Louisiana Law Review

Volume 28 | Number 1
December 1967

Suspensive Appeal in Expropriation Proceedings

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and for acquisitive prescription may be proved. This starting point may only be found if there exists a permanent state of affairs both on the servient estate and elsewhere so that no question of precariousness may arise. Otherwise under the Louisiana view, how is the court to know when the owner of the servient estate might realize that the exercise of the servitude is not a temporary thing, but one which the owner of the dominant estate intends to continue to exercise by his own intervention whenever necessary to replenish the water supply, or reset the state of affairs?

The holding in the *Wild* case can possibly be justified in the light of public policy to protect the rice industry. To hold that rice farmers have not prescribed for rice irrigation outlets would work grave hardship because irreplaceable drainage canals might be lost. Apparently this policy decision demanded enlargement of the concept of continuous servitudes to include drainage from dominant estate rice fields flooded periodically by acts of man.

But the *Wild* case is inconsistent with the requirement of a permanent state of affairs for possession and continuity. It is submitted that the French view is more consistent with the spirit of the code provisions.

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Suspensive Appeal in Expropriation Proceedings

A pipeline corporation brought an action to expropriate a servitude. The defendant challenged the right to expropriate as well as the necessity for the taking. From an adverse judgment the landowner sought a suspensive appeal. The court of appeal denied the motion on the basis that Acts 92, 93, and 108 of 1960 had abolished suspensive appeals in expropriation proceedings.[1] The Louisiana Supreme Court granted certiorari. In the first hearing the court held that "the legislative fiat abolishing suspensive appeals in all expropriation cases is violative of limitations contained in Section 2 of Article 1 and Section 15 of Article 4 of our [Louisiana's] Constitution."[2] No property can be

1. La. R.S. 19:13 (1950), *as amended*, La. Acts 1954, No. 706, § 1; La. Acts 1960, No. 108, § 1; La. Civil Code art. 2634 (1870), *as amended*, La. Acts 1954, No. 705, § 1; La. Acts 1960, No. 92, § 1; La. Civil Code art. 2636 (1870), *as amended*, La. Acts 1960, No. 93, § 1.

2. Tennessee Gas Transmission Co. v. Violet Trapping Co., 248 La. 49, 72, 176 So.2d 425, 433-34 (1965).

taken except for a public purpose and after just and adequate compensation is previously paid. On rehearing the court reversed itself, holding that there is no constitutional right to a suspensive appeal in expropriation proceedings. *Tennessee Gas Transmission Co. v. Violet Trapping Co.*, 248 La. 49, 176 So.2d 425 (1965).

The statutes in question were in response to a series of decisions which held that a defendant, in an expropriation suit, was entitled to a suspensive appeal whenever he was contesting the right to condemn.[3] The prior jurisprudence was not based on constitutional grounds but rather on a somewhat tenuous interpretation of Louisiana Civil Code article 2634 which then read:

> "Any appeal to the Supreme Court from the verdict of a jury and judgment of the lower court, made by either party, shall not suspend the execution of such judgment . . . but in the event of any change being made by the final decree in the decision of the cause, the corporation shall be bound to pay the additional assessment, or be entitled to recover back the surplus paid."

The court reasoned that the last sentence showed an intent to limit application to situations where right to expropriate was conceded, or the compensation and severance damages to be paid were contested.[4] The instant case was the first time the court determined the constitutionality of an act abolishing suspensive appeals in expropriation proceedings.

In the original hearing, the court did not hold that the denial of a suspensive appeal was violative of either state or federal procedural due process. On the contrary, the court conceded that due process is met when an opportunity for a full and complete hearing has been afforded.[5] Furthermore, the court noted that federal due process does not guarantee a right of appeal;[6] *a fortiori*, it does not guarantee a suspensive appeal. The court,

3. Interstate Oil Pipe Line Co. v. Crowley, 223 La. 672, 66 So.2d 588 (1953); Tennessee Gas Transmission Co. v. Wyatt Lumber Co., 221 La. 886, 60 So.2d 713 (1952); Rapides Central Ry. v. Missouri Pacific Ry., 209 La. 26, 25 So.2d 828 (La. App. 2d Cir. 1946), *appeal transferred*, 209 La. 26, 24 So.2d 240 (La. App. 2d Cir. 1946); Louisiana Highway Commission v. Hays' Heirs, 186 La. 398, 172 So. 432 (1937); Orleans-Kenner Electric Ry. v. Metairie Ridge Nursery Co., 136 La. 968, 68 So. 93 (1915).

