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Expropriation - Lessee's Award

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consent before enacting a tax. A counter-argument to this would be that in seeking such a broad basis of consent the state is diluting the vote of those who favor a tax because of their political views.[64] It is submitted that if the equal protection clause is found to be applicable to the two-thirds tax law, in light of the noted cases, it is doubtful that the state can prove a compelling state interest.

Since the application of the equal protection clause to voting right cases seems now firmly imbedded in our constitutional law, the states cannot deny the franchise to anyone unless a "compelling state interest" in doing so is demonstrated. For this reason many state laws on voter qualifications are of doubtful constitutionality.

R. Bradley Lewis

EXPROPRIATION—LESSEE'S AWARD

Plaintiff, the State of Louisiana through its Department of Highways, initiated this suit to perfect the expropriation of a certain tract of land, which was encumbered by a lease with sixty months left in its unexpired term. The trial court awarded separate compensation to the lessee in addition to the value of the property in perfect ownership awarded to the lessor-landowner.[1] Plaintiff appealed on the basis that the lessee's award should be paid out of, and not in addition to, the amount found by the court to be the true value of the tract in perfect ownership. Reversing, the supreme court *held* that where the value of the taken tract in perfect ownership is determined by using the actual value of the lease and the cost of reproduction of the premises less an amount for depreciation thereof, and these two determinations are substantially the same, the lessee is to be paid out of and not in addition to this amount. *State, Dep't of Highways v. Holmes*, 253 La. 1099, 221 So.2d 811 (1969).

As a practical matter, the process of expropriation[2] was relatively unknown in the United States in the earliest stages of

64. Carrington v. Rash, 380 U.S. 89, 94 (1965); Reynolds v. Sims, 377 U.S. 533, 562-63 (1964).

1. State, Dep't of Highways v. Holmes, 209 So.2d 780 (La. App. 2d Cir. 1968).

2. As used in this Note, the term "expropriation" means a taking of private property for public use upon the payment of just compensation therefor.

its infancy due to the extreme abundance of virgin land within its then still undefined territory. As the country became more urbanized and more of the land came to be owned by private interests, the establishment of highways and other public utilities gave birth to the need for a system whereby the federal and state governments could justly acquire real estate needed for these purposes. Two decisions of the United States Supreme Court in 1896[3] held that the requirement of just compensation of the fifth amendment[4] to the United States Constitution is deemed applicable to the states via the due process clause of the fourteenth amendment.[5] However, many state constitutions had for decades contained provisions requiring the payment of just compensation upon the expropriation of private property.[6] At the present time, every state of the United States[7] except North Carolina[8] has a constitutional provision requiring this procedure.

A very similar provision existed in Louisiana for more than twenty years before the passage and ratification of the fourteenth amendment.[9] Although split into two articles, substantially the same provisions are found in the 1879 constitution;[10] and the present State Constitution contains no less than three provisions on expropriation and the guarantee of just compensation.[11]

In order to understand the practical applications of expropriation calculations, it is necessary to compare the nature of the interests in land held by the lessor and lessee under Anglo-American law and under the law of Louisiana. Under the theory

3. Fallbrook Irrigation Dist. v. Bradley, 165 U.S. 112 (1896); Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896).

4. U.S. CONST. amend. V: "[N]or shall private property be taken for public use without just compensation."

5. *Id.* amend. XIV, § 1: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

6. *See generally* Corwin, *The Doctrine of Due Process Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911).

7. *See* C. HAAR, LAND-USE PLANNING 470 (1959).

8. In North Carolina, compensation has been held to be required under the principles of natural law. Staton v. Norfolk & Carolina R.R., 111 N.C. 278, 16 S.E. 181 (1892).

9. La. Const. art. CIX (1845): "No ex post facto law, nor any law impairing the obligations of contracts, shall be passed, nor vested rights be divested, unless for purpose of public utility, and for adequate compensation previously made." *See also* La. Civ. Code arts. 2605-2607 (1825).

10. La. Const. art. VI (1879): "No person shall be deprived of life, liberty or property, except by due process of law." *Id.* art. CLVI: "Private property shall not be taken nor damaged for public purposes without just and adequate compensation being first paid."

