Expropriation - Consequential Damages Under the Constitution

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Article I, Section 2, of the Louisiana Constitution provides in part that compensation must be paid where private property is taken or damaged for public purposes. There are two situations in which property may be damaged in the public interest under this provision. One is where part of a person's property is acquired, and the acquisition injures the remainder or residuum of the property. The other situation is where property near the public improvement is injured even though no part of that property is appropriated or physically invaded. Some writers have suggested that injuries incurred in connection with a partial taking be termed severance damages to distinguish them from those injuries which occur where there is no part of the property taken, this latter situation giving rise to consequential damages.

1. La Const. art. I, § 2: "No person shall be deprived of life, liberty, or property, except by due process of law. Except as otherwise provided in this Constitution, private property shall not be taken or damaged except for public purposes and after just and adequate compensation is paid."


4. See Note, 10 Fla. L. Rev. 354 (1957), which clearly presents the distinction. Cf. the position of Nichols on this point: "The term 'consequential damages' is ambiguous in character and is not truly relevant in any discussion respecting the different classes of damage. . . . The term is generally used with reference to damage to property no part of which is appropriated." 2 Nichols, Eminent Domain § 6.4432 (3d ed. 1950).

To determine if there has been a "partial taking" and thus severance damages, some courts apply a three-fold test: (1) unity of ownership, (2) unity of use, and (3) contiguity of the land areas. See Winner, Some Problems of Severance Damages, 29 Dicta 327 (1952). There has been no Louisiana development on this point, probably because of the normal physical connection generally found between the land taken and that injured. In any event, consideration on these lines would be academic, since the injury will in most respects be recoverable under the damage provision if recoverable at all. See the interesting case of International Paper Co. v. United States, 227 F.2d 201 (5th Cir. 1955), 8 Baylor L. Rev. 354 (1956). Here severance damages were being asked for injury to a paper mill 136 miles distant from the site of the condemned property. Such a technique was resorted to because the federal government under the Federal Constitution is not liable for consequential damages, but must pay for severance damages incurred.
There exists some judicial authority for this terminology and these terms will be used in this Comment. It should be noted, however, that the designations "severance" and "consequential" do not refer to the nature of the injury, but rather to the factual situation giving rise to the injury. It seems clear that in Louisiana the constitutional terms "taken" and "damaged" are to be interpreted in the disjunctive, thus necessitating the payment of compensation where property is "merely" consequentially injured. It is the purpose of this Comment to examine the conditions which must exist to create a cause of action for consequential damages.

Historically the state constitutions only required compensation for property actually appropriated by the taker. Thus even in connection with a partial taking. See Peabody v. United States, 231 U.S. 530 (1913).

"Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in the course of time." United States v. Dickinson, 331 U.S. 745, 748 (1947). See, e.g., United States v. Caussy, 328 U.S. 256 (1946). A single isolated act of injury will not constitute recoverable damages. Harris v. United States, 205 F.2d 765 (10th Cir. 1953). See Cooper v. City of Bogalusa, 195 La. 1097, 198 So. 510 (1940), where plaintiff tried to say that injury produced by federal government was authorized by Bogalusa so as to collect damages from the latter.

5. See, e.g., Latourette v. United States, 150 F. Supp. 123, 125 (D. Ore. 1957): "The term 'consequential damages' as used herein is deemed to mean damages to property not actually taken but an injury to property that occurs as a natural result of an act lawfully done by another and for which no liability [under the federal rule] exists."

6. Under most decisions applying eminent domain statutes or provisions, the only injury considered is that affecting real or immovable property. Hence, damages or injuries as hereafter used in this Comment will mean a diminution of market value of the real estate. See Louisiana v. Sauls, 234 La. 241, 99 So.2d 97 (1958), where compensation was refused for "damages" suffered when the defendant had to sell his movables at a loss.

7. The main cases are McMahon v. St. Louis, Ark. & Texas R.R., 41 La. Ann. 827, 6 So. 640 (1889); Griffin v. The Shreveport and Ark. R.R., 41 La. Ann. 808 (1889). These cases involved an injury sustained for the benefit of the public. At one time, it perhaps could have been argued that since the actor in the above cases was a delegate of the sovereign, recovery for consequential damages would not lie where the actor was the sovereign or an agency thereof, as was done in Brock v. City of Anniston, 244 Ala. 544, 14 So.2d 519 (1943). But the case of Jarnagin v. Highway Comm., 5 So.2d 690 (La. App. 1942) should have clearly settled this point in the negative. After all, the power of eminent domain is granted to either class for the benefit of the public good. See New Orleans, Opelousas & G.W. R.R. v. Lagarde, 10 La. Ann. 130 (1855).

8. The subject of expropriation or acquisition of property by the exercise of the power of eminent domain is covered generally in Comment, 18 Louisiana Law Review 509 (1958).

