id. at 961, 2 So.2d at 660.
87. Id.
the land as farm unit, but the evidence showed that the value of land fronting on the new highway was enhanced. The supreme court held that this particular enhanced value was not shared by the community generally and hence was a "special" benefit which could be used to offset the severance damage caused to the land's farm value. This 1941 decision referred with approval to a prior 1932 decision of the same court, *Louisiana Highway Commission v. Hoell.*

There, an increase in valuation resulting from highway construction was held to be a general benefit not available as an offset to the severance damages. In *Hoell,* a similar farm tract of 320 acres was diagonally bisected by a new highway. The supreme court approved the trial court's refusal to charge the jury that severance damages should be offset by any general benefit or advantage received by the property. In this case the general benefit was the advantage that resulted generally to all of the owners of land adjacent to or near the new highway. The court held that "general enhancement of value of property" in the vicinity was not available as an offset.

It may be instructive to compare the facts in *Grey,* in which the increase in value was held a special benefit (and thus offset against other severance damages), with those in *Hoell,* in which the general increase in value resulting from the improvement was held a general benefit (and thus was not offset). In *Grey,* the increase in value of the farm tract, which was near the city, essentially resulted because as a direct consequence of the improvement, a better use of the land was available. There was a present market value for small, road-frontage tracts located near the city, which could have been sold at higher per-acre value than could the previously isolated farm acreage. On the other hand, in *Hoell,* all of the land in the vicinity, whether fronting on the highway or not, increased in value because of the greater accessibility resulting from the modern highway improvement. In the one case, it was held the land received some special or peculiar benefit because of the direct relationship of the land to the highway improvement. In the other, an enhancement in value of all of the land in the vicinity because of the highway project—whether the land fronted on the highway project or not—was held to be a general, not a special, benefit.

38. 174 La. 302, 140 So. 485 (1932).
39. Id. at 307, 140 So. at 486.
It does not follow that a benefit is general merely because it is enjoyed by many other tracts contiguous to the same improvement. As the Grey case among many others held, the benefits are no less direct and special to the subject tract because other lands on the same street are benefited in a similar manner, even though the valuation is to a greater or lesser degree with each and every lot upon the same street. Thus, where there is a special benefit in being newly situated near an interstate interchange, it is a special benefit to each particular tract so newly located as to be able to take peculiar advantage of the interchange, even though that tract immediately next to the exit may have a greater special benefit than that one 300 feet further away.

In the writer's opinion, the benefit derived from, for example, an interstate interchange should thus be a special new value of land because of its relationship to the interstate exit, such as its now-availability for enhanced-value service stations or motel property, compared to its former value as farmland or country store property. But, if the evidence does not show any peculiar or special increment in value because of the interchange, such as a greater market value for sale for some use it did not possess before, then the general increase of value of all property in the neighborhood because of the interstate exit is a general benefit shared by all property in the area.40

The increase of value of all land near an interstate interchange due to increased accessibility to urban centers by quick transit is thus a general not a special benefit, because all property within a reasonable distance of the highway thus appreciates whether part of it is taken for the project or not. This may be proved by showing that since the building of the highway, all land in the general area, including land not located on the interstate or its access highways, has increased in value more than lands outside that general area. But, if because of its location near the new interstate highway, property increases in value at a rate greater than that of properties benefiting generally, for example, if property fronting on the highway becomes more attractive commercially, this may be a special benefit. The extent of special benefits depends on many factors. For example, land at an interstate highway interchange will be

benefited depending on the location of the interchange with respect to population centers, competing sites at the same or a nearby interchange, the location of the property within the interchanges, the volume of traffic on both highways concerned, the position of the property with respect to the exit ramp, and the visibility of the property from the interstate highway.  

As a leading treatise on eminent domain summarizes: "The most satisfactory distinction between general and special benefits is that general benefits are those which arise from the fulfillment of the public object which justified the taking, and special benefits are those which arise from the particular relationship of the land in question to the public improvement."  

**DATE OF VALUATION**

In general expropriation proceedings the jurisprudence has, in the absence of precise statutory regulation, evolved the rule that both severance damages and the valuation of the property actually taken are to be fixed as of the date the expropriation suit is filed, and not as of some indeterminate time in the future (as, for instance, the date the improvement is completed or the date the judgment permits the taking after trial).  

Severance damages are said to be determined by the diminution in the market value of the remainder immediately before and immediately after the expropriation; but where a particular date has been material, the court has fixed the valuation as of the date of the filing of the expropriation suit. Thus, where a first suit is dismissed for procedural or other reasons, and a second suit is filed, the value is fixed as of the date of the second suit's filing.  