11. LA. CONST. art. I, § 2; art. IV, § 15; art. VI, § 19.1.

of estates,[12] upon which the Anglo-American law of real property is founded, the highest degree of ownership is the estate known as the fee simple absolute.[13] Out of this may be carved lesser estates intended to endure for a shorter span of time than would be evinced by a conveyance styled, "to *A* and his heirs and assigns forever."[14] The lesser estate of particular note at this point is the estate for years[15] or lease. When an estate for years is conveyed by the fee simple owner, he becomes the owner of a future interest[16] called a reversion in fee simple[17] and the lessee is the owner of an estate for years.[18] The principal result of the Anglo-American property system is that both lessor and lessee own estates in the land subject to the lease. This means that upon the expropriation of the tract, both have a compensable interest in the taken land and each must be awarded just compensation according to the extent of his respective interest as each interest constitutes property within the meaning of the fifth and fourteenth amendments.[19]

In Louisiana, the practice of giving an award to the lessee, upon expropriation, for his interest has by some writers been attributed to a feeling that the state probably felt obliged to follow the procedure of Anglo-American jurisdictions.[20] However, this practice finds considerable support in the civil law. Civil Code article 2015 provides that a lease creates a real obligation in favor of the lessee.[21] Taking the view that a real obligation is but the correlative partner of a real right, it may be concluded that the lessee has a real right in the leased premises.[22] But, the

12. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 28 (1962); 1 AMERICAN LAW OF PROPERTY § 1.7 (Casner ed. 1952).

13. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 29 (1962); 1 AMERICAN LAW OF PROPERTY §§ 1.8, 2.3 (Casner ed. 1952).

14. *See* 1 AMERICAN LAW OF PROPERTY § 2.3 (Casner ed. 1952).

15. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 63 (1962); 1 AMERICAN LAW OF PROPERTY §§ 1.11, 3.13 (Casner ed. 1952).

16. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 93 (1962); 1 AMERICAN LAW OF PROPERTY § 4.1 (Casner ed. 1952).

17. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 94 (1962); 1 AMERICAN LAW OF PROPERTY § 4.16 (Casner ed. 1952).

18. *See* C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 73 (1962); 1 AMERICAN LAW OF PROPERTY § 3.13 (1952).

19. *See* J. SACKMAN, 2 NICHOL'S THE LAW OF EMINENT DOMAIN § 5.23 (rev. 3d ed. 1963).

20. *See, e.g.*, Comment, 24 LA. L. REV. 849, 873 (1964).

21. LA. CIV. CODE art. 2015: "Not only servitudes, but leases and all other rights, which the owner had imposed on his land before the alienation of the soil, form real obligations which accompany it in the hands of the person who acquires it . . . ."

22. *See* Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part II*, 23 LA. L. REV. 518, 523 (1963).

contract of predial lease has traditionally been regarded as one creating only personal rights.[23] Also, the lessee is not permitted to bring either the possessory or the petitory action in order to protect his interest.[24] However, the supreme court has held that the lessee is owed compensation for his interest upon expropriation of the premises.[25] Thus, the right of the lessee functions as one of a personal character when he seeks to avail himself of the protection of the possessory and petitory actions,[26] but functions as a real right when the premises are transferred by conventional means[27] or expropriation.[28] This suggests that the contract of predial lease is actually one of a hybrid nature.[29] Because the lessee's interest functions as a real right in expropriation proceedings, there is support for classifying it as an incorporeal immovable,[30] and this adds considerable weight to the proposition that compensation to the lessee is proper.[31]

Having determined the presence and nature of the separate interests of lessor and lessee in an expropriation proceeding, it is necessary to discuss briefly methods recognized and utilized by the courts in computing the expropriation award. There are three generally recognized appraisal procedures in Louisiana: (1) market data as to the sales of comparable property in the vicinity; (2) cost of reproduction less depreciation; and (3) capitalization of the economic rent.[32] Different combinations of the three provide the two most prevalent methods used in appraising the value in perfect ownership of property subject to a lease.