9. 2 Nichols, EMINENT DOMAIN § 6.38(4) (3d ed. 1950). Louisiana first incorporated a damage provision in its Constitution of 1879 (Article 156). Britt v. Shreveport, 83 So.2d 476 (La. App. 1955). It would appear that legislative authority allowing recovery of damages existed in Louisiana prior to 1879. Article 497 of the Civil Code of 1870 was expanded from the previous code by this provision: "By an equitable indemnity, in this case, is understood not only a payment for the value of the thing of which the owner is deprived, but a remunera-
though the actual taking caused injury to the remainder of the landowner's property, severance damages were non-recoverable.\textsuperscript{10} A fortiori were such injuries not compensated if there was no appropriation of any part of the property.\textsuperscript{11} At the time of the origin of these provisions in the United States in the Eighteenth Century, such injuries were few, and the term “taken” provided adequate compensation to the affected landowners.\textsuperscript{12} However, with the development of mechanized transportation and its concurrent needs for vast and permanent constructions of highways and other public facilities, considerable injury was inflicted which was beyond even the most liberal interpretation of the word “taken.”\textsuperscript{13} With Illinois as the leader in revision, the words “or damaged” were added to many of the state constitutions providing an additional basis for compensation for the damages which may be caused thereby.” Article 2633 was interpreted to encompass damages (see Brit v. Shreveport, supra) and Article 2632 specifically refers to damages. The source of this latter article in the Code of 1825 was Article 2608, which does not refer to damages, but makes provision for plotage value damage in principle. See 3 \textsc{Louisiana Legal Archives, Compiled Editions of the Civil Codes of Louisiana}, pt. II, at 1440 (1942). The wording of Articles 497 and 2632 apparently contemplates a physical taking as a condition precedent to a recovery of damages. Thus it would appear that the requirement of compensating consequential damages (as defined in this Comment) has its origin as of 1879. Such a view is supported by McMahon v. The St. Louis, Ark. & Texas R.R., 41 La. Ann. 827, 6 So. 640 (1889). The case of Koelmel v. New Orleans, M. & C. Ry., 27 La. Ann. 442 (1875) fell between the statutory enactments and the constitutional provision and there the court reversed a lower court which had awarded damages to a landowner who had been “injured” by the erection of a nearby railroad. Justice Wyly, dissenting on several grounds, made the remark: “In principle there is no difference between destroying the house and destroying its usefulness to the owner.” Id. at 443. The first application of the damage provision of the Constitution occurred in a partial taking case which adopted in large part the rationale of Justice Wyly. Vicksburg, S. & F. Ry. v. Dillard, 35 La. Ann. 1045 (1883).

10. The various provisions discussed at note 9 supra would seem to be sufficient authority for a recovery of damages in a partial taking case prior to the constitutional provision. \textit{But see Jarnagin v. Highway Comm.}, 5 So.2d 660, 663 (La. App. 1942): “Until [the damage provision was added to the Constitution] . . . an owner could recover only the market or cash value of property actually ‘taken’ for public purposes. Consequential [severance] damages resulting from the ‘taking’ were not recoverable. The same was true as to those owners who were simply damaged from the erection of some public improvement no part of whose property was taken.”

In most jurisdictions the lack of coverage as to damages was not fatal to a recovery of damages if they occurred in the context of a partial taking case, as most elements of damages could be worked in on a liberal interpretation of the word “taking.” Even though there was no deliberate appropriation of even a part, at times the damage could be so severe as to amount in fact to a “taking.” This latter construction of the word “taken” was worked to its utmost limits. 2 \textsc{Nichols, Eminent Domain} § 6.38 (3d ed. 1950). It was where the injury incurred was imperceptible physically that the most liberal interpretation of the word “taking” was inadequate, and the real need for an allowance of consequential damages felt.


12. For general coverage relative to the historical aspects involved here, see 2 \textsc{Nichols, Eminent Domain} § 6.4 (3d ed. 1950).

13. \textit{Ibid.}
Louisiana adopted a damage provision in its Constitution in 1879 which has been applied to both severance and consequential damages. The injury occurring in severance and consequential damages is essentially the same, that is, there is a deflation in the market value of property which has not been physically taken. Thus, there would appear to be no reason why the absence of a taking of an injured whole, as in a consequential damage situation, should be treated any different from the absence of a physical taking with respect to an injured part of the property, as in a severance damage case. An examination of the situations which give rise to severance damages will therefore facilitate a consideration of consequential damages.

**SEVERANCE DAMAGES**

A classification of the recoverable injuries which may be inflicted on the remaining property of an owner where part of his property is taken may be made in four general divisions: (1) deflation of the market value of the remaining property because of the general unattractiveness of the public improvement or because of its permanent interference with the convenient use of the remaining property; (2) deflation of the market value of the remaining property because of the general unattractiveness of the public improvement or because of its permanent interference with the convenient use of the remaining property; (3) deflation of the market value of the remaining property because of the general unattractiveness of the public improvement or because of its permanent interference with the convenient use of the remaining property; (4) deflation of the market value of the remaining property because of the general unattractiveness of the public improvement or because of its permanent interference with the convenient use of the remaining property.


16. The court generally does not distinguish between the several types of injury, but terms them all damages, either severance damages, consequential damages, or severance and consequential damages. See Louisiana Highway Comm. v. Boudreaux, 139 So. 621 (La. App. 1932), where the court considers several types of injury.


18. A lawful, temporary interference with a person's property does not constitute a cause of action. Sholars v. Louisiana Highway Comm., 6 So.2d 163 (La. App. 1942). Even though the property is acquired, if it be only temporarily, the owner is entitled at most to only a fair rental. Louisville & N. R.R. v. R. E. E. De Montluzin Co., 106 La. 211, 116 So. 854 (1928).

19. Louisiana Highway Comm. v. Guidry, 176 La. 389, 401, 146 So. 1, 5 (1933): "Counsel for the state suggests that mere inconvenience and annoyance caused by the building of the road do not constitute elements of damage. That is true, but, if the inconvenience and annoyance in the use of the property are such as to diminish its market value, the decrease in value is a damage which plaintiff must pay." And at id. at 399, 146 So. at 4, it is said: "Considering these inconveniences which result from the cutting of this land in two by the highway . . . the witnesses . . . testified . . . that the market value of the property would be
of the remaining property because of a fear of subsequent tortious injury by reason of the use of the acquired portion;{20} (3) deflation or destruction of the plottage value inherent in the total and larger whole property by reason of the acquisition of the part,{21} and (4) expenses incurred by the owner of the remaining property in adjusting his estate to the occupation of the acquired portion by the taker.{22} Generally, severance damages are those injuries which render the remaining property less valuable than it was before the acquisition or which make it more expensive to maintain in its pre-acquisition state of utility. To be recoverable the injury must affect market value; it cannot be a personal injury to the owner.{23} As long as the acquisition

materially decreased. . . . This diminution in value is not only present but prospective, and the property is damaged to the extent of the decrease in value. This damage is part of the compensation which must be paid for the taking of the land." See Vicksburg, Shreveport & Pac. R.R. v. Dillard, 35 La. Ann. 1045, 1048 (1888): "Why should not the fact that the track of a railroad runs through the heart of a plantation and severs its arteries, and dislocates its whole framework, be an element of damage?"

20. The mere possibility of a subsequent tortious injury to the owner by reason of the use made of the taken property is no basis for an award in damages in the expropriation suit. Yazoo & M.V. R.R. v. Longview Sugar Co., 135 La. 542, 65 So. 638 (1914); Commercial Telegraph Cable Co. v. Prevost, 133 La. 47, 62 So. 347 (1913); Louisiana Ry. & Nav. Co. v. Sarpby, 133 La. 288, 51 So. 433 (1910). But if the effect of the fear of such injury in the future is to depreciate the market value of the remaining property, this depreciation is an element of damages. Yazoo & M.V. R.R. v. Teissier, 134 La. 958, 965, 64 So. 866, 868 (1914): "If the evidence had shown a depreciation in the value of the land along plaintiff's right of way by reason of danger from fire to improvements or crops, such damage would be allowed." This follows even though the fear is in fact groundless. Texas Pipe Line Co. v. National Gasoline Co., 203 La. 787, 14 So.2d 636 (1943).

21. Plottage value is "an increment of value arising as a consequence of the combining of two or more sites so as to develop one site having a greater utility than the aggregate of each when separately considered." APPRAISAL TERMINOLOGY AND HANDBOOK 119 (1950). See Louisiana Highway Comm. v. Boudreaux, 139 So. 521 (La. App. 1932). Market value of several tracts diminished considerably by their insignificant area remaining after the acquisition and by reason of their separation from the main tract.

Some writers would call the destruction of plottage value "severance damages" and all other injuries "consequential damages." See Comment, Consequential Damages, 35 V.A. L. Rev. 1064 (1949). This Comment does not employ that distinction.


adversely affects the market value of the remaining property, any type of injury would seem to be recoverable as severance damages. Recovery is generally made for severance damages in the same suit in which compensation is given for the property actually acquired. There is some authority to the effect that the total award is to be composed of two separate items, severance damages and market value of the acquired portion, but the better position is to determine the total award by the difference between the market value of the total property before the acquisition and the market value of the property remaining after the acquisition. Whether the market value plus damages rule or the before and after rule is used is important only in relation to minor qualifications which adjust award value. In theory at least the total computation under either approach will be the same.

INCIDENTAL DAMAGES

Recovery is denied for injuries inflicted in connection with a partial taking where they do not affect market value but are

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24. See Parish Council v. Koller, 94 So.2d 505 (La. App. 1957) (loss of esthetic values not per se compensable, but recovery is possible if the market value of the property is affected thereby).


27. In this manner all the elements of severance damage are lumped into one computation, except perhaps item number four, which is generally capable of more objective determination and is usually handled as an isolated item. Texas Pipe Line Co. v. Barbe, 229 La. 191, 220, 85 So.2d 290, 271 (1955) is the leading case on the method of determining the damages generally. There the rule adopted was clearly the before and after rule. The quantum of the damages (which in such a computation includes the value of the land) is the difference between the market value of the total property before and after the acquisition. In the court's words: "To make ourselves perfectly clear, defendants must effectively show the market value of each tract immediately before and immediately after the expropriation in order to establish the quantum of their severance damages." See Police Jury v. Hernandez, 232 La. 1, 93 So.2d 672 (1957) (affirming).

28. Some courts say that benefits can only be offset against the damage incurred by the remaining property, and may not offset the amount due for the land taken. See 1 ORGEL, VALUATION UNDER EMINENT DOMAIN 265 (2d ed. 1953). In Louisiana, benefits cannot be offset against the damages unless the injury is special to the property affected and not general to the community. Louisiana Highway Comm. v. Hoell, 174 La. 302, 140 So. 485 (1932).

29. For further discussion on this problem of the various methods to compute the total award due in the case of a partial taking, see generally JAHN, EMINENT DOMAIN §§ 98 (1953); 1 ORGEL, VALUATION UNDER EMINENT DOMAIN § 49 (2d ed. 1953).
merely personal to the landowner. These injuries encompass such items as inconvenience, loss of business and good will, moving costs and mental suffering. Even though they arise out of an exercise of the power of eminent domain they are termed *incidental damages* for which the owner can receive no compensation. It was early decided in Louisiana that the addition of the word "damage" to the constitution did not cover such items. The reasons given for refusing recovery here generally reflect a judicial hesitancy to enter into such a many faceted area of personal property injury. Some have said that in such cases the taker is not acquiring any item which has caused deprivation to the owner, and, since the injuries will differ so materially according to the individual owner, that they can only be speculative. Perhaps a more logical explanation

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30. See American Tel. & Tel. Co. v. Maguire, 219 La. 740, 54 So.2d 4 (1951). Cf. Hoggatt v. Vicksburg, Shreveport & Pac. R.R., 34 La. Ann. 624 (1882), where the landowner sought damages because the property taken from him was alleged to have been diverted from the purpose for which it had been expropriated. Recovery was denied when no diversion was found.

31. Housing Authority v. Green, 200 La. 463, 8 So.2d 295 (1942). But if the inconvenience is of such a nature as to deprecate the value of the remaining property then that depreciation is a proper element of recoverable damages. Highway Comm. v. Guidry, 176 La. 389, 146 So. 1 (1933); Highway Comm. v. Hoell, 174 La. 302, 140 So. 485 (1932).

32. In expropriation it is the property that is normally acquired and not the business conducted thereon. Thus it is generally well settled that the profit-making capacity of the business is not to be considered in fixing the amount of the award. Housing Authority v. Green, 200 La. 463, 8 So.2d 295 (1942) and Opelousas Gulf & N.E. Ry. v. St. Landry Cotton Oil Co., 121 La. 796, 46 So. 810 (1908) seem to follow this principle. However, Department of Highways v. Laird, 219 La. 567, 53 So.2d 674 (1951) seemed to predicate a refusal of recovery for such an item on the failure of proof.


35. See JAHN, EMINENT DOMAIN 134 (1953): "The recoverable damages are sometimes referred to as *severance damages* and sometimes as *consequential damages*. The nonrecoverable damages are frequently termed *incidental damages.*"

36. McMahon v. St. Louis, A. & T. R.R., 41 La. Ann. 827, 830, 6 So. 640, 641 (1889): "Mere consequential damage to property, when the property itself was not taken, was not recoverable; and much less any damages resulting to individual owners, in the way of discomfort, inconvenience, loss of business and the like. . . . The article 156 of the present constitution, in providing that 'private property shall not be taken nor damaged for public purposes without adequate compensation, etc.,' only extended its protecting shield over one additional injury and required compensation, not only for property taken, but also for property damaged. . . . There is no warrant for extending the liability one whit beyond this. . . . Mere consequential injuries to the owners arising from discomfort, disturbance, injury to business and the like, remain, as they were before, damnum abique injuria, particular sacrifices which society has the right to inflict for the public good."

37. See generally, JAHN, EMINENT DOMAIN 155 (1953).
is that the damage provision was only intended to extend recovery to injuries incurred in a different factual context than that in which recovery was possible before, and that additional injuries different in nature did not come within the coverage of the amendment.\textsuperscript{38} An examination of these offered justifications may be in order, but such is beyond the purview of this Comment.\textsuperscript{39} Incidental damages have been presented briefly here only so that the main factors which determine whether an injury will be considered a recoverable damage under the constitutional provision can be seen.

**Consequential Damages**

A depreciation in the market value of property may be recoverable as a constitutional damaging so long as there is an actual appropriation of at least a portion of the injured property\textsuperscript{40} or so long as there is a physical invasion of it which amounts in fact to a taking\textsuperscript{41} if the before and after rule\textsuperscript{42} of valuating compensation is employed. It is where neither of these factors is present that the real problem in applying the damage provision of the Constitution comes to the front. There would appear to be no reason in theory for denying recovery to an owner who has suffered depreciation in the market value of his property because there has been no physical appropriation of any portion of it. To require some taking as a condition precedent to recovery for damages would be to predicate recovery in some cases on the mere fortuitous selection of location by the taker, denying recovery in other cases by a matter of inches. Where there is no damage provision, however, this is the general result.\textsuperscript{43} Even where there is such a provision, judicial reasoning predicated on the conceptual idea of a physical taking may prevent recovery of injuries which are consequential.\textsuperscript{44}

\textsuperscript{38} McMahon v. St. Louis, Ark. & Tex. R.R., 41 La. Ann. 827, 6 So. 640 (1889) to some extent would support such a conclusion.

\textsuperscript{39} See Comment, 67 \textit{Yale L.J.} 61 (1957).

\textsuperscript{40} This follows due to the liberal interpretation which can be given the word "taken" so as to encompass these damages. As soon as there is a physical appropriation the court moves into a consideration analyzing according to the rules discussed above relative to severance damages.

\textsuperscript{41} See Brockett v. Shreveport, 160 La. 105, 106 So. 710 (1926) (flooding of plaintiff's land with water, damages recoverable).

\textsuperscript{42} Under the rule of Texas Pipe Line Co. v. Barbe, 229 La. 191, 85 So.2d 260 (1956).

\textsuperscript{43} See the federal cases in note 4 supra and compare the Federal Constitution, Amendment V, with the Louisiana Constitution Article I, § 2.

\textsuperscript{44} Generally, it seems that those states which incorporate a damage provision in their constitutions do not require that there be a physical appropriation. See 2 \textit{Nichols, Eminent Domain} § 6.441(1) (3d ed. 1950), who seems to reject
jurisdictions, however, allowed recovery for severance damages in a partial taking case even prior to the adoption of the damage provisions by some manner or means, generally by extending the legal meaning of the word "taking." Thus it would appear that the chief objective of the constitutional amendment was to cover those injuries incurred where there was no "taking," and this is the position of Louisiana.

The contention that the constitutional provision for damages extends coverage equally to those cases where there is no physical appropriation as well as to those where there is such appropriation. He says such a position has received "some support," but is rejected in most jurisdictions because it is "too broad." Jahr, Eminent Domain §§ 47, 51 (1953) indicates that the damage provision is considered by some states as inoperative until there is some physical appropriation. Orgel, Valuation Under Eminent Domain (2d ed. 1953) generally considers damages only in the situations of a partial taking case. See Note, 10 Fla. L. Rev. 354 (1957) (Florida does not have a damage provision, does not allow recovery for consequential damages). The federal rule under the Federal Constitution is similar. See note 4 supra.

45. The chief impetus for the adoption of the damage provision occurred in connection with consequential damages resulting from alterations in the grades of streets. See 2 Nichols, Eminent Domain § 6:38(4) (3d ed. 1950). Previous to such adoption the more liberal states were allowing recovery for such injuries under a strained interpretation of the word "taken." Ibid.

46. The leading case involving an interpretation of the recovery of consequential damages is McMahon v. St. Louis, Ark. & Tex. R.R., 41 La. Ann. 827, 5 So. 640 (1889). The court said: "Prior to the constitution of 1879 the ... law of this state ... simply provided that 'private property shall not be taken for public purposes without adequate compensation, etc.' Under this rule, in absence of other special provision, a taking of the property was a condition precedent to liability. ... Mere consequential damage to property, when the property itself was not taken, was not recoverable. ... The article 150 [now Article I, § 2] of the present [1879] constitution ... extended its protective shield over one additional injury, and required compensation, not only for property taken, but also for property damaged." Id. at 830, 5 So. at 641. This decision and rationale have been reaffirmed many times. Although McMahon is often cited as the first case construing the damage provision, there were in fact two prior cases. Vicksburg, S. & P. Ry. v. Dillard, 35 La. Ann. 1045 (1883) considered it in a partial taking case. Griffin v. Shreveport & Ark. R.R., 41 La. Ann. 805, 809 (1889) apparently is the first case to apply the provision to consequential damages, but its rationale is not so complete as that of McMahon. "A similar article in the Constitution of the State of Illinois has recently passed under the review of the Supreme Court of the United States, and it was held that under such provision, a recovery may be had in all cases where private property has sustained a substantial injury from the making and use of a public improvement, whether the damage be direct, as when caused by trespass or physical invasion of the property, or consequential, as in a diminution of its market value. ... The opinion is well considered and conforms to the rulings of the Supreme Court of Illinois on the same subject ... The doctrine seems to us clearly correct and we adopt it. It follows that the authorization by the city of Shreveport cannot avail to protect the defendant. Had the city itself done the work it would have been responsible."

The most thorough case considering the provision from the legal and historical viewpoint is Jarnagin v. Highway Comm., 5 So.2d 600, 604 (La. App. 1942): "We are of the opinion that a physical invasion of real property or of a real right is not indispensable to the infliction of damages within the meaning of the constitutional guaranty under discussion. If the public improvement, as a consequential effect, has caused special damage to property, such as is not sustained by the public or the neighborhood generally, whether it abuts the improvement or not, an action lies to recover." (Emphasis added.)
NECESSARY ELEMENTS TO HAVE CONSEQUENTIAL DAMAGES

The main consideration necessary to a finding of consequential damages is a diminution of the market value of the property. This is the only injury which is here compensated and it should make no difference how the cause of the injury originated so long as the cause is certain and was performed to further the public benefit. Thus the four elements mentioned above which produced severance damages should also be held to produce consequential damages provided the following rules are fulfilled. The quantum recoverable is measured by the diminution in market value and not by ex delicto standards. Even though this diminution is the main consideration here, it alone will not produce recoverable injuries. The depreciation produced by public improvements can be so extensive that it would be prohibitively expensive to reimburse it all. Thus there is the further requirement that only those injuries which specially affect the property as distinguished from that which affect the community in general can be recovered. More specifically, it

47. See cases cited in note 7 supra. See also Thomas & Warner v. New Orleans, 230 La. 1024, 89 So.2d 885 (1950); Harrison v. Louisiana Highway Comm., 191 La. 839, 186 So. 354 (1939); Cahn v. Shreveport, 140 La. 158, 72 So. 909 (1916); Britt v. Shreveport, 83 So.2d 476 (La. App. 1955).

Plaintiff's petition must allege diminution in market value; if cost of repairs is sought, the petition will be subject to an exception of no cause of action. Beck v. Boh Bros. Const. Co., 72 So.2d 765 (La. App. 1954).

48. It is elementary that there must be a causal relationship between the construction and the fact of injury, yet in most cases this point is tacitly conceded. However, in Harrison v. Louisiana Highway Comm., 191 La. 839, 186 So. 354 (1939), the court felt that adequate proof of the cause relationship had not been established in view of the possibility that the diminution of market value might have been due to the general economic depression. It would seem that the injury due to the public improvement need only be proved and should not be required to be the sole cause of any diminution in market value, since the other applicable rules (e.g., before and after rule of measure) should eliminate any injury produced by causes other than the public improvement.


It is not necessary that the injury occur during the construction of the public improvement (one that will benefit the public interest); it is sufficient if the injury arose in connection with the operation of this public improvement, see McMahon v. St. Louis, Ark. & Tex. R.R., 41 La. Ann. 827, 6 So. 640 (1889).

has been held that before recovery will lie, the injuries must differ in kind from that received by the community in general; distinction by degree alone will not be sufficient.\(^\text{51}\) Mere injurious diversion of traffic does not constitute a cause of action,\(^\text{52}\) probably because to hold otherwise would seriously hamper the exercise of police power in controlling the flow of traffic. Yet, if ingress and egress of the property is interfered with, damages are recoverable under the constitutional provision.\(^\text{53}\) By legislative provision, any special benefit inuring to the property by reason of street improvements may be offset against any damages falling on the property.\(^\text{54}\) However, since the method of computing the amount of the damages is by taking the difference in market value before and immediately after the injury, it would appear that benefit offset is inherent in the computation and it need not be specifically considered.\(^\text{55}\) Since the amount of damages cannot be determined before the erection of the improvement, Louisiana's general requirement of previous compensation\(^\text{56}\) before acquisition has no application to conse-

\(^{51}\) Jarnagin v. Louisiana Highway Comm., 5 So.2d 660 (La. App. 1942). Most of these rules set forth here relative to consequential damages are also applicable to severance damages, except perhaps this one. This is clearly brought out in City of Crookston v. Erickson, 69 N.W.2d 909 (Minn. 1955). Notice though, that as long as there is a portion of the property actually acquired, the remaining property is almost certain to be "specially" damaged.


\(^{53}\) This is clearly brought out in Patin v. New Orleans, 223 La. 703, 66 So.2d 616 (1953) in explaining the holding of the case of Harrison v. Louisiana Highway Comm., 202 La. 345, 11 So.2d 612 (1942). The companion cases of Carter v. Louisiana Highway Comm., 6 So.2d 159 (La. App. 1942); Sholars v. Louisiana Highway Comm., 6 So.2d 153 (La. App. 1942); Jarnagin v. Louisiana Highway Comm., 5 So.2d 660 (La. App. 1942); Thieme v. Louisiana Highway Comm., 5 So.2d 167 (La. App. 1941) offer an illustration of how this rule operates. All of the properties involved in the cases were injured by the same construction, but recovery was allowed only in Sholars and Carter.

\(^{54}\) LA. R.S. 33:3742 (1950). Notice the particular wording of the statute.

\(^{55}\) See Britt v. Shreveport, 83 So.2d 476 (La. App. 1955). See also LA. R.S. 33:3742 (1950), which provides that in street constructions which injure adjoining property, special benefits may be offset. The determination of the recoverable quantum automatically considers the effect of any benefits which the property may receive (since the formula for determining the extent of the injury is the difference between the market value of the property before the injury and after the injury). Such a formula, however, would incorporate general benefits and thus an adjustment may be required since only special benefits may be offset. Manning v. Shreveport, 119 La. 1044, 44 So. 882 (1907).

\(^{56}\) LA. CONST. arts. 1, § 2, IV, § 15; LA. CIVIL CODE art. 2629 (1870).
sequential damages. It naturally follows then, that so long as the taker or actor moves lawfully, the owner cannot enjoin him from injuring his property if there is no physical trespass thereon. The prescriptive period applicable to an owner's claim for consequential damages is slightly confused. It seems clear, however, that the general one-year tort prescription for damage to property is not applicable. It is submitted that R.S. 9:5603 and R.S. 9:5624 squarely contemplate consequential damages as defined in this Comment. Thus where the damages arise in connection with an improvement of streets they are prescribed in


61. See La. Civil Code art. 2630 (1870) and La. R.S. 19:2.1 (1950). The source of these provisions apparently is La. Acts 1855, No. 58, p. 32: "All claims for land, or damages to the owner, caused by its expropriation for the construction of any public works, shall be barred by two years prescription, which shall commence to run from the date at which the land was actually occupied and used for the construction of the works." This provision was incorporated in La. Civil Code art. 2630 (1870) and La. R.S. § 1479 (1870). Subsequent amendments occurred by La. Acts 1896, No. 96, p. 142, which added the words "taking or" before the word expropriation in La. R.S. § 1479 (1870) and by La. Acts 1886, No. 117, p. 215; La. Acts 1902, No. 227, p. 457; and La. Acts 1908, No. 205, p. 362, which made no substantive change in the provision. The exact situation covered by this provision is unclear. Amet v. Texas & P. Ry., 117 La. 454, 41 So. 721 (1906) held that it applied to a situation where there was acquisition after the award of a jury but before there was actual payment. Amet says such procedure is no longer available. See Poindexter v. Louisiana & A. Ry., 124 So. 535 (La. App. 1929), affirming Amet in this interpretation, reversed on other grounds, 170 La. 521, 128 So. 297 (1930). But cf. the cases of Donaldson's Heirs v. New Orleans, 168 La. 1059, 118 So. 134 (1928) (two-year prescription applied and plaintiff's suit for possession or value of land and damages dismissed) and Bourree v. Roy, 232 La. 149, 94 So. 2d 13 (1957), where the court found it unnecessary to pass on the applicability of Article 2630 and R.S. 9:5624. Application of this two-year provision to a situation where the taker enters without suit would result in undue hardship. See Amet v. Texas & P. Ry., 117 La. 454, 458, 41 So. 721, 722 (1906): "We cannot on the face of the Act [now La. Acts 1955, No. 38, incorporated in La. Civil Code art. 2630 (1870)] presume the deliberate legislative intention of interpolating in an expropriation statute a new law of prescription to enable corporations to acquire title to lands by mere occupancy, without legal right or title, for the short period of two years from the date of the trespass.

An interesting interpretation was made by Tremont & Gulf Ry. v. Louisiana & A. Ry., 128 La. 299, 54 So. 826 (1911), which apparently held that where a taker enters without suit, he may be ejected and held for damages if the owner acts within two years. In effect, this would place a two-year limitation on an application of the rule of St. Julien v. Morgan Louisiana & Texas R.R., 35 La. Ann. 924 (1883). See Comment, 18 Louisiana Law Review 509, 533 (1958) and cases cited at 534, n. 176.

one year by application of R.S. 9:5603. Where they arise in any other context, the claim for damages should prescribe in two years under R.S. 9:5624.

**FACTUAL SITUATION OF THE CAUSE FACTOR**

The chief point of trouble in determining the application of the constitutional damage provision has centered around the determination of what factual situation should be held to produce recoverable damages. The context of the provision itself would seem to act as a limitation in this respect, restricting recovery to injuries, produced in the public interest only where the power of eminent domain was involved.

Considerable litigation has been centered around the possibility of the inclusion of an injury produced by negligence of public employees as a cause of action under the constitutional provision. In *De Moss v. Police Jury* a lessee's crops were destroyed as a result of the negligence of public employees engaged in a public improvement. There, although the court had an applicable special statute encompassing such damages, it found it necessary to further buttress its allowance of recovery by application of R.S. 9:5603. Where they arise in any other context, the claim for damages should prescribe in two years under R.S. 9:5624.

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63. LA. R.S. 9:5603 (1950): “Actions for the recovery of damages to person or property by reason of the grading of any public way by any municipality are prescribed by one year, reckoning from the time the damage was sustained.” In view of the self operation generally afforded eminent domain statutes, the use of the word “person” in the above statute might be held to circumvent the sovereign immunity concept for personal injuries in this limited situation.

64. LA. R.S. 9:5624 (1950): “When private property is damaged for public purposes any and all actions for such damages are prescribed by the prescription of two years, which shall begin to run when the damages are sustained.”

65. Note that it should not be held necessary to a recovery of damages that there be an actual exercise of the power of eminent domain. It is the possession of the power of eminent domain that has placed the taker-actor in a position to injure the landowner. Thus even though there is no exercise of that power either on the injured landowner or adjacent landowners, recovery should lie if market value is depreciated by the construction or operation of the improvement concerned. Injury resulting merely while a public purpose was being served should not be sufficient to constitute recoverable damages under the constitutional provision.

66. 167 La. 83, 118 So. 700 (1928).
by reference to the constitutional provision. Since this provision is self operating and recovery under it does not need special legislative authorization, the holding of the De Moss case effectively eliminated the protection of sovereign immunity where the torts of public employees arose in the context of an exercise of the power of eminent domain. In Angelle v. State suit was pressed under the constitutional provision for damages incurred through the negligence of state employees who were not engaged in any work connected with the power of eminent domain. This lack of connection with the spirit of the constitutional provision should have been sufficient reason to deny recovery, but unfortunately the court felt it necessary to go further and overrule the De Moss rule insofar as it relied on the constitutional provision. In one of those few instances where the court has generalized on the constitutional provision, Angelle established the rule that recovery was possible under the provision only where the injury occurred as a necessary consequence of a public undertaking, eliminating the De Moss coverage of negligent injury.

The Buras Problem

In another case involving a generalization as to the possibility of recovery under the constitutional provision, the court has recently brought a considerable portion of the prior law of this area into question, especially the Angelle rule. In Buras Ice

67. Scorsune v. State, 224 La. 1031, 71 So.2d 557 (1954); Nagle v. Police Jury, 175 La. 704, 144 So. 425 (1932), although these were partial taking cases, the rule should be applicable in the situation of consequential damages as well. See Angelle v. State, 212 La. 1069, 34 So.2d 321 (1948). 68. See The Work of the Louisiana Supreme Court for the 1947-1948 Term—Torts and Workmen's Compensation, 9 LOUISIANA LAW REVIEW 224 (1949). 69. 212 La. 1069, 34 So.2d 321 (1948). 70. The court in Angelle relied heavily on federal authorities which do not completely substantiate the position taken, since consequential damages are not recoverable at all under the Federal Constitution. See The Work of the Louisiana Supreme Court for the 1947-1948 Term—Constitutional Law, 9 LOUISIANA LAW REVIEW 164 (1949). See note 4 supra. Nevertheless, the result reached by Angelle seems to be the majority position of those jurisdictions which have found it necessary to consider this point. See the Note on Eriksen v. Anderson, 195 Va. 655, 79 S.E.2d 597 (1954) in 40 VA. L. REV. 373 (1954). See the cases cited in the annotation for Angelle, 2 A.L.R.2d 666, 677 (1948). 71. Angelle v. State, 212 La. 1069, 1085, 34 So.2d 321, 328 (1948): "[W]e view the constitutional provision as applicable only to cases where the taking or damaging of the private property is intentional or occurs as a necessary consequence of the public undertaking." (Emphasis added.) The italicized words should be taken to refer to the element of foreseeability. Thus, where the injury is anticipated (intentional), it must be compensated, as well as where, though not anticipated, it results as a natural consequence of the improvement. The Angelle rule should be understood to exclude from the operation of the constitutional provision negligent (and intentional) torts of state employees.
Factory v. Department of Highways, \textsuperscript{72} the landowner had an ice factory located at the head of a canal which was owned by a third person. Plaintiff's ice factory supplied shrimp boats which came up the canal to be serviced with ice. The canal owner sold a right of way over the canal to the State Highway Department which filled in a portion of the canal for a roadway across it. This fill blocked the canal and prevented the boats coming up it, thus rendering plaintiff's factory almost completely valueless. Seeking recovery under the constitutional provision, plaintiff received the value of his ice plant in the district court. On appeal to the Supreme Court, the lower court was reversed and recovery denied. Finding that plaintiff had no servitude in the canal, the court said that he could not have recovered from a third person if they had filled in the canal and thus no cause of action existed against the highway department. Recovery under the provision in the Constitution was said to be possible only where the injury would have been recoverable under Articles 2315 or 667 of the Civil Code had it been done by an individual or private corporation. \textsuperscript{78} An exception to this general rule was said to exist in the case of injury to property abutting a public street where it was damaged by a change in the grade of that street.

