Louisiana Law Review

Volume 41 | Number 2
Developments in the Law, 1979-1980: A Symposium
Winter 1981

Public Law: Expropriation

Melvin G. Dakin

EXPROPRIATION

*Melvin G. Dakin**

AUTHORITY TO TAKE

The legislature vests the power to expropriate in "any domestic or foreign corporation created for the piping and marketing of natural gas."[1] A 1962 act[2] authorizes the Commissioner of Conservation to regulate the use of underground reservoirs for gas storage. Reading the expropriation provision and the conservation statute *in pari materia*, the court of appeal in *Mid-Louisiana Gas Company v. Sanchez*[3] easily concluded that a pipeline company had the implied authority to expropriate above and underground property interests for the purpose of storing the gas as well as piping it to the public, as integral parts of marketing and supplying gas to the public.[4] In *Southern Natural Gas Company v. Poland*[5] another court of appeal added, by interpretation, a facet to this area of law when multiple interstate pipeline interests seek to share the construction of such facilities. A storage facility was proposed to be developed by a jointly-owned storage company, and the requisite certificate from the Federal Energy Regulatory Commission (FERC) had been obtained by that company. Since the facility was not a pipeline, however, expropriation proceedings were brought by one of the shareholders, a Louisiana corporation "created for the piping and marketing of natural gas"; in keeping with contractual arrangements, the expropriated property then would be transferred to the storage company for development. In response to the argument that the expropriator lacked public purpose and Federal authorization, the court sagely observed that circumstances may arise where intricate dealings and conveyances between corporations will defeat the ostensible public and necessary purpose, but these circumstances are not present here; "the mandate of strict construction . . . does not permit a court to add further restrictive conditions to those which are imposed . . . legislatively."[6] In passing, the court also noted that "the FERC certificate relating to the operation of an

---

* Professor Emeritus of Law, Louisiana State University.

1. LA. R.S. 19:2(5) (1950 & Supp. 1974).
2. 1962 La. Acts., No. 190, *amending* LA. R.S. 30:22 (1950).
3. 280 So. 2d 406 (La. App. 4th Cir. 1973).
4. 280 So. 2d at 411.
5. 384 So. 2d 528 (La. App. 2d Cir. 1980).
6. *Id.* at 530.

interstate facility is some evidence that the public and necessary requirement of state law has been fulfilled, but it is not the sole and exclusive evidence."[7]

NATURE OF THE INTEREST TAKEN

Louisiana coastal areas are threaded by a seemingly unending maze of natural and artificial waterways. The waterways provide access for hunting and fishing, for oil and gas exploration, and for other developmental activities in the wetlands. Many canals are constructed upon private property but are interconnected with natural navigable waterways; these artificial bodies of water provide tempting targets for commercial fishing and shrimping activities but are available, however, only upon obtaining permission from the owners. In *Vaughn v. Vermilion Corp.*[8] the issue presented to the United States Supreme Court was whether such privately constructed canals, by virtue of their interconnection with the "navigable waters of the United States,"[9] become part of such waterways and consequently are open to use by all citizens of the United States without a right to exclude in the owner of such canals.[10] The Court had no difficulty in reaching the conclusion that the private waters were a part of the "navigable waterways of the United States" by virtue of interconnection. In the interest of furthering navigation or commerce, Congress could regulate navigation thereon and assure its continuance. However, the Court also found that opening the canals to public use without permission from the owner constituted a taking of one of the "essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others."[11] That right was held to fall within the category of interests that cannot be taken by the government without payment of fair value.[12]

---

7. *Id.*, *citing* Texas Gas Transmission Corp. v. Soileau, 251 So. 2d 104, 106-07 (La. App. 3d Cir. 1971). *See* M. DAKIN & M. KLEIN, EMINENT DOMAIN IN LOUISIANA 317 n.171 & 362 n.31 (Supp. 1978).

8. 100 S. Ct. 399 (1979).

9. Gilman v. Philadelphia, 70 U.S. (3 Wall.) 713, 724-25 (1865).

10. This issue also was presented to the Court in the companion case of *Kaiser Aetna v. United States*, 100 S. Ct. 383 (1979). The *Vaughn* case from Louisiana presented a second issue which resulted in its remand to the state courts for further proceedings; plaintiffs sought to establish in *Vaughn*, in addition to interconnection with the navigable waters of the United States, that a pre-existing natural navigable waterway had been diverted and destroyed by the construction of the private canals and that those formations were thus artificial substitutes for such navigable waterways not subject to control under state law. 100 S. Ct. at 401.

11. Kaiser Aetna v. United States, 100 S. Ct. 383, 391 (1979).

12. U.S. CONST., amend. V. It is anticipated that the Court will shortly announce a definitive position in the more complex case of an alleged taking by rezoning because the owner's use of property thereby is substantially curtailed or destroyed. In *Agins v.*

The case provides an interesting parallel for *State v. Jeanerette Lumber & Shingle Company*[13] in which a similar result was achieved. In *Jeanerette Lumber* the Louisiana Supreme Court held that the taking of a canal right of way for use in the construction of an interstate highway through the Atchafalaya Floodway was for highway purposes; the taking did not include future use of the canal by the public for access to public recreational waters.[14] The court did not deny the power of the state to take for such a purpose but held that the state must pay the owner for depriving him of the right to exclude.

The perils of relying upon general legislation in the acquisition of title to highway property, even for the laudable purpose of husbanding state tax dollars, are well illustrated in *Folse v. State*.[15] Six decades ago, Louisiana embarked on a statewide system of roads; an initial step in the process was a legislative transfer of the existing parish roads to the State Board of Highways, subject to relocation by that body as needed.[16] The right of way in question originally had been granted as a servitude to a railway by the landowner. The right of way subsequently was transferred by the railway to the parish to allow construction of a two-lane road. Finally, general legislation transferred the servitude to the Board of Highways. In the present era of four-lane highways, the state proposed to utilize the full original right of way, but an abutting owner, asserting

---

City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25 (1979), the California Supreme Court concluded that the owner had no right to sue in inverse condemnation as for a taking but would be entitled to sue for declaratory relief and possible invalidation of the zoning regulation upon a showing that the owner had been deprived of substantially all reasonable use of his property. The United States Supreme Court has noted probable jurisdiction in the case and in its review must deal with an interpretation of the statement by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 422. The California court has asserted that the use of the word "taking" by the Supreme Court was "solely to indicate the limit by which the acknowledged social goal of land control could be achieved by regulation rather than by eminent domain." 24 Cal. 3d at 274, 598 P.2d at 29. In *Kaiser Aetna v. United States*, 100 S. Ct. 383 (1979), after noting that Congress had unquestioned power to assure the public a free right of access if it so chose, the Court stated that whether a taking occurred under the logic of *Pennsylvania Coal Co.* was "an entirely separate question." *Id.* at 390. In *Kaiser Aetna* creating such free public access was deemed to go "so far beyond ordinary regulation . . . as to amount to a taking." *Id.* at 392. In *Agins*, the issue well might be whether zoning which deprives the owner of substantially all reasonable use of his property similarly exceeds "ordinary regulation" and is hence a taking subject to payment of compensation.

13. 350 So. 2d 847 (La. 1977).

14. *Id.* at 856.

15. 356 So. 2d 411 (La. 1978); *on remand*, 377 So. 2d 511 (La. App. 3d Cir. 1979).

16. LA. R.S. 48:191 (Supp. 1955 & 1979).

peaceful possession for the requisite period, sought injunctive relief. The state countered by asserting title, although it had not taken the precaution of obtaining from the parish a formal grant of the right of way outside the road surface proper,[17] as it had in other instances. Perhaps piqued by this oversight, the parish authorities executed a blanket abandonment of any remaining interest in the right of way to contiguous landowners. In this posture of the case, the state probably spent in litigation what it might have spent in acquiring the property by voluntary deed or by expropriation proceeding. Nonetheless, had the state been successful in establishing that the general legislation transferred whatever interest the police jury possessed, it might have saved tax dollars. Instead, the Louisiana Supreme Court found it a "fair reading of the [transfer] statute"[18] that this result was not the legislative intention; the court also found that a parish resolution of "blanket abandonment"[19] was insufficient to convey title to the landowner. The final result was a victory for the landowner without title but in peaceful possession of the right of way outside the road surface proper; disturbance of that possession by the state was deemed to warrant damages in the amount of 75 per cent of the fair market value of the land taken. The true owner, never determined but presumably the parish, would have been entitled to full compensation for the value of the land.

DAMAGES

State v. Wilson[20] illustrates again the importance of adequate proof if advantage is to be taken of the expanded constitutional language that "property owners are to be compensated to the full

17. The highway cases decided under the *St. Julien v. Morgan Louisiana & Texas R.R. Co.*, 35 La. Ann. 924 (1883), doctrine have established that only the road surface and supporting areas over which dominion clearly could be shown to have been exercised would be vested in the state. Thus, in *State v. Thurston*, 338 So. 2d 154 (La. App. 2d Cir. 1976), the state was unopposed in its position that a servitude had been established in the paved surface of a road but was unsuccessful in an attempt to prove that the shoulders and ditches had also been acquired. There was no showing of construction or other dominium "which would have clearly indicated to the landowner at that time the dimensions of the land area which the department intended to occupy for a public purpose." *Id.* at 156. The *St. Julien* rule was also successfully invoked in *Holt v. City of Bossier City*, 384 So. 2d 495, 498 (La. App. 2d Cir. 1980), against a co-owner who knew of the construction of drainage facilities across her property and made no protest; of course, acquiescence was deemed to establish only the right of the city to expropriate and did not preclude a claim for compensation. *See also* M. DAKIN & M. KLEIN, *supra* note 7, 164-65.

18. 356 So. 2d at 414.

19. *Id.* at n.5.

20. 372 So. 2d 632 (La. App. 1st Cir. 1979).

extent of . . . loss."[21] Only a small amount of land was taken from the owner, but the forty-acre tract was rendered less valuable for small acreage homesites; the interstate highway for which the property was taken isolated the tract from more populated areas. Severance damages were awarded accordingly. In addition, a commercial building was rendered useless for its original purpose by the taking. But the owner submitted only an estimate of cost to convert to residential use instead of calculating business loss by submitting proof of the present value of the profits that the building would have produced. Since the building was not shown to be damaged, and "cost to cure" usually is used only in lieu of damages, the latter item was disallowed.[22] Had there been proof, presumably the court would have allowed the present value of profits lost by the taking, since only thus would the owner have been "fully compensated."

State v. Willet[23] brings into sharp focus an anomaly stemming from the decision of the Louisiana Supreme Court in *State v. Garrick*[24] almost a decade ago: Citing *Garrick* as its authority, the court of appeal in *Willet* awarded severance damages to an owner aggrieved by a partial taking for highway improvements. The court specifically held that such "damages are allowable even though . . . not peculiar to the complaining owner but rather are suffered by the neighborhood generally."[25] In *Garrick* narrow strips had been taken from property frontage for the purpose of widening a highway; severance damages of 35 percent of the value of the remainders had been allowed to compensate for the loss attributable to "noise, dirt, vibration . . . resulting from the increased traffic after the construction of the by-pass . . . ."[26] The circuit court in *Garrick*[27] disallowed such severance damages. Citing *Reymond v. State*,[28] the appellate court made an abortive attempt to establish for severance damages the rule applicable to an owner claiming damages only because of proximity to a public work—such damages "must be peculiar to the subject property and not such as are suffered generally by other landowners in the area."[29] The Louisiana Supreme Court rejected

21. LA. CONST. art. I § 4. The Louisiana Supreme Court now has approved in principle such compensation in *State v. Constant*, 369 So. 2d 699 (La. 1979). *See* Note, *Expropriation: Compensating the Landowner to the Full Extent of His Loss*, 40 LA. L. REV. 817 (1980).

22. 372 So. 2d at 634.

23. 383 So. 2d 1344 (La. App. 3d Cir. 1980).

24. 260 La. 340, 256 So. 2d 111 (1972).

25. 383 So. 2d at 1352.

26. 260 La. 342, 256 So. 2d at 112.

27. 242 So. 2d 278 (La. App. 2d Cir. 1970).