4. Orleans-Kenner Electric Ry. v. Metairie Ridge Nursery Co., 136 La. 968, 68 So. 93 (1915).

5. McKane v. Durston, 153 U.S. 684 (1894); Dohany v. Rogers, 281 U.S. 362 (1930).

6. *Id.*

however, recognized that the Louisiana Constitution guaranteed a right of appeal if jurisdictional requirements are met.[7]

The majority in the first hearing relied on constitutional provisions:[8] "private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid"; "nor shall vested rights be divested, unless for purposes of public utility and for just and adequate compensation previously paid." The court first reasoned that since a denial of suspensive appeal divests ownership prior to a final determination as to the public purpose, the right to expropriate, or the adequacy of compensation, the defendant has not had the full protection of his constitutional rights. The court implies that until a judgment is final as to the right to expropriate or the adequacy of compensation the expropriator has no property right and therefore no right of possession. The court in the first hearing relied on *State through Sabine River Authority v. Phares*,[9] which held unconstitutional an act giving this agency the right to take possession of property upon depositing the appraised market value and estimated severance damages. The legislature in this act had given the Sabine River Authority the right to exercise the "quick taking" procedure.[10] The court conceded that the two cases were distinguishable; in the present there had been a hearing before a court of first instance whereas in the *Phares* case there had been a taking prior to adversary litigation. The court found the distinction irrelevant, however, finding in both situations a taking prior to final disposition which infringed on the constitutional restrictions.

On rehearing, the court reversed itself. It met the arguments put forth in the original hearing by stating that there is not a taking within the meaning of the constitution, since the pending devolutive appeal prevents it from becoming absolute until a final determination of the issues raised. The court held that all the company acquires before final judgment is an "inchoate" title. Thus the court read the provision to prevent only a "final and absolute" taking prior to payment.

The majority cited, at length, *Cherokee Nation v. Southern*

7. LA. CONST. art. VII, §§ 10, 29, 36.
8. *Id.* art. I, § 2; art. IV, § 15.
9. State, Through Sabine River Authority v. Phares, 245 La. 534, 159 So.2d 144 (1964).
10. The "Quick-Taking" procedure is limited to property taken for highway purposes. LA. CONST. art. VI, § 19.1.

Kansas Railway Co.[11] in which the United States Supreme Court held that an act of Congress granting a right of way through Indian territory did not violate that part of the fifth amendment to the United States Constitution which provides "nor shall private property be taken for public use without just compensation." The case stands for the well-recognized fact that the fifth amendment does not require payment prior to the occupancy of the land taken.

The court concluded with perhaps the most persuasive rationale behind the decisions. The court stated:

> "It is a matter of common knowledge that natural gas is one of the major products of Louisiana, consumed in large volumes by the public and by industry; it is a major source of revenue not only to the State of Louisiana, but also to the thousands of royalty owners throughout the State.
>
> "To hold LSA-R.S. 19:13, as amended, and Articles 2634 and 2636 of the Revised Civil Code, as amended, unconstitutional, grant defendant a suspensive appeal, and prevent plaintiff from entering upon defendant's property under the circumstances of this case would not only be against the great weight of authority, but would also be against *public policy*." (Emphasis added.)[12]

It is submitted that the case represents a judicial recognition of a public need for a speedy and simplified expropriation procedure—a need which produced the legislative acts referred to above and which has predicated numerous revisions of expropriation procedure in the past. This need distinguishes procedure in expropriation from other types of civil proceedings.[13] The court's purported reliance on prior decisions by the Supreme Court hardly seems appropriate since the Federal Constitution contains no provision requiring payment prior to the taking. Moreover, the court in the original hearing conceded that the Federal Constitution contains no guarantee of a suspensive appeal in expropriation proceedings. The court also purported to rely on the "inchoate title theory" but failed to consider

11. Cherokee Nation v. Southern Kansas Ry., 135 U.S. 641 (1890).

12. Tennessee Gas Transmission Co. v. Violet Trapping Co., 248 La. 49, 107, 176 So.2d 425, 446 (1965).

13. *E.g.*, the possibility of a jury trial has been removed. LA. R.S. 19:4 (1950). The delay for filing an answer is ten days instead of the usual fifteen. *Id.* 19:6. Judgment must be rendered within 48 hours after the completion of trial. *Id.* 19:10.

the actual language of the amendments in question, which state: "Payment to the owner of the amount awarded . . . or deposit thereof in the registry of the court, entitles the plaintiff to the property described *in the same manner as would a voluntary conveyance.*"[14] (Emphasis added.) Thus, it would seem that under the statute title does pass to the expropriating authority.

