

Expropriation - Actions Ex Delicto for Unlawful Appropriation

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indicate a strong desire on the part of the legislature that these courts should not decide large disputes. This desire was expressly recognized by at least one of our appellate courts in the previously mentioned case of *Koerner v. Francingues*.²⁵ The effect of the majority ruling in the instant case would be to expand the jurisdiction of these courts by allowing them to hear cases where the amount actually in dispute may greatly exceed their maximum jurisdictional limit. This could lead to crowding of city court calendars and the defeat of their primary purpose. For the reasons given above it is submitted that the dissenting opinion in the principal case is the correct one and should be followed.

James R. Pettway

EXPROPRIATION—ACTIONS EX DELICTO FOR
UNLAWFUL APPROPRIATION

The Highway Department expropriated a temporary servitude on defendant's land to obtain fill for an interstate highway. After the vesting of title and withdrawal of the \$37,000 deposit, the Department filed an amended petition seeking to accommodate local industry by changing the location of the borrow pit to another part of defendant's land. The condemnee timely objected to the procedure and the condemnor's amended petition was set aside. The Highway Department, however, proceeded to remove dirt from the new location. After the earth had been removed, the landowners brought an action ex delicto seeking damages for trespass and conversion. The court of appeal held that the trial court erred in denying damages in the same amount as would be determined by ex delicto or article 507 standards, and increased the award to a net \$111,000. The Louisiana Supreme Court reversed, holding that recovery would be restricted to just compensation as in an ordinary action to

interest and attorney's fees while the other sections of the constitution speak of amounts *exclusive* of such interest and fees, the drafters of the constitution intended this to be a further limitation on this class of city courts. The more likely explanation of this difference in terms, however, is that expressed by McMahon in the introduction to LA. R.S. ANN.—CODE CIV. P. bk. VIII, tit. 1 (West 1960): "The word 'inclusive' in the constitutional provision is actually due to a typographical error in an earlier amendment, retained by subsequent amendments [T]he Louisiana State Law Institute intended to recommend the amendment of this constitutional provision to correct the error; but through inadvertence such a recommendation was not submitted to the Legislature in 1960."

25. 3 Ori. App. 220 (La. App. 1925). See material and following discussion referred to by note 8 *supra*.

appropriate property. "[The] measure of compensation is to be estimated by the same standards whether the property is formally expropriated in accordance with law or appropriated by the condemning authority so long as it is intentionally taken for a public use."¹ *Gray v. State, Through the Department of Highways*, 250 La. 1045, 202 So.2d 24 (1967).

The instant case presented the issue of whether a landowner may recover damages by *ex delicto* standards against the state for appropriation of property. Similar attempts in the past have usually failed because of the concept of sovereign immunity.² In an effort to circumvent this concept, property owners have brought their actions under article I, section 2, of the Louisiana Constitution, which prohibits the taking or damaging of private property until after the payment of just compensation.³ The article has been found self-executing; therefore suit requires no legislative authorization.⁴ These inverse condemnation proceedings, however, have been limited to actions arising from an *intentional* taking for a public purpose.⁵ Recovery of damages for the negligent acts of a state employee engaged in a public duty has not been allowed.⁶ Such act was held not to be a "taking" within the meaning of the constitutional provision, and therefore any recovery of damages required legislative approval.⁷

In the instant case, however, there was no need to confront the concept of sovereign immunity since the immunity previously enjoyed by the Highway Department had been waived by the legislature.⁸ The landowners therefore chose to institute the action under article 2315 of the Civil Code rather than article

1. *Gray v. State, Through the Department of Highways*, 250 La. 1045, 1059, 202 So.2d 24, 29 (1967).

2. *Angelle v. State*, 212 La. 1069, 34 So.2d 321 (1948); *Marie v. Police Jury of the Parish of Terrebonne*, 161 So.2d 407 (La. App. 1st Cir. 1964); *Hebert v. T. L. James & Co.*, 72 So.2d 754 (La. App. 1st Cir. 1954).

3. LA. CONST. art. I, § 2.

4. *E.g.*, *Scorsune v. State*, 224 La. 1031, 71 So.2d 557 (1954); *Angelle v. State*, 212 La. 1069, 34 So.2d 321 (1948); *Aleman v. Sewerage & Water Board of New Orleans*, 196 La. 428, 199 So. 380 (1940); *Harrison v. Louisiana Highway Commission*, 191 La. 839, 186 So. 354 (1939); *Booth v. Louisiana Highway Commission*, 171 La. 1096, 133 So. 169 (1931); *Kendeal v. State Department of Highways*, 168 So.2d 840 (La. App. 2d Cir. 1964); *Hebert v. T. L. James & Co.*, 72 So.2d 754 (La. App. 1st Cir. 1954).

5. *Angelle v. State*, 212 La. 1069, 34 So.2d 321 (1948).