In general operation, the loss in market value is determined as of the date of the filing of the expropriation suit, but we assume that the improvement for which the taking is made has been completed as of that date. Special benefits are likewise

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41. Id.  
42. 3 P. Nichols, Eminent Domain, § 8.6203 (3d rev. ed. 1965).  
45. See Louisiana Power & Light Co. v. Simmons, 229 La. 165, 85 So.2d 251 (1956).  
determined as those which will accrue to the remainder as a consequence of the new improvement as if it were already constructed as of the date of filing. (Certainly on the date the suit is filed, no such benefits have been derived by the remainder, since in general expropriations no taking is made until after trial court judgment.)

The highway "quick-taking" statute, however, explicitly provides that, whether the taking be partial\(^7\) or of an entire tract,\(^8\) the market value of the property expropriated is determined as of the time of the taking, but the severance damages are assessed as of the date of the trial. The owner, however, need not file an answer demanding severance damages until one year after final completion and acceptance of the highway project for which the taking was made.\(^9\) The more common practice, however, is for the landowner to file suit for severance damages before completion of the long-term highway construction project.\(^5\)

Whether the demand for severance damages for highway quick-takings is tried before or after completion of the project, these severance damages—and by inference, special benefits—are calculated as if the project is completed. A recent decision pointed out: "If the defendant [owner] elects to demand full compensation, including severance damages, prior to completion of the highway project, he must assume some of the risks or loss because of the speculative factors involved in an earlier determination of his severance damages. He nevertheless may have his demand for severance damages tried prior to completion of the project, and when he does the burden rests on him of proving to the degree of certainty required by law what his severance damages will be upon the completion of the project."\(^5\)

On at least one occasion the highway department has argued that the landowners' appraiser's testimony was incompetent, because it estimated the damage to the remainder caused by a 1961-62 taking as of the date of the taking rather than as of the date of the 1967 trial. The appraisers had eliminated from market value any increase produced by general economic

50. See, e.g., State v. Williams, 131 So.2d 600 (La. App. 3d Cir. 1961).
improvements, or any general benefits received following the highway construction, as of the date of the 1967 trial. In rejecting the department's argument, the court stated that the statutory provisions in question were only "intended to specify that the damage the remainder suffers should be reduced by special benefits which result to it from the completion of the highway construction, not to deprive the landowner of compensation for damages . . . because of any general increase in the value of the land between the taking and the trial."52

If this is the case—if we are to eliminate any increase in valuation of the subject land due to general appreciation or to general benefits—then it is suggested, without being fully committed to the proposition, that before-and-after land values to determine initial severance damage are determined on the same basis in general expropriation suits as in highway quick-takings, although the theoretical time is, in the former, the date of filing the suit, while in the latter, the date of the trial. In either case, in effect, we determine the value of the land as of immediately before and immediately after the taking (or filing of the suit), since in the highway quick-takings we eliminate general appreciation factors and are attempting only to isolate special benefits received as of the date of completion of the project, as valued at the time of trial. However, in highway quick-takings tried after completion of the project, an unfair result of this approach might be to calculate special benefits on the inflated land-values as of the time of the trial, and deduct these higher values from severance damages based on lower acreage-values as of the time of the taking.

To the contrary, the landowner can certainly argue with irrefutable logic that by the express terms of the statute his severance damages are to be calculated as of the date of the trial. So, if the remainder suffers a percentage loss of value, this severance-caused loss should be calculated upon the higher land-values at the time of the trial rather than the lower ones at the time of the taking several years earlier. If, instead of the general inflation in values since World War II, a deflationary trend sets in, then (by this reasoning) the landowner's severance damages should be calculated upon the lower values prevailing at the time of the trial rather than the higher ones at

the time of the taking. But this would deprive him of the
damage caused by the loss in market value at the time of the
actual (quick-)taking. Again, if he sells the remainder between
the time of the taking and the time of the trial, should his
damages be calculated as those based upon a theoretical (lower
or higher) market value of the land at the later time of the trial,
instead of upon the actual value of the land at the time of the
-taking or of his sale of it?

Until the issue is positively clarified by the jurisprudence,
in highway quick-takings it might well be advisable to value
damages and benefits both as of the time of the taking and as
-of the time of the trial, in the event of any great discrepancy
of values between the two dates.

PIPELINE AND POWER LINE TAKINGS

The law regarding pipeline and power line takings is in a
state of flux, and to attempt to synthesize it is a foreboding
task. Many of its principles were announced in isolated decisions
as dicta or without reasoned reference to statutory guides or
jurisprudential explanations.

One problem aspect of consequential damages arises when
takings for pipelines or high-voltage power lines allegedly affect
the market value not only of tracts or subdivision lots through
which they pass, but also of other lots or parcels. These tracts
fall into three principal categories: (1) those immediately con-
tiguous and owned by the defendant-landowners in the con-
demnation proceedings; (2) those owned by such defendants
but not immediately contiguous and therefore regarded as
separate and independent parcels; and (3) those owned by third
persons not parties to the proceedings, which are regarded as
separate and independent parcels regardless of whether they
are contiguous to the taken tracts.

Whether a contiguous holding is part of the tract taken, or
a separate and independent parcel—such as where parts are
separated by a street or road,\(^58\) or where a part is acquired
by the wife of the husband-owner made defendant\(^54\)—is some-
times an issue. It will suffice to say that a tract is not regarded

\(^53\) Louisiana Ry. & Navigation Co. v. Xavier Realty, Ltd., 115 La. 328,
39 So. 1 (1905); State v. Williams, 131 So.2d 600 (La. App. 3d Cir. 1961).
\(^54\) State v. Yawn, 127 So.2d 545 (La. App. 3d Cir. 1961).
as a separate parcel merely because acquired at a separate time and divided by an imaginary line from the tract belonging to the same owner: generally, separateness is a question of fact under all the circumstances.55

(1) When the land damaged is part of the contiguous tract across which the pipeline or power line partial taking has been made, two principal methods of valuation have been approved by the jurisprudence. Earlier jurisprudence tended to find a loss of a percentage of the value of the entire remainder—perhaps five or ten per cent—if the remainder did suffer severance damage.56 This practice was in spite of a supreme court decision disapproving this method of computing severance damages.57 This latter decision was distinguished as being based upon the absence of expert testimony in the record to support the percentage method of computing severance damages.58

Many more recent decisions, however, contain expert testimony accepted by the court showing severance damages to only a strip of property, perhaps 100-500 feet wide, in the subdivision or tract contiguous to the servitude taken.59 The reasoning of these later decisions is that not all of the property of a contiguous tract is adversely affected by a power line or pipeline taking, but only that property immediately adjacent to it. To state that a 1,000-acre tract suffers a percentage loss throughout its whole area in the same manner as does a 5-acre tract would (so the argument goes) be ridiculous. This seems, however, a matter upon which expert testimony could differ. For example, a 1,000-acre tract with best value for industrial purposes might indeed suffer a percentage loss in the market value of the whole were it traversed by a 500,000 volt high-power line with giant "H"-structures. This is a question of fact, and appraisers might do well to estimate loss of valuation upon both theories when in the best interests of those who retain them.

(2) When other independent parcels owned by the same

55. State, Dep't of Highways v. Mouledous, 200 So.2d 384 (La. App. 3d Cir. 1967); State v. Williams, 131 So.2d 600 (La. App. 3d Cir. 1961).
56. Interstate Oil Pipeline Co. v. Friedman, 137 So.2d 700 (La. App. 3d Cir. 1962); Tennessee Gas Transmission Co. v. Primeaux, 100 So.2d 917 (La. App. 1st Cir. 1958).
landowner are damaged by the taking, earlier expressions in the jurisprudence were to the effect that, even in general expropriation proceedings, the defendant landowner could not reconvene for such damages but was relegated to an independent suit. These decisions seem to have been based on procedural bars repealed by the 1960 Code of Civil Procedure, as at least one post-1960 decision has inferentially recognized. However, since the courts might hold this former jurisprudential prohibition still applicable when part of a landowner's property is taken in a general expropriation proceeding, he might be well advised to file a separate suit for damages to independent parcels caused by the same taking. He might then consolidate it for trial with the condemnation proceeding in order to avoid the expense and delay of a subsequent trial which would require a duplication of much of the expert testimony of the initial condemnation proceeding. It should be noted that the date for valuing consequential damages to an independent parcel, however, is the date of the injury sustained by construction of the project, not the date of filing the suit, as in expropriation proceedings. Until the jurisprudence is clarified, this independent suit might be dismissed as premature if brought before the damages were actually sustained through construction of the project.

