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EXPROPRIATION

*Melvin G. Dakin**

PROCEDURE

Pleadings

During the term, a number of significant announcements were made which interpret procedural provisions affecting expropriation cases.

In the *Rottman* case,[1] the first circuit examined the applicability of the Code of Civil Procedure to an expropriation suit and determined that an expropriation defense was abandoned, pursuant to the Code,[2] where no answer had been filed within five years of the filing of a petition for expropriation and the funds deposited by the expropriator in the registry of the trial court had been withdrawn by the expropriatee. While a provision in the expropriation statutes might have been utilized to dispose of the case, since it provides for waiver of defenses where no timely answer has been filed,[3] the Code of Civil Procedure would seem properly available to eliminate any possible question as to the existence of laches where the delay is of a magnitude to qualify. In these circumstances, the trial judge is deemed entitled to respond favorably to a motion for final judgment on the ground that the suit has been finally concluded.

Where the issue is the adequacy of severance damages to the remainder rather than the fairness of compensation for the property actually taken, the legislature in 1954 provided a relief measure enabling the expropriatee to delay his answer without fear of losing his defense of inadequacy for lack of timeliness.[4]

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1. State v. Rottman, 213 So.2d 77 (La. App. 1st Cir. 1968).

2. LA. CODE CIV. P. art. 561.

3. LA. R.S. 48:452 (Supp. 1966). State v. Higgins, 135 So.2d 306 (La. App. 4th Cir. 1961), clearly holds that unless an answer is filed within the statutory period of thirty days provided in LA. R.S. 48:450 (Supp. 1966) all defenses are waived under LA. R.S. 48:452 (Supp. 1966) for failure to answer timely, including the defense that the compensation deposited by the expropriator is not adequate.

4. LA. R.S. 48:451 (Supp. 1966). In State v. William T. Burton Indus., Inc., 219 So.2d 837, 842 (La. App. 3d Cir. 1969), the court noted "that severance damages be valued as of the date of the trial was statutorily intended to specify that the damages 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 sustained by his tract because of any general increase in the value of land between the taking and the trial. We do not believe that the legislature intended to deprive a landowner of damages to his property undoubtedly caused him by the taking,

In *Genest*,[5] the third circuit again recognized that the purpose of this provision is to permit the expropriatee to prove damage after the project has been completed and the full extent of the damage determined; he is permitted to file a timely answer on this issue within one year after he is notified of final acceptance of a project by the expropriator and to prove his severance damages at the time of trial. He must, however, be prepared to prove damages in fact, since the burden is upon him to prove as well as allege. The trial court was held properly entitled to disregard "vague and generalized testimony" as to loss of value in remainders because of their shape where similarly shaped plots had been marketed successfully in the vicinity.[6]

In *Hatcher v. Gulf States Utilities Co.*,[7] expropriatee sought, in a separate suit, severance damages alleged to have accrued subsequent to the taking and for which no compensation was received in the original proceeding. The expropriatee had there been awarded severance damages by the trial court but they were on appeal deleted as unproved.[8] In this subsequent suit a plea of res judicata was successfully interposed by the expropriator and was affirmed on appeal. The first circuit reasoned that severance damages can be determined at the moment of expropriation and if expropriatee then fails to carry the burden of proof that such damages have been incurred, the issue is properly res judicata.[9]

Occasional hardship results, no doubt, from the requirement that severance damages be proved at the time of taking; under the Department of Highways quick-taking procedures, as noted, such possible hardship from difficulty of proof is mitigated by provision of the alternative, pursuant to which the expropriatee can elect to try the issue of severance damages after completion of the project by filing an answer within one year from the date he is notified of the acceptance of such completed project.[10] The contention that prayers for severance damages are premature if

simply because—in the long interval between the taking itself and the subsequent completion of the long-term major highway construction project—his property had increased in value due to generally improved economic conditions, along with all lands in the area (and, probably, most other lands in the entire State)."

5. State v. Genest, 218 So.2d 114 (La. App. 3d Cir. 1968).

6. *Id.* at 116.

7. 219 So.2d 208 (La. App. 1st Cir. 1969).

8. Gulf States Util. Co. v. Hatcher, 184 So.2d 326 (La. App. 1st Cir. 1966).

9. Hatcher v. Gulf States Util. Co., 219 So.2d 208, 212 (La. App. 1st Cir. 1969).

10. LA. R.S. 48:451 (Supp. 1966).

filed prior to completion has been rejected on the ground that expropriatee is not thereby precluded from asserting his claim to severance damages earlier if he chooses to do so.[11] No such alternative is provided in the general expropriation statute.[12]

Venue

Tenneco, Inc. v. Earhart[13] was a suit brought under the general expropriation statute for the taking of pipeline right of way with venue set in the parish where the land is situated pursuant to the general expropriation statute.[14] Expropriatees made no appearance at the trial and after proof by the expropriator, final judgment was rendered for the expropriator, with the right reserved to the expropriatee to prove additional damages as a result of the taking. Upon appeal, the most interesting error alleged by the expropriatee was that the venue of the suit did not conform to the venue requirements of the Code of Civil Procedure in that suit was not brought at the domicile of the defendant.[15] The third circuit rejected the attack on the ground that enactment of general rules of venue did not repeal special venue provisions in such statutes as the expropriation statute since the general provision was made specifically not applicable where venue was otherwise provided by law.[16]

Interlocutory Appeals

In the taking in *State v. Kilchrist*[17] an issue of ownership was raised by the parties and disposed of in a separate trial by the district court. A motion to dismiss an appeal therefrom was rested on the ground that the judgment was interlocutory and non-appealable unless threatening irreparable injury.[18] Against the motion, it was argued that the judgment qualified as a partial but final judgment on an incidental demand and was appealable.[19] In a per curiam opinion, the third circuit decided it was the latter although the reasons adduced might well have supported a holding that it was an appealable interlocutory judg-

11. State v. Williams, 131 So.2d 600, 605 (La. App. 3d Cir. 1961). For experience under this provision, *see* Comment, 26 LA. L. REV. 91, 102-103 (1965).
12. LA. R.S. 19:2.1 (1950).
13. 220 So.2d 109 (La. App. 3d Cir. 1969).
14. LA. R.S. 19:2.1 (1950).
15. LA. CODE CIV. P. art 42(1).
16. *Id.* art. 43.
17. 222 So.2d 635 (La. App. 3d Cir. 1969).
18. LA. CODE CIV. P. art. 2083.
19. *Id.* art. 1915(4).

ment because threatening irreparable damage. That failure to finally determine such a title issue could have deleterious effects on the trial of the expropriation suit seems sufficiently clear to warrant departure from the admonition against "piecemeal appeals."[20]

JUST COMPENSATION

Income Capitalization

In *Parish of East Baton Rouge v. S. & H. Heating Co.*,[21] the expropriatee persuaded the trial court that severance damages should be calculated as the difference between the market value of the condemned land at its *total future permissive use* immediately before and immediately after the expropriation. Since such total permissive use would be reduced by the taking, it was urged that the capitalization of income formula should reflect the loss in severance damages. The first circuit rejected the analysis on the ground that such damages were predicated on conjecture and speculation, citing *Rapides Parish School Bd. v. Nassif*[22] among other cases. A stronger case might have been *State v. Hub Realty Co.*[23] in which the supreme court refused to accept a calculation of the market value which the land would have had if a shopping center were constructed thereon and rented at prevailing rates. In the instant case the "permissive use" involved the construction of a future parking lot and it was urged that the taking reduced said future parking facility value some ten percent.[24]

In *State v. Mason*[25] severance damages to a filling station and motel had been calculated in part by estimating that the net income attributable to the land and improvements would be reduced ten percent by the taking and hence this net income decrease "capitalized" at ten percent represented damages. The second circuit rejected the damages as inadequately proved, concluding that the strip taken was not a "substantial or discernible factor in the diminution of the motel revenue nor has the taking

20. *Id.* art. 2083, Comment (a): "The general concept that there is no appeal except in the case of final judgments is universal in order to prevent piecemeal appeals."

21. 216 So.2d 360 (La. App. 1st Cir. 1968).

22. *Id.* at 364.

23. 239 La. 154, 118 So.2d 364 (1960).

24. Parish of East Baton Rouge v. S. & H. Heating Co., 216 So.2d 360, 364 (La. App. 1st Cir. 1968).

25. 218 So.2d 329 (La. App. 2d Cir. 1969).

adversely affected the rental value of the business units."[26] The court did not find it necessary to further probe the capitalization method used. Had it done so, it might have criticized the approach as insufficiently distinguishing between unencumbered and leased property in expropriatee's calculations since presumably for the period of any lease in effect there would be no decrease in value; if the damage was in fact suffered, it would lie in a lesser value for the reversionary interest.[27]

In *State v. Wm. T. Burton Indus., Inc.*,[28] the third circuit rejected again the argument that in Louisiana the trier of fact is not authorized to determine damages in an amount to which no expert has testified; that court stated that its power to do so "is a necessary correlative of the fact trier's right to evaluate the weight to be given to each witness' testimony, as well as of its right to make factual determinations as to which of the factors relied upon by the witnesses relevantly influence market value and severance damage. . . . [it] is not required to accept or to reject the testimony of each witness in toto."[29]

Highest and Best Use

In *Humble Pipeline Co. v. Wm. T. Burton Indus., Inc.*,[30] the supreme court was presented with a crop valuation problem in a somewhat novel setting. A servitude was expropriated through land then used for agriculture but as to which expert testimony established industrial utilization as its highest and best use. The award for the servitude was determined on the basis of the diminution in value suffered for such industrial use. However, a crop had already been planted thereon at the time of the expropriation and the issue arose as to whether its destruction in the course of utilizing the right of way was subject to compensation, over and above the amount awarded for diminution of the land for industrial purposes.[31] In the more conventional setting in which the issue arises, where residential property is appraised as commercial and the award made on that basis, no allowance is made for the value of the residential improvements except

26. *Id.* at 333.
27. M. DAKIN & M. KLEIN, EMINENT DOMAIN IN LOUISIANA: AN ANALYSIS OF EXPROPRIATION LAW AND PRACTICE (Mimeo) ch. IV, § 8B4, p. IV-120 (1968).
28. 219 So. 2d 837 (La. App. 3d Cir. 1969).
29. *Id.* at 845.
30. 253 La. 166, 217 So.2d 188 (1968), *rev'g* 205 So.2d 724 (La. App. 1st Cir. 1967).
31. *Id.* at 170, 217 So.2d at 190.

negatively, to reduce the commercial value of the net cost of removing the residential improvements since such improvements must be removed prior to commercial use.[32] If the analogy is carried over to agricultural land appraised for industrial development, it would appear that only the net fair market value to an industrial buyer, whether positive or negative, could be taken into account.

In the instant case, the supreme court was persuaded that the expropriatee should not be "penalized" for his good husbandry, by disallowance of such crop value;[33] the expropriator plausibly argued that if the value was to be allowed, there should be an adjustment to reduce it to presumably its "net" value, although the calculation is unclear.[34] The court also relied upon a provision in the expropriation laws requiring the Department of Highways to compensate for crops destroyed as well as for property taken for right of way.[35] It seems likely, however, that this provision was drafted with the taking in mind of agricultural lands which had been appraised as agricultural rather than, as here, for a more valuable industrial use, the higher fair market value of which reflected its readiness for such use. This was, no doubt, what the dissent had in mind when it quoted an earlier case to the effect that "growing crops and timber upon the land and minerals and other deposits in or under the land are circumstances to be considered *as they affect the market value of the land*, but that they do not form an additional and separate value for the purpose of just compensation."[36]

LEASEHOLD PROBLEMS

In *State v. Holmes*,[37] the most recent supreme court decision involving valuation of lease interests, the approach used by the trial court in valuing the lessee's interest was conventional except for the failure to discount the excess of economic rental over contract rental back to the date of taking;[38] the supreme court

32. State v. Gras, 141 So.2d 35, 37 (La. App. 2d Cir. 1962). *See generally* H. KALTENBACH, JUST COMPENSATION REVISED § 1-4-2 at 47, 48 (1964).

33. Humble Pipeline Co. v. Wm. T. Burton Indus., Inc., 253 La. 166, 176, 217 So.2d 188, 193 (1968).

34. Humble Pipeline Co. v. Wm. T. Burton Indus., Inc., 205 So.2d 724, 730 (La. App. 1st Cir. 1967).

35. LA. R.S. 48:218 (1950).

36. Humble Pipeline Co. v. Wm. T. Burton Indus., Inc., 253 La. 166, 178, 217 So.2d 188, 194 (1968).

37. 221 So.2d 811 (La. 1969).

38. State v. Cockerham, 182 So.2d 786 (La. App. 1st Cir. 1966), writ refused 249 La. 110, 185 So.2d 219 (1966).

found reversible error, however, in requiring the state to pay an award to the lessee for lease advantage in addition to payment to the lessor of the value of the unencumbered property.[39] The *Holmes* case is ably discussed in a student Note in this issue.[40]

PROCEDURE

CIVIL PROCEDURE

*Albert Tate, Jr.**

No procedural decision of any great consequence was rendered during the year, even though almost a third of the 1400 appellate opinions included procedural issues. This may demonstrate the clarity of the Louisiana Code of Civil Procedure of 1960 and the efficiency of its working. The discussion of the year's jurisprudence concentrates, therefore, on the few trouble areas and recommends statutory change where indicated by nearly ten years of experience with the Code.

ACTIONS AND PARTIES

Cumulation of Actions

The 1960 enactment liberalizes cumulation of actions and permissive joinder of parties, an important Code reform.[1] A plaintiff may cumulate against a defendant all consistent actions, even though based on different grounds, providing certain simple procedural requirements are met, such as each being properly venued. If multi-plaintiffs or multi-defendants are joined, there must then also be "a community of interest" between the parties joined, that is, the cumulated actions must arise out of the same facts or present the same factual and legal issues.[2]

The cumulation articles have worked well in practice. The

39. *Id.* at 814.

40. Note, 30 LA. LAW REV. 346 (1969).

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1. LA. CODE CIV. P. arts. 461-65, 647. *See* McMahon, *The Joinder of Parties in Louisiana*, 19 LA. L. REV. 1 (1958).

2. LA. CODE CIV. P. art. 463(1), comment (c).