The first method is to add the present value of the land to the cost of reproducing the improvements, if any, less an amount equal to the depreciation of these improvements.[33] The most widely used procedure for valuing bare land is to compare it,

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23. *Id. Part I*, 23 LA. L. REV. 161, 189 (1963).
24. *Id.* at 190.
25. *In re* Morgan R.R. & S.S., 32 La. Ann. 371 (1880).
26. LA. CODE CIV. P. arts. 3651-3664.
27. LA. CIV. CODE arts. 2015, 2011. Note that the public records doctrine must be complied with in order for the real right to be effective against subsequent acquirers of the tract. *See id.* arts 2239, 2251-2266, 2452; LA. R.S. 9:2271, 2272; McDuffie v. Walker, 125 La. 152, 51 So. 100 (1909).
28. *See In re* Morgan R.R. & S.S., 32 La. Ann. 371 (1880).
29. *See* Yiannopoulos, *Real Rights in Louisiana and Comparative Law: Part II*, 23 LA. L. REV. 518, 550 (1963).
30. *See* 1 A. YIANNOPOULOS, CIVIL LAW OF PROPERTY § 61 (1966).
31. *See* LA. CIV. CODE arts. 2626, 2628; LA. CONST. art. I, § 2; art. IV, § 15; art. VI, § 19.1.
32. *See generally* State, Dep't of Highways v. Crockett, 131 So.2d 129 (La. App. 2d Cir. 1961).
33. State, Dep't of Highways v. Ferris, 227 La. 13, 78 So.2d 493 (1955).

either on a front foot or a square footage basis, to sales of comparable land in the vicinity.[34] The value of the improvements is determined by finding their replacement cost less whatever depreciation may be attributed to them due to age, dilapidation, or obsolescence, or a combination of any or all of these.[35] By adding the value of the land to the adjusted value of the improvements, a sum is obtained which represents the present value of the tract in perfect ownership. Since this is a total valuation of perfect ownership, it should follow that all interests are to be compensated out of this amount because, logically, the sum of the parts should not exceed the value of the whole.[36]

The second method also arrives at the total value by adding the present value of the land to the value of the improvements, but utilizes a procedure for computing the latter in which age and cost are irrelevant.[37] The value of the improvements is found to be the capitalized amount of the rent attributable to the improvements[38] over the remainder of the lease term. Thus, the earnings attributable to the improvements are used to find their present value. This is known as the building residual method of deriving improvement value,[39] and when combined with the value of the land, produces a figure equal to the present valuation of the entirety.[40]

With respect to the apportioning of awards, attention is now directed at one method for determining the lessor's interest. This is computed by adding the present value of the land to the capitalized value of the rent reserved in the lease (contract rent) over the remaining period of the lease.[41] By using the rent reserved in the lease as a base, the final sum necessarily excludes any interest of the lessee. This is because his interest if any, in the taken tract will only be the value of his lease advantage,

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34. S. McMICHAEL, APPRAISING MANUAL 31 (4th ed. 1966).
35. *Id.* at 460.
36. *See generally* 27 AM. JUR. 2d EMINENT DOMAIN § 247 (1966).
37. *See* G. SCHMUTZ, THE APPRAISAL PROCESS § 1801 (1953).
38. *Id.* at § 3506. This is known as the economic rent and is that which would be received if a lease were negotiated on the date of appraisal which would put the premises to their best use. It is an expected rent and should not be confused with the rent reserved in the lease which is known as the contract rent.
39. *See* G. SCHMUTZ, THE APPRAISAL PROCESS §§ 1801-1816 (1953); S. McMICHAEL, APPRAISING MANUAL 43 (4th ed. 1966).
40. State, Dep't of Highways v. Holmes, 253 La. 1099, 221 So.2d 811 (1969).
41. State, Dep't of Highways v. Cockerham, 182 So.2d 786 (La. App. 1st Cir. 1966), *cert. denied*, 249 La. 110, 185 So.2d 219 (1966).

unless of course, he has paid the full rent in advance.[42] This lease advantage is found to be the difference, if any, between the rent reserved in the lease and the higher economic rent attributable to the premises. "Whenever the contract rent is below economic rent, a leasehold interest (lease advantage) in favor of the tenant exists. Whether the landowner-lessor wishes or not, he is now sharing the value of his property with his tenant."[43] With the foregoing in mind, now will be examined the activity of Louisiana courts in this area.