Therefore, the only rationale left is the public need for a relatively fast method of acquiring property for needed public improvements.[15] Though the majority was somewhat unresponsive to the arguments made by the dissenting judges, the decision appears sound because of present day conditions which require public improvements to progress rapidly enough to handle our increasing population. Moreover, the practical consequences of the decision from the landowner's point of view are not as harsh as they might first seem. The chance of success in a plea of no right to expropriate, no necessity for the project, or no public purpose is practically nil.[16] And, if the sole issue on appeal is the value of the land taken or amount of severance damages, there is no need for a suspensive appeal, since the landowner will suffer no harm by giving up possession prior to the final determination. In effect, all the decision does is

14. LA. R.S. 19:13 (1950), *as amended*, La. Acts 1954, No. 706, § 1; La. Acts 1960, No. 108, § 1; LA. CIVIL CODE art. 2634 (1870), *as amended*, La. Acts 1954, No. 705, § 1; La. Acts 1960, No. 92, § 1.

15. *Cf.* State, Through Sabine River Authority v. Phares, 245 La. 534, 159 So.2d 144 (1964) (dissenting opinion). Justice Hawthorne, a member of the majority in the instant case, seemed to state that all that the above-quoted constitutional provisions require is that just and adequate compensation, ascertained in a reasonable manner, be made available to the owner prior to the taking. Hence, the constitution would be satisfied if the appraised amount were deposited either prior to or after trial. And, *a fortiori*, there would be no right of a suspensive appeal. This would be in accord with the solution reached in most other jurisdictions and would perhaps offer a sounder basis upon which to rest the decision in the instant case. See also Hawthorne's dissent in the first hearing in the instant case. Tennessee Gas Transmission Co. v. Violet Trapping Co., 248 La. 49, 73, 176 So.2d 425, 434 (1965).

16. Objections aimed at challenging the right of the taker to expropriate are generally taken care of by the elementary principle that federal and state governments have constitutional authority to delegate power of eminent domain, through designated agencies, to certain classes of entities that serve public necessity and convenience. *E.g.*, Texas Gas Transmission Co. v. Pierce, 192 So.2d 561 (La. App. 3d Cir. 1966); Texas Pipe Line Co. v. Stein, 190 So.2d 244 (La. App. 4th Cir. 1966) (objections phrased under the general prerequisite of necessity aimed at challenging the location are disposed of by the well-recognized rule that the court will not interfere with the considerable discretion of the condemnor in choosing one location over another in the absence of fraud, bad faith, or conduct amounting to an abuse of privilege); Texas Eastern Transmission Corp. v. Bowie Lumber Co., 176 So.2d 735 (La. App. 1st Cir. 1965) (challenging the public purpose alleged or the necessity of the project are usually disposed of by citing the rule that a public purpose does not mean actual public use).

remove the procedural weapon commonly known as a "hold up" suit, *i.e.*, dilatory tactics aimed at taking advantage of the fact that there is usually considerable pressure on the condemnor to complete the project within a limited time.

Robert W. Collings

WORKMEN'S COMPENSATION—OCCUPATIONAL DISEASE—DISABILITY OF EMPLOYEE

Plaintiff, a sandblaster and painter continuing to perform his duties without pain or discomfort, sought workmen's compensation benefits for disability allegedly resulting from silicosis.[1] The district judge reasoned that even if plaintiff had contracted the disease he had not become disabled by it. The court of appeal reversed, holding that plaintiff was disabled though he could still perform his duties without pain or discomfort. The Louisiana Supreme Court non-suited the plaintiff, and *held* that since plaintiff continued satisfactory performance of his duties with the same employer, without undue pain or discomfort, he could not recover because there was no factual disability. *LaCoste v. J. Ray McDermott & Co.*, 250 La. 43, 193 So.2d 779 (1967).

Factual v. Legal Disability

Louisiana's occupational disease compensation statute[2] removes the necessity of proving an "accident" in occupational disease situations; proof of contraction of one of the listed diseases will satisfy this requirement. Once contraction has been proved the employee need only show resulting disability to recover compensation benefits.[3] Since the statute equates disabling injuries with disabling diseases, the jurisprudence

1. Silicosis is one of the occupational diseases listed in LA. R.S. 23:1031.1 (1950), added by amendment, La. Acts 1952, No. 532, § 1, which provides in part: "A. Every employee who is disabled because of the contraction of an occupational disease as herein defined . . . shall be entitled to the compensation provided in this Chapter the same as if said employee received personal injury by accident arising out of and in the course of his employment.

"B. An occupational disease shall include only those diseases hereinafter listed when contracted by an employee in the course of his employment as a result of the nature of the work performed."

2. LA. R.S. 23:1031.1 (Supp. 1966), added by amendment, La. Acts 1952, No. 532, § 1.

3. See MALONE, LOUISIANA WORKMEN'S COMPENSATION § 218 (Supp. 1964).