60. Louisiana Highway Comm'n v. DeBouchel, 174 La. 968, 142 So. 142 (1932). This decision cites isolated earlier expressions to such effect, id. at 976, 142 So. at 144, in applying the principle.
61. In Louisiana Ry. & Navigation Co. v. Sarpy, 125 La. 388, 51 So. 433 (1910), the court attempts to explain the prohibition on the ground that it is an improper cumulation since the damages caused to the independent parcel do not arise until the new project is constructed, while the severance damages per se are calculated as of the date of the filing of the expropriation proceeding. Since severance damages themselves can be calculated as if the new "improvement" is constructed, there seems to be no practical reason why the consequential damages to the independent parcel could not be similarly calculated. But see note 65 infra. Under the 1960 procedural reform, the right to cumulate demands is considerably broadened, La. Code Civ. P. arts. 461-65, 647, as is the right of a defendant to assert all actions against a plaintiff, id. arts. 1061-66.
64. See text accompanying 43-46 supra.
65. Because these damages arise only upon construction projects, the independent suit brought before the damages were sustained might be dismissed as premature. La. Code Civ. P. art. 423; Louisiana Ry. & Navigation Co. v. Sarpy, 125 La. 388, 51 So. 433 (1910). In the writer's view, however, recovery of these consequential damages, reasonably possible to estimate in advance of construction of the new line, is no more premature than the recovery of severance damages per se before the actual construction of the project for which the expropriation is made. The single-trial considerations of judicial efficiency which brought on the 1960 procedural reforms broad-
In highway "quick-takings," the statute provides only that the landowner may seek to recover damages to the "remainder"—i.e., severance damages *per se*—by his answer in the condemnation proceedings.66 It has been held that this prevents him from seeking consequential damages to independent parcels in the expropriation suit.67 These consequential damages to separate parcels do not include "general damages," but are limited to "special damages," a limitation which applies whether the tract is owned by a condemnation defendant or by a third person.68

(3) Under the Louisiana Constitution, the physical invasion of real property or of a real right is not a prerequisite to the recovery of consequential damages sustained through the taking of property for a public purpose.69 However, a thin line of decisions has developed to the following effect: consequential damages to such independent and separate parcels, no part of which is taken or invaded, "are not recoverable unless the owner sustains special damages, caused by the public works, which peculiarly affect his property only and which are not sustained by the neighborhood generally."70 Thus, in one case where a new power line caused identical consequential damages in loss of market value both to tracts partially taken and to nearby independent parcels, the consequential damages to the separate parcels were regarded as general damages common to all property in the neighborhood and held not recoverable, even though recovery of similar damages to tracts partially taken was allowed in the same suit.71

**Burden of Proof**

In determining severance damages and special benefits one party must sustain the burden of proof—that is, the duty to
establish the valuation by a preponderance of the evidence. He loses on the issue unless he bears his burden by sufficient admissible evidence in the trial. In highway quick-takings, the burden of proving "damages" is placed by statute upon the landowner (who incidentally also has the burden of proving that the market value of the land taken is greater than the estimated compensation deposited in the court).\footnote{72} In general expropriation cases, there is no statutory regulation, but the courts have decided that the landowner claiming severance damages has the burden of proving them.\footnote{73} The landowner has the burden not only of providing the presence of severance damages but also their extent and value,\footnote{74} although the appellate courts in the interest of justice have sometimes remanded cases to the trial court when convinced that some severance damages were sustained although the evidence was insufficient as to the amount.\footnote{75}

Once severance damages have been proved, however, the burden shifts to the taker to prove both the existence and the quantum of any special benefit received by the property which is available as an offset. This is true both in highway "quick-takings" and in general expropriation cases.\footnote{76} In the absence of affirmative proof of the amount of special benefits, the claim to such an offset against severance damages will be dismissed.\footnote{77}

**RUMINATIONS IN CONCLUSION**

In years to come, new trends and developments in the law of eminent domain will primarily result from legislative action. Some changes, however, will involve judicial adaptation of present principles to the conditions of tomorrow. At this point, it seems appropriate to take a long look down that road.

The law of eminent domain has been and is evolving in the

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75. See note 74 supra.
light of the changed conditions of modern times. In the early
days of our republic, the “public use” for which property could
be taken against the consent of the owner was restricted. This
concept has expanded to such an extent that in modern times
we see, for instance, urban redevelopment as a sufficient justi-
fication permitting the acquisition of property through eminent
domain for resale to private developers who may utilize it for
their own profit in accomplishing community improvement.
Similarly, the concept of “just compensation” is now under
review, and every indication is that the concept will be expanded
to include items and considerations presently disregarded. 78

Again, in earlier times, this empty continent, with its great
stretches of vacant land, permitted the heedless use of our land
resources to accomplish the industrial and transportation objec-
tives of our growing nation. The thrust of the American people
for industrial greatness, international power, and a high individu-
al standard of living demanded a condemnation law that served
these objectives through exploitation of our resources, some-
times at the expense of the owner of property affected, even
though private property is and always has been one of the
sacred values of our free enterprise economy. The conditions
which produced a condemnor-favoring eminent domain law are
now in the process of change. Land, rather than being a bound-
less resource, is perhaps the one material item which our ever-
expanding economy cannot multiply in availability for our
increasing millions of people.

In the re-evaluation of loss suffered by the individual when
a part of our shrinking private lands owned by him is taken
against his will, one of the first readjustments will probably
allow compensation for what are now termed “incidental” losses
which result directly from the entire or partial taking of the
owner’s tract. At the present time, for instance, a business may
be destroyed because of the loss of its site through a taking.
But this loss is held to be a noncompensable, incidental loss
which an owner must bear as a part of the price of being a
member of a civilized society. The cost of relocation when a

78. Without specific citation, the writer will note that some of the
observations are based upon the five following authoritative and stimu-
lating treatments: M. DAKIN & M. KLEIN, EMINENT DOMAIN IN LOUISIANA
passim (1970); Hershman, Compensation—Just and Unjust, 21 BUS. L. 285
(1966); Klein, Eminent Domain: Judicial Response to the Human Disrup-
tion, 46 J. URBAN LAW 1 (1968); Michelman, Property, Utility and Fairness,
business or home is taken is likewise not allowable; nor are losses due to the diversion of traffic, even when as a result of a partial taking the new road now passes behind a service station instead of in front.\textsuperscript{79} These incidental losses were not appreciable factors in the historical development of compensation formulae by the courts. Recovery for them has been excluded because the courts have been reluctant to encounter the difficulties of proving both their causation and severity, and have feared that to allow recovery for incidental damage would make condemnation too expensive—thus retarding social progress.

The measurement of incidental losses is perhaps not so speculative as has been claimed. Identical problems have been resolved by courts in private suits in contract and tort. Accountants and economists may differ with regard to measuring goodwill; moving and relocation costs may depend on the condemnee's peculiar taste and relocation; and it is difficult to place a monetary value on mental suffering, to evaluate lost profits, or to repair the condemnee's expectant earnings. However, in trespass, nuisance, zoning, and wrongful eviction, property is seen as a set of legal relationships. If there is interference with some of these legal relationships, the property owner is entitled to compensation. There seems to be no technical or moral reason why the same sort of recoveries should not be permitted in eminent domain as in these other fields.

As a matter of fact, many courts have been able to measure these losses in condemnation cases. In England and Canada, for instance, reasonable recoveries for such injuries have been granted for many years without undue difficulty. We have already seen some indications of this trend in recent federal statutory provisions providing that a taking is conditioned upon the condemnor's providing or paying for replacement housing for the people displaced by the taking in addition to the market value.

While the condemnor may ultimately charge his attorney's fees to the cost of doing business and be made whole through the taxpayer or the ultimate consumer, the landowner whose property is taken must deduct from the "just compensation" paid to him the cost of his own attorney. The English have long

\textsuperscript{79} State, Dep't of Highways v. Chesson, 229 So.2d 763 (La. App. 3d Cir. 1969).
allowed an additional ten per cent of the award for "general inconvenience" to the condemnee. It is not difficult to envisage a similar American rule which might automatically allow an additional fixed percentage of the award to the landowner for the attorney's fees, at least where the condemnor does not prior to suit tender the amount ultimately awarded by the court.

Some will view with dismay changes such as these, but this is natural. We dislike the erosion of legal principles which we have spent years mastering. However, the law stands still no more than does the life around us. The airplane, that unbelievable wonder of yesterday, stands today as a commonplace along with television and space travel that were barely dreamed of a few short decades ago. The law taught in law schools today is different from the law learned there some twenty years ago. The law we talk about now will likewise differ, in detail if not in degree or kind, from the principles applicable to the same situation twenty years from now.

Rather than waste our time in lamentations and wails of anguish, let us be glad that we are not members of a stagnant society, but rather of this bursting boundless visionary nation, America, ever vigilant in the protection of individual freedom, including private ownership of property, but at the same time thrusting in community towards an even higher standard of use of its economic resources for the national, and indeed, the world's good.