In 1880, the Supreme Court of Louisiana handed down its historic decision *In re Morgan R.R. & S.S.*[44] In this opinion the court recognized that the lessee of land subject to expropriation is entitled to compensation for his right in the taken land, if such right gives him a lease advantage. But the court went on to hold that the lessee's award could not be taken out of the award to the landowner-lessor unless the rent had been paid in advance or, "the value of his right has been fixed by the present actual value of the lease."[45]

In 1955, the court decided *State, Dep't of Highways v. Ferris*[46] in which it awarded the lease advantage to the lessee in addition to an award to the landowner-lessor based upon the value of the land plus the value of the improvements (by cost less depreciation), or a valuation of the tract in perfect ownership.[47] The court reasoned from *Morgan* that the only time the lessee gets paid out of the value in full ownership is when the rent is paid in advance or the lessor's rights are fixed by using the present actual value of the lease. It is submitted that this award was a misapplication of the rule of the *Morgan* case since the court in *Morgan* never intended for a lessee to be awarded an amount above and beyond the present value of the tract in perfect ownership nor does the language of that case point to that conclusion.[48]

The question of leasehold interest in an expropriation pro-

42. *In re* Morgan R.R. & S.S., 32 La. Ann. 371 (1880).
43. G. JACOBSON, PROOF OF VALUE IN EMINENT DOMAIN LEASEHOLD INTERESTS 41 (Highway Research Record No. 260, 1969).
44. 32 La. Ann. 371 (1880).
45. *Id.* Note that this is entirely correct as the "present actual value of the lease" means the economic rent attributable to the premises and by using such as a base, the result is a valuation of the entirety. *See* text accompanying note 38 *supra*.
46. 227 La. 13, 78 So.2d 493 (1955).
47. *See* text accompanying note 36 *supra*.
48. *See* note 45 *supra*.

ceeding surfaced again in 1965 with the holding of the First Circuit Court of Appeal in *State, Dep't of Highways v. Cockerham.*[49] The court found the valuation of the entirety to be the sum of the lessor's interest plus the lessee's interest or lease advantage, both discounted to present value. The lessor's interest was computed by capitalization of income (based on the rent reserved in the lease)[50] while the lease advantage was found to be the difference between the contract and economic rentals. This would seem to run afoul of the rule of *Morgan*, but it must be remembered that although the lessor's right was fixed by the value of the lease, it was by the value as to him alone, that is, on the basis of the contract rent. Thus, the additional award to the lessee was quite proper if not required. It is interesting to note that the awards in *Cockerham* were discounted to present value, a very commendable solution.

In *Holmes*,[51] the improvements were valued by two procedures, cost less depreciation and capitalization of income. The trial court and the court of appeal concluded that under the ruling of the supreme court in the *Ferris* case and that of the First Circuit Court of Appeal in the *Cockerham* case, the lessee's award (lease advantage) should be paid in addition to the amount paid to the lessor for the value of the property in perfect ownership.[52] Reference has already been made to the oversight within the *Ferris* opinion[53] and the facts of the instant case do not fall within the purview of the *Cockerham* decision due to the fact that in *Cockerham* the valuation of the entirety was not fixed by capitalization of the economic rental.[54] In *Holmes*, the valuation of the entirety was based on a capitalization of the economic rent attributable to the premises, which necessarily includes the lease advantage.[55]

49. 182 So.2d 786 (La. App. 1st Cir. 1966), *cert. denied*, 249 La. 110, 185 So.2d 219 (1966).

50. *See* text accompanying note 41 *supra*.

51. State, Dep't of Highways v. Holmes, 253 La. 1099, 221 So.2d 811 (1969).

52. State, Dep't of Highways v. Holmes, 209 So.2d 780 (La. App. 2d Cir. 1968).

53. *See* text accompanying note 47 *supra*.

54. *See* text accompanying note 50 *supra*.

55. It is interesting to note that the court of appeal in the *Holmes* case used a higher value ($550) for the economic rental when fixing the value of the entirety than it used when fixing the lease advantage ($400). Thus the court subtracted the contract rent ($200) from $400 and arrived at $200 when they should have subtracted from $550 and arrived at a lease advantage of $350 per month. The court points this out but finds it to be non-germane as the lessee did not appeal the decision of the court of appeal. 253 La. 1099, 1106, 221 So.2d 811, 814 (1969).

The court in *Holmes* justified its reversal by bringing the case within the rule of *Morgan* and without overruling its prior decision in the *Ferris* case. It reasoned that the award of the lessor had been fixed with reference to the present actual value of the lease and therefore the lease advantage should properly be deducted therefrom. It is submitted that this decision is not as much a mixture of fact and law as the court made it seem to be by bringing it under the *Morgan* rule.