6. *Id.*

7. *Id.*

8. LA. R.S. 48:22 (1950); *Hamilton v. City of Shreveport*, 247 La. 784, 174 So.2d 529 (1965); *Lambert v. Austin Bridge Co.*, 189 So.2d 752 (La. App. 1st Cir. 1966).

I, section 2, of the constitution. The amount recoverable in an ex delicto action is the amount necessary to restore the injured party to the same position he enjoyed prior to the wrongful act, i.e., no less than the value of the dirt removed in the instant case.⁹ The amount recoverable under an action for compensation under article I, section 2, of the constitution is the diminution in the market value of the property taken and any severance damages incurred.¹⁰ In the instant case the value of the dirt removed greatly exceeded the diminution in market value. The court, therefore, had to decide whether a landowner whose property is intentionally taken for a public purpose, without lawful condemnation proceedings, by a state agency *subject to suit*, may choose between an ex delicto or an inverse condemnation action authorized by the constitution. The Supreme Court indicated that such a landowner was limited to an inverse condemnation proceeding. The court stated:

“[W]hen the owner recovers just compensation, he recovers all the law gives him. To hold otherwise would be to inflict punitive damages upon the condemnor which is not permissible under our civil law system.”¹¹

In support of the holding, the court cited prior jurisprudence that established the distinction between actions arising under the constitution and those classified as ex delicto.¹² Since the instant case involved no question of sovereign immunity, the relevancy of these decisions would appear to be somewhat tenuous. The holding is subject to the further criticism that the ultimate effect is the same that would have resulted had the Highway Department proceeded lawfully. The conclusion suggested is that there is no sanction to encourage compliance with the prescribed procedure for exercising the rather harsh process of involuntary alienation.¹³ The court was obviously influenced by the policy of protecting the public fisc and the fact that the state, through a technical error, was forced to pay for an unnecessary and

9. *Aleman v. Sewerage & Water Board of New Orleans*, 196 La. 428, 199 So. 380 (1940); *Hebert v. T. L. James & Co.*, 72 So.2d 754 (La. App. 1st Cir. 1954).

10. *Id.*

11. 250 La. 1045, 1061, 202 So.2d 24, 30 (1967).

12. *Angelle v. State*, 212 La. 1069, 34 So.2d 321 (1948); *Schneidau v. Louisiana Highway Commission*, 206 La. 754, 20 So.2d 14 (1944); *Aleman v. Sewerage & Water Board of New Orleans*, 196 La. 428, 199 So. 380 (1940).

13. See dissenting opinion in principal case, *Gray v. State, Through the Department of Highways*, 191 So.2d 802 (La. App. 3d Cir. 1966).

unused servitude.¹⁴ The latter occurrence, however, should have had no bearing on whether a trespass occurred. Despite the rather broad holding, there were indications that the result might be limited to the facts of the present case.¹⁵ Application of unqualified language in the case would indicate that the existence of a constitutional remedy forecloses the use of a civil remedy or modifies the damages recoverable by the latter.¹⁶ Considering the express waiver of sovereign immunity, it would seem that there are few persuasive reasons why the state should not be responsible for damages arising from an unlawful entry to the same extent as an individual.

Robert W. Collings

FEDERAL LAW AND SEASHORE ACCRETION

Plaintiff, owner of a tract of land on the Pacific Ocean in the State of Washington, brought an action in state court to quiet title to alluvion formed since 1889, the date of the state's admission to the Union. Title derived from a federal patent issued before statehood which conveyed title "to the line of ordinary high tide."¹ Plaintiff claimed all alluvion formed after 1889. The trial court held that federal rather than state law governed since title derived from a federal patent issued before statehood and that under common law plaintiff had a right to the alluvion. Under state law she would not have acquired title to the alluvion because the State Constitution² provided that all lands accreted

14. 250 La. 1045, 1063, 202 So.2d 24, 30 (1967): "In truth, the supplemental order of expropriation was invalid solely because of a legal error of a technical nature and, as a result of it, plaintiffs obtained a windfall of \$37,145, or as (sic) least \$36,000, for the unused borrow pit."

15. By way of dicta the court offered two other possible bases for the holding in the case. They indicated that under the facts given there had been no tortious act committed and, in any event, the plaintiff was estopped by his failure to get an injunction to prevent the unlawful action by the state. It is interesting to speculate whether the cost of an injunction proceeding to the state, in possibly closing down an interstate highway construction project, would have exceeded the damages sought for the alleged trespass.

16. 250 La. 1045, 1059, 202 So.2d 24, 29 (1967): "The measure of compensation is to be estimated by the same standards whether the property is formally expropriated in accordance with law or appropriated by the condemning authority so long as it is intentionally taken for a public use."

1. *Hughes v. State*, 67 Wash. 2d 799, n.801, 410 P.2d 20 (1966).

2. WASH. CONST. art. 17, § 1: *Declaration of State Ownership*. "The state of Washington asserts its ownership to the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes."