Expropriation

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AUTHORITY TO TAKE AND NATURE OF THE INTEREST TAKEN

In Terrebonne v. South Louisiana Tidal Water Control Levee District, the first circuit decided, somewhat anomalously, that only procedural rights were conferred upon landowners with appropriation claims pending on July 10, 1978, when the legislature directed the payment of fair market value for servitudes taken from these riparian owners for levee purposes. The second circuit, in Pillow v. Board of Commissioners, subsequently rejected this reasoning and held that the legislature, in extending its directive to such pending appropriation suits, conferred substantive rights on the claimants. This court held that the omission of this extension in Act 676 of 1979 could not take away the rights which had vested by virtue of Act 314 of 1978.

The limitation on the exercise of expropriation power by electric utilities was interpreted in Louisiana Power & Light Co. v. Caldwell and in Southwestern Electric Power Co. v. Tally to require utilities to plead and prove that a proposed taking does not interfere “more than is necessary” with the convenience of the landowner; however, only the location of the servitude to be taken was in issue in these cases. During last term, in Southwest Louisiana Electric Membership Corp. v. Duck, a landowner sought to go beyond mere protest of the location of the servitude and, in effect, requested a showing that size, location and supporting piers of the transmission lines to be constructed on the servitude also did not interfere “more than is necessary” with landowner conven-

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1. 414 So. 2d 805 (La. App. 1st Cir. 1982).
2. Id. at 816; see also id. at 816-17 (Shortess, J., dissenting).
4. 425 So. 2d 1267 (La. App. 2d Cir. 1982), cert. granted, 427 So. 2d 1199 (La. 1983).
5. Id. at 1276. There is no mention of the caveat in the legislation that owners shall be compensated at fair market value “only when and if, in its discretion, the Louisiana Legislature, the levee board, or the federal government, appropriates the funds therefor.” LA. R.S. 38:281(B)(1) (Supp. 1983). In light of the conflict in the circuits, the Louisiana Supreme Court has granted writs of certiorari and will perhaps appraise the significance of this provision on the vesting of rights under Act 314 of 1978. Terrebonne v. South La. Tidal Water Control Levee Dist., 414 So. 2d 805 (La. App. 1st Cir. 1982), cert. granted, 427 So. 2d 1199 (La. 1983); Pillow v. Board of Comm'rs, 425 So. 2d 1267 (La. App. 2d Cir. 1982), cert. granted, 427 So. 2d 1200 (La. 1983).
7. 360 So. 2d 848 (La. 1978).
8. 377 So. 2d 364 (La. App. 2d Cir. 1979).
9. 418 So. 2d 38 (La. App. 3d Cir. 1982).
ience. The trial court order to produce such data was reversed by the
third circuit on the ground that the statute requires only a showing that
the location of the servitude interferes no more than is necessary with
owner convenience; to require more, the court said, would bring under
judicial scrutiny details of construction not contemplated by the statute.¹⁰

That cable television has expropriation power was further butressed
in Edward J. Gay Planting & Manufacturing Co. v. Bayou Cable Tele-
vision.¹¹ Failing in negotiations with a landowner to obtain a servitude
for cable within the servitude already granted to the Louisiana Depart-
ment of Highways, Bayou Cable proceeded to install its cable with only
departmental permission. In a suit by the landowner to compel removal,
Bayou Cable filed a reconventional demand seeking expropriation of a
servitude. In dismissing the demand for expropriation and ordering
removal, the trial court relied upon implied legislative denial of expropria-
tion rights to cable companies in imposing a requirement of owner con-
sent, in addition to consent of the servitude holder, where cable was to
be laid within a servitude of the Department of Highways.¹² Since owner
consent had previously been held to be an implicit requirement in creating
such a second servitude,¹³ the first circuit held that the legislative action
merely made such consent statutorily explicit; it had no bearing on the
expropriation power implicitly granted to cable companies as "[c]orpora-
tions . . . formed for the purpose of transmitting intelligence by telegraph
or telephone or other system of transmitting intelligence."¹⁴ Expropria-
tion was ordered to continue as requested in the reconventional demand.¹⁵

In Louisiana Power & Light Co. v. Holmes,¹⁶ an appeals court found
the trial court in error in classifying a right of way for electric lines as
a legal servitude,¹⁷ holding that a servitude validly acquired under the St.
Julien doctrine constituted a limited personal servitude governed by Civil
Code article 651. The owner of the servient estate was hence required
"to keep his estate in suitable condition for the exercise of the servitude
due to the dominant estate."¹⁸ The utility was held to be entitled to in-

¹⁰. Id. at 40. The owner would seem not without remedy, however, since "size, loca-
tion, and supporting piers" of lines to be constructed would clearly bear on the utility
remaining to the owner in the servitude and, hence, on the quantum of compensation and
damages recoverable. See M. Dakin & M. Klein, EMINENT DOMAIN IN LOUISIANA 49-50
¹¹. 423 So. 2d 58 (La. App. 1st Cir. 1982).
¹⁵. 423 So. 2d at 61.
¹⁶. 422 So. 2d 684 (La. App. 3d Cir. 1982).
¹⁷. Id. at 686. The taking antedated Lake, Inc. v. Louisiana Power & Light Co., 330
42 LA. L. REV. 556 (1982).
¹⁸. LA. CIV. CODE art. 651, quoted in Holmes, 422 So. 2d at 688.
junctive relief precluding the servient estate owner from construction which would constitute an obstacle to maintenance of the electric lines.\(^9\)

In *United States v. Security Industrial Bank*\(^{10}\) the threat of a “taking” was alleged to be contained in language of the new bankruptcy code\(^{21}\) permitting a debtor to avoid a pre-existing lien on household and professional items as to which exemption had been waived. In order to avoid invalidating the provision under the fifth amendment, the United States Supreme Court invoked the principle that “[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress.”\(^{22}\) The Court then found that Congress “may not have intended that [the provision] operate to destroy pre-enactment property rights.”\(^{23}\)

An appeals court has recently concluded, contrary to 1969 dicta of the Louisiana Supreme Court,\(^{24}\) that a railroad, although vested with a public interest, is nonetheless a private property owner and is entitled to compensation for a highway right of way servitude expropriated from it.\(^{25}\) In *State v. Illinois Central Gulf Railway Co.*\(^{26}\) the first circuit concluded that statutes dealing with highway crossings of railways are relevant only as to allocating the cost of building and maintaining such crossings and do not legislatively announce a railroad right of way to be public property.\(^{27}\) The court further concluded that the 1974 constitution\(^{28}\) superseded a provision of the 1921 constitution\(^{29}\) relied upon to establish the status of such property as “public.”\(^{30}\)

**DAMAGES—VALUATION**

The Uniform Eminent Domain Code\(^{31}\) recommends that “[i]f there is a partial taking of property, the fair market value of the remainder on the valuation date shall reflect increases or decreases in value caused by the proposed project . . . [and] . . . as of the date of valuation, shall

\(^{19}\) 422 So. 2d at 690.
\(^{22}\) 103 S. Ct. at 414; see Holt v. Henley, 232 U.S. 637 (1914).
\(^{23}\) 103 S. Ct. at 414. An early rejected version of the provision specifically applied to “all cases,” thus carrying an implication of retroactivity. *Id.*
\(^{26}\) *Id.*
\(^{27}\) LA. R.S. 45:841, 382 (1982 & Supp. 1983); the latter was also deemed to have superseded the former.
\(^{28}\) LA. CONST. art. I, § 4.
\(^{29}\) LA. CONST. of 1921, art. XIII, § 3.
\(^{30}\) LA. CONST. art. XIV, § 16-17.
reflect the time the damage or benefit caused by the proposed improvements or project will be actually realized.”

In *State v. Wells*, the Louisiana Supreme Court held this was also the import of Louisiana Revised Statutes 48:453, which somewhat cryptically provided that “[d]amage to the remainder of the property is determined as of the date of the trial.” The court noted that this language must be read in light of Louisiana Revised Statutes 48:451(1), providing that the landowner could file suit after the completion of the project, if he chose to do so, thus permitting a more accurate appraisal of damage or special benefits resulting from the project. Nonetheless, in *State v. Harris*, another unsuccessful attempt was made to have all the severance damages determined after project completion.

In *Transcontinental Gas Pipe Line v. Terrell*, the first circuit again approved the percentage method of calculating the severance damages in the taking of a servitude for a gas pipeline, noting that applicable law is adhered to if there is an overall valuation before and after the taking and a deduction for the value of the servitude from the overall diminution in value, thus clearly identifying severance damages. The court mentioned that offers to purchase by the expropriator might be some evidence of fair market value but carefully noted that there was more than sufficient evidence of comparable sales to support the expert opinion relied upon.

The federal government’s acquisition of sites for stockpiling petroleum in Louisiana brought to the federal courts what was described in *United States v. 131.68 Acres of Land*, as “the age-old legal problem of how to measure damages for the destruction of crops.” In this case the Fifth Circuit noted that, while state law dictated the characterization of growing crops as property, the measure of damages was a matter of federal law under which the “guiding principle of just compensation... is that the owner ‘must be made whole but is not entitled to more.’” The formula used by the trial court for measuring damages for loss of a three-

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33. 308 So. 2d 774 (La. 1975).
34. Id. at 776.
35. 423 So. 2d 721 (La. App. 1st Cir. 1982).
37. 416 So. 2d 571 (La. App. 1st Cir. 1982).
38. Id. at 574. In *Housing Authority v. Gondolfo*, 208 La. 1065, 24 So. 2d 78 (1945), the Louisiana Supreme Court treated an offer by expropriator as an admission that the property was worth not less than the amount the expropriator was willing to pay for the property.
39. 695 F.2d 871, 872 (5th Cir. 1983).
40. Id. at 875 (quoting *United States v. 564.54 Acres of Land*, 441 U.S. 506, 516 (1979) (quoting Olson v. United States, 292 U.S. 246, 255 (1934))).
year sugar cane crop, valuing the standing crop less harvesting costs and adding thereto two-thirds of the cost of planting the acreage, was deemed correct. The owner's contention that he was entitled to net profits on the remaining two potential crops was rejected since he was receiving the fair market value of the acreage taken as measured by the total value of the tract before and after the acreage was expropriated. The court reasoned that "adding compensation for the loss of net profits after the date of the taking would thus have resulted in double compensation." The value of the subject acreage was valued by means of comparable sales, so there was no further reliance on actuarial techniques.

In City of Shreveport v. Standard Printing Co., a somewhat novel dimension was added to the 1974 constitutional provision requiring an expropriatee to be compensated to the full amount of his economic loss. An expropriatee successfully maintained that relocation within a downtown area was essential to preservation of its business. The second circuit agreed that, as a consequence of the relocation, the replacement cost of the structure taken must include the cost of improvements required by a city building code for current construction. The court also found no functional obsolescence or depreciation of the building for the owner's uses and awarded full undepreciated replacement cost to the expropriatee. The use of replacement cost was buttressed by evidence in the record that such cost was substantially less than the value of the structure on a capitalized net income basis.

In State v. Exxon Corp., a service station lessee was permitted to intervene in expropriation proceedings against the lessor of the station and to prove and recover lost profits from diminished sales as a result of the taking. The lessee was deemed to be included in the language of the 1974 constitution that an "owner shall be compensated to the full extent of his loss," and he was awarded damages based on profit lost through diminished sales attributable to the taking up to the time verbal extension of an original written lease was finally terminated.

41. Id. (footnote omitted). The court did not explain why this was so but evidently assumed that the fair market value of the commercial acreage taken represented the present value of future profits to be derived therefrom.

42. See M. Dakin & M. Klein, supra note 10, at 222.

43. 427 So. 2d 1304 (La. App. 2d Cir. 1983).

44. LA. CONST. art. I, § 4.

45. 427 So. 2d at 1307-08.

46. Id. at 1309. In essence, the court accepted the "buy or build" approach when determining the fair market value of a commercial building. See M. Dakin & M. Klein, supra note 10, at 240.

47. 430 So. 2d 1191 (La. App. 1st Cir. 1983).


49. 430 So. 2d at 1195. A verbal extension of the original lease was given the same effect as a formally executed new lease which was available but refused because of the
In *Boudreaux v. Terrebonne Parish Police Jury*, a landowner filed a suit in trespass and prayed for removal of public works constructed on his property without his consent, a suit deemed governed by the two-year prescriptive period provided by Louisiana Revised Statutes 9:5624. Suit was filed within the three-year period under Louisiana Revised Statutes 13:5111 for actions for recovery of compensation for unauthorized takings, but a plea for compensation as required by that statute was not alleged. Had the *St. Julien* characteristics of the taking been recognized at the time taking was discovered by the owner and a suit in inverse condemnation, rather than for damages, been brought, some compensation for the value of the servitude should have been recoverable. The suit as filed was profitless, however, since no damages were suffered within the immediately preceding two years, and damages incurred prior thereto had prescribed.

In *Succession of Rovira v. Board of Commissioners*, the board appropriated swamp acreage for construction of a portion of the Mississippi River Gulf Outlet. The co-administrators of the successions of the deceased landowners brought a suit in inverse condemnation for compensation some twenty years later. The board pleaded prescription (as well as a number of other pleas) in support of dismissal of the suit on the ground that there had been either actual or constructive notice of the construction of public works upon the property, thus tolling the prescriptive period. The plea was rejected by the trial court, and, on appeal, rejection was affirmed on the trial court's reasoning.

Where the aerial photographs of the canal and the surrounding property show the entire area to be nothing more than inaccessible swampland and where the property was owned by numerous heirs who had inherited fractional interests from generations past and these facts were discernible from the public records, governmental agencies have a greater duty to notify the property owners directly than were the property located on the suburb of a metropolitan area and legal advertisements cannot be relied on under these circumstances.
The board was thus held liable to pay compensation, but no valuation date was fixed. On remand the plaintiffs will presumably argue, as did the landowner in Koerber v. City of New Orleans, that the time of expropriation, and hence the date of valuation, is fixed when the expropriator files an answer asserting the power of expropriation in an inverse condemnation suit.

In State v. Ellender, the Louisiana Supreme Court held that judicial economy will be best served by permitting a tort claim stemming from damage inflicted by the expropriator (but not directly by the taking) to be raised by reconventional demand rather than in a separate suit. In Prentice Oil & Gas Co. v. State, an additional dimension was added to the Ellender holding. Expropriation proceedings were dismissed for non-compliance with statutory requirements and judgment had become final. However, the deposit in the registry of the court was ordered retained to satisfy any judgment for damages and attorneys' fees which might thereafter be obtained by the landowner. A suit in tort followed in which the owner recovered for an array of injuries stemming from the dismissed expropriation proceeding. Satisfying the judgment in tort out of a registry deposit made as a potential compensation award was held not to violate the constitutional proscription against seizure of public funds since the funds deposited had been expressly reserved for this purpose. If Prentice Oil is upheld, the "judicial economy" supporting the Ellender decision, as well as legislative economy, will be served since in cases of dismissal where, as here, no reconventional demand is feasible, legislative appropriation would otherwise be required to satisfy a related judgment in tort.

In Mills v. State, the state relied on its police power in limiting a landowner's access to a state highway to one of the three access ways which he had previously enjoyed from his property. The second circuit held this limitation to be such a substantial interference with the property

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56. 228 La. 903, 84 So. 2d 454 (1955).
57. 228 La. at 907, 84 So. 2d at 456; see also M. Dakin & M. Klein, supra note 10, at 164-65 (1970), 57 (Supp. 1978).
59. 421 So. 2d 937 (La. App. 1st Cir. 1982).
60. Id. at 938.
61. LA. CONST. art XII, § 10(c).
62. Id.
63. 416 So. 2d 957 (La. App. 2d Cir. 1982).
rights of an abutting owner as to require the state to expropriate and make compensation. 64

In United Gas Pipe Line Co. v. Becnel,65 the fourth circuit affirmed a trial court's holding that the highest and best use of property located near a deep water area of the Mississippi river was industrial. The potential industrial status of the property was deemed established by expert testimony that small acreages could potentially be assembled with other nearby tracts to create an industrial site for which an informed buyer would pay the prevailing prices, appropriately discounted for difficulties incident to assemblage. Severance damages were deemed proven with legal certainty by expert testimony that such property would suffer a twenty percent decline in value when encumbered with a pipeline servitude. 66

It is well-established in Louisiana that a trial court is "not at liberty to substitute its own appraisal for those of expert witnesses, when those appraisals are well-reasoned and are not contradicted."67 Thus, in State v. Allen, 68 a trial court was held to have committed manifest error in substituting its own judgment for qualified expert witnesses on the ground that the court was better informed. 69

64. The deprivation of access was likened to attempted appropriation of a servitude which could properly be prevented by bringing a possessory action even though suit in inverse condemnation might be more conservative of judicial resources. Id. at 960.
65. 417 So. 2d 1198 (La. App. 4th Cir. 1982).
66. A dissenting judge was of the view that, while potential assemblage of property for industrial sites was a legitimate consideration in the valuation of property (although res nova in Louisiana), no reasonable probability had been established that the assemblage could be accomplished. The evidence of severance damage was also suspect as speculative since some of the tracts were already burdened with pipeline servitudes. In State v. Goldsby, 427 So. 2d 580 (La. App. 5th Cir. 1983), taking of a mere highway servitude was held to diminish the value of industrial property by only two percent.
68. 422 So. 2d 1368 (La. App. 1st Cir. 1982).
69. The testimony of an owner and a purchaser contradicting expert testimony as to the value before taking was rejected where no expert qualifications were established and no basis for their opinion was introduced in evidence. Id. at 1370.