The writer suggests the rule should be that the sum of the parts cannot exceed the whole; and therefore, where a valuation is made of the property in perfect ownership, by whatever means, the lessee must receive his award out of that amount. It could be argued that this would prevent the landowner-lessor from receiving the total fair market value for his land. But in an expropriation proceeding, it is submitted that a lessor is not entitled to the entire amount of the fair market value because of the outstanding real right held by the lessee,[56] which subtracts from both the quantitative and qualitative nature of the lessor's interest in the land. Thus, the sum of these two interests, where the rights to the land are not further subdivided, equals the value of the land in full or perfect ownership and can equal no more.[57] This is the conclusion reached by the Third Circuit Court of Appeal in basing its decision in *State, Dep't of Highways v. Thornton*[58] on the *Holmes* case even though the entirety was valued by using the cost less reproduction approach. That court said that under the rule of *Holmes*, the lease advantage must always be paid out of the value of the tract in perfect ownership.[59]

The sound and just accounting technique of discounting awards to their present value has been used in the jurisprudence,[60] but has not as yet become a requirement in the adjudi-

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56. *See* text accompanying notes 20-31 *supra*. *See also* LA. CIV. CODE arts. 488-492.

57. State, Dep't of Highways v. Thornton, 220 So.2d 217, 223 (La. App. 3d Cir. 1969).

58. 220 So.2d 217 (La. App. 3d Cir. 1969).

59. The supreme court has also stated that this is the rule which should follow from its decision in the *Holmes* case, but it has said so without overruling the *Ferris* opinion. *See* State, Dep't of Highways v. D & J Realty Co., No. 49,402 (La. Sup. Ct., Nov. 10, 1969).

60. *See* State, Dep't of Highways v. D & J Realty Co., No. 49,402 (La. Sup. Ct., Nov. 10, 1969); State, Dep't of Highways v. Levy, 242 La. 259, 136 So.2d 35 (1961); State, Dep't of Highways v. Cockerham, 182 So.2d 786 (La. App. 1st Cir. 1966), *cert. denied*, 249 La. 110, 185 So.2d 219 (1966).

cation of expropriation sums.[61] As the whole theory of just compensation in expropriation is geared to the value at the time of the taking, it seems rather anomalous to require the expropriator to pay these sums without their first being discounted to present value. It is submitted that the supreme court should expressly recognize this principle as being one required by law in the fixing of such adjudications.

Winston E. Rice

PRESCRIPTION OF A MODE OF USE OF A SERVITUDE

In 1949, plaintiff Hanks' ancestor in title conveyed to the defendant, Gulf States Utilities, the servitude which is described in part as follows: ". . . the right, privilege and servitude to enter upon and erect, construct, extend, . . . replace, remove, repair and patrol one line of poles, frames or towers which may be erected simultaneously or at some future time . . . [for] use as adapted for the transmission of electricity, electrical energy and power."[1] The defendant immediately erected a single line of poles supporting one electrical wire. Thirteen years later, defendant replaced the single line of poles with a double line known as H-frames. Plaintiff Hanks instituted an action for damages resulting from the alleged trespass. The court of appeal affirmed the lower court's decision that the replacement of the single line with the H-frames constituted a trespass. The appellate court reasoned that three modes of use, poles, frames and towers, of the servitude had been granted and the right to construct H-frames had prescribed by non-usage for ten years according to article 796 of the Civil Code.[2] The Supreme Court of Louisiana reversed, holding that the above-mentioned rights were accessory rights and as such had not prescribed. *Hanks v. Gulf States Util. Co.*, 253 La. 946, 221 So.2d 249 (1969).

The original existence of the right of Gulf States to replace

61. *See* State, Dep't of Highways v. Holmes, 253 La. 1099, 221 So.2d 811 (1969); State, Dep't of Highways v. Ferris, 227 La. 13, 78 So.2d 493 (1955); State, Dep't of Highways v. Thornton, 220 So.2d 217 (La. App. 3d Cir. 1969).

1. Hanks v. Gulf States Util. Co., 253 La. 946, 947, 221 So.2d 249, 250 (1969).

2. LA. CIV. CODE art. 796: "The mode of servitude is subject to prescription as well as the servitude itself, and in the same manner.

"By mode of servitude, in this case, is understood the manner of using the servitude as is prescribed in the title."