28. 255 La. 425, 231 So. 2d 375 (1970).

29. 242 So. 2d at 280.

the *Reymond* parallel, characterizing it as "not an expropriation case."[30] Instead the court held that, if a partial taking occurs, severance damages properly may include loss in value resulting from the construction of the improvement in the form of enhanced levels of noise, smoke, and vibration, despite the fact that similar damages are suffered by adjacent owners.[31] The *Willet* holding no doubt will be known as "the total effect" rule since, as formulated, damages are allowed "not because the remainders were damaged [but] . . . because the total effect of the contemplated public work subjected the properties to increased traffic, noise and vibration which in turn depreciated their value."[32]

Thus, we have fixed in the jurisprudence what a dissenting justice in *Garrick*[33] protested was the anomaly of awarding damages—a small piece of land is taken from an owner who is compensated, but no damages are awarded to nearby owners from whom no land is taken but who suffer equivalent damage. In his opinion such damages are not special to this owner but general to the entire neighborhood and hence noncompensable. He suggests that severance damages should continue to be "the consequences of diminution in value by reason of a partial *taking* and not by reason of the *use made* by the public body of other land than that involved in the partial taking. These latter damages, if compensable, should not exceed the liability of private persons for maintenance of public nuisances."[34]

PROCEDURE

For several decades it had been "settled jurisprudence" that the only issues before the court in an expropriation case are the value of the property taken and severance damages and the preliminary issues of public purpose and necessity; a tort claim, although also a result of the expropriator's actions, was relegated to a separate

30. 260 La. at 345, 256 So. 2d at 112.

31. 260 La. at 349-51, 256 So. 2d at 114-15. The parallel that might have been argued more successfully since it could not have been dismissed as "not an expropriation case" is the rule for treatment of benefits conferred by an improvement when the benefits are to be set off against an award of severance damages; for such benefits to be set off the expropriator must show successfully that a specific piece of property has benefited from an improvement in excess of other property in the area, thus excluding general benefits from any possibility of setoff.

32. 383 So. 2d at 1352.

33. State v. Garrick, 260 La. at 357, 256 So. 2d at 117 (Barham, J., dissenting) (1972).

34. *See The Work of the Louisiana Appellate Courts for the 1969-1970 Term—Neighboring Landowners—Dangerous Activities*, 31 LA. L. REV. 231-47 (1971).

suit.[35] However, in *State v. Ellender*[36] the Louisiana Supreme Court held that, in a taking for highway purposes, judicial economy will be served better by permitting a tort claim stemming from damage inflicted by the expropriator (but not directly by the taking) to be raised by reconventional demand as permitted in actions generally.[37] The argument that permitting such a demand would "impede the process of expropriation" was rejected since, under a quick-taking statute, the process in fact would not be delayed. The court also noted that permitting the claim to be raised in reconventional demand would honor further the constitutional proscription against unreasonable delay in providing adequate remedies for the citizens.

Justice Holmes once inveighed against use of "the petty larceny of the police power"[38] rather than the comparative fairness of expropriation and its provisions of "just compensation." *Housemaster Corporation v. City of Kenner*[39] might be an illustration of the extent to which seemingly harmless error will be judicially utilized to temper undue harshness in the application of the police power to property deemed appropriate for demolition as a nuisance. Since no physical taking occurs, no issue of compensation exists in such cases. Nonetheless, destruction of existing property values may happen and, if renovation is possible, the owner must be afforded reasonable opportunity to preserve those values. Thus normal Louisiana procedures require an engineering report to support a show cause order for demolition, and the owner must be afforded an opportunity to demonstrate at a hearing that repairs and renovation are possible.[40] In *Housemaster* notice was given, a hearing held, and a showing made, but the showing was deemed inadequate by the city. However, instead of seeking judicial review of the final demolition order within the statutory appeal period, the owner ignored the order and requested a permit to renovate. The permit was denied on the basis of the pending demolition order, and the owner sought injunctive relief. The Louisiana Supreme Court held that notice of the hearing was defective and invalidated the order of demolition; a new hearing thus was required with opportunity for judicial review in the event demolition was ordered. The defect, consisting of failure to identify the person served as president of the corporation holding title to the building, might have been treated as harmless error, since the

35. *See* State v. Mouledeous, 199 So. 2d 185, 190-91 (La. App. 3d Cir. 1967). *See also* M. DAKIN & M. KLEIN, *supra* note 7, at 348.

36. 379 So. 2d 1069 (La. 1980).

37. *Id.* at 1071.

38. 1 HOLMES-LASKI LETTERS 457 (M. HOWE ed. 1953).

39. 374 So. 2d 1240 (La. 1979).

40. LA. R.S. 33:4762 (1950).

affected parties did appear in fact and were afforded an opportunity to adduce evidence. But the court, noting that it is "axiomatic that procedural provisions and substantive restraints [on the police power] must be strictly contrued,"[41] held the proper owner had not been notified, and, as a consequence, further opportunity must be afforded the proper party to present his case against demolition to avoid unnecessary property loss.

Occasional inadvertent takings seem inevitable in the construction and maintenance of the sprawling interstate highway system; the time of valuation and the running of prescriptive periods are often crucial issues. Thus in *Reddel v. State*[42] the owner was unaware of the taking at the time of the appropriation, and fairness was deemed to dictate that the time of valuation be fixed as of the time of acquisition of such knowledge. In *Powell v. State*[43] the time of valuation was not an issue, because the state constructively admitted a value "at all times pertinent."[44] However, the state did argue that prescription[45] should run from the time of the actual taking. The court refused to "ascribe to the legislature such a harsh intent"[46] and here also fixed the date of acquisition of knowledge as the time from which prescription would run, citing *Chenevert v. State*.[47] The court further noted that this situation was the same type of inverse condemnation suit as in *Reddel*.[48] The landowner also prayed for "rentals" from the time of taking, but his claim was refused; in lieu thereof he was allowed interest from the time of taking, the court finding this disposition reasonable, since the state then should have compensated the owner. The award of a possibly higher value by virtue of determining the value at the time the taking is discovered can be justified as a deterrent against careless appropriations of private property.[49]

Not all utilities have yet put into practice procedures dictated

41. 374 So. 2d at 1242-43.
42. 340 So. 2d 1010 (La. App. 4th Cir. 1976).
43. 383 So. 2d 425 (La. App. 4th Cir. 1980).
44. *Id.* at 429.
45. LA. R.S. 13:5111 (Supp. 1975).
46. 383 So. 2d at 429.
47. 345 So. 2d 960 (La. App. 4th Cir. 1977).
48. 383 So. 2d at 428.
49. Full knowledge of the taking existed in *Donohoe v. State*, 366 So. 2d 598 (La. App. 3d Cir. 1979), but no express permission was given; the owner of the property (a subservient estate because of natural drainage) was entitled to be compensated for damages due to the intrusion of a state-constructed culvert. Since the initial servitude was not created by "the industry of man," LA. CIV. CODE art. 660, and since an increase in the flow of water by virtue of the installation was not shown, only nominal damages for the taking were awarded. 366 So. 2d at 602.

by the decision in *Louisiana Power & Light Company v. Caldwell*.[50] That decision required that the expropriator plead and prove a proposed taking does not interfere more than is necessary with the convenience of the landowner. Thus, in *Southwestern Electric Power Company v. Tally*,[51] while the utility made a strong case in economic and engineering terms for the location of a proposed servitude, the expropriator made no showing that convenience of the landowner had been considered specifically and rejected because of such economic and engineering studies. Hence, it could not be stated that the utility had discharged the burden of proof imposed upon it by the legislature; the court said that since expropriation laws are in derogation of common right, those statutes must be strictly construed.[52] In *Caldwell*, since an interpretation of the statute or announcement of its requirements had not yet occurred, the case was remanded for trial on amended pleadings;[53] in *Tally* the expropriation prayed for was simply denied.[54]

50. 360 So. 2d 848 (La. 1978).
51. 377 So. 2d 364 (La. App. 2d Cir. 1979).
52. 377 So. 2d at 367.
53. 360 So. 2d at 852.
54. 377 So. 2d at 368.