It was the original concept in this area that injury suffered because of public works should be uncompensated because of the public benefit involved; the injury was said to be \textit{damnum absque injuria}. \textsuperscript{74} The taking and damaging provisions of the state constitutions abrogated this principle when it became evident that harsh injuries were being absorbed by individuals when they should be spread out over the general public who benefitted thereby. \textsuperscript{75} It could well be said that the damage provision was intended only to remove an outdated obstacle to an otherwise existing cause of action and not to create one where none existed before. \textsuperscript{76} There is but slight authority to the effect that the constitutional provision was intended to create a new cause of action requiring no evaluation via conventional and established principles of liability. \textsuperscript{77} Nevertheless, it is submitted that this

\textsuperscript{72} 235 La. 158, 163 So.2d 74 (1958).

\textsuperscript{73} It should be noted that under Louisiana law only a corporation or state agency or a political subdivision can exercise the power of eminent domain. See generally Title 19 of the Louisiana Revised Statutes of 1950.


\textsuperscript{75} See generally 2 NICHOLS, EMINENT DOMAIN § 6.38 et seq. (3d ed. 1950).

\textsuperscript{76} See id. § 6.441(2).

\textsuperscript{77} See \textit{ibid.}: "To lay down the rule that damage in the constitutional sense
interpretation, holding that injury under the constitutional provision should be compensated, although it would not be recoverable in a situation between private persons, is sound, logical, and more consonant with the ends sought to be reached with eminent domain legislation than is the *Buras* rule.

If one works from the premise that every injury should be compensated unless there is a sound reason for not doing so, one of the most obvious reasons for restricting recovery here is the administrative reason. Even though the facts of *Buras* present a rare situation, the lack of a servitude in the canal seems to be slight reason for denying recovery. Probably the court felt that any other course would have resulted in an administratively unwieldy flood of litigation in reference to public improvements. But this need not follow in light of the other rules which are necessary to recovery under the Constitution. *Buras* then may be an unnecessary gloss on the constitutional provision engendering difficult problems of proof if it is to be followed. The *damnum absque injuria* rule precluded any consideration of recovery in this area once it was found that the public was to benefit from the construction. Thus there was no elaboration of any principles of liability where massive constructions were made on adjacent land by public concerns. Neither has there been any elaboration of possible liability where private persons erected such constructions, simply because private persons do not build roadways, overpasses, bridges, and so forth. Zoning restrictions and other governmental controls limit the possible constructions which a person may make on his property to improvements which seldom depreciate the value of adjoining land. If *Angelle* is still to be considered operative, is such injury and such injury only as would be actionable if done by a private individual neither clarifies the situation nor gives the clause a broad enough meaning to include the specific form of injustice which was chiefly intended to remedy. . . . Common law liability is undoubtedly an indication of damage; but lack of liability at common law should not conclusively prove that there is no damage under the constitutional provision.” See *Omaha v. Kramer*, 25 Neb. 489, 41 N.W. 295 (1889). See also the very early Comment on this problem in 12 *ALBANY L.J.* 53 (1875).

78. See 2 *NICHOLS, EMINENT DOMAIN* § 6.441 (2) (3d ed. 1950) : “Few public improvements which injuriously affect adjoining land are of such a character that similar structures have been erected without legislative authority frequently enough to have settled the question whether they would constitute an actionable injury at common law, so that the proposed test [similar to that laid down in the *Buras* case] is in most cases useless. Furthermore, many of the injuries from public improvements which cause the greatest hardship to individuals would not be actionable at common law.”

79. *Angelle* would exclude any consideration of a situation involving intentional or negligent injury which did not result as a “natural consequence” of the public improvement. *Buras* apparently did not intend to overrule this principle.
precluding the inclusion of negligent injuries from the scope of the constitutional provision, the Buras rule will in effect limit recovery under the constitutional provision to those cases where the public improvement takes on the nature of a nuisance. Such a restrictive interpretation of the provision seems to do violence to its spirit.

Society is presently making great demands on the individual as more and larger public improvements are being constructed. Under the power of eminent domain many injuries are inflicted on the hapless individual which have traditionally been refused recovery. Reconsideration would now seem to be in order; society should pay for the damage that it causes.

Admittedly there is persuasive logic in the argument that to allow recovery where there would be none if the injury were inflicted for private gain, in cases involving improvements for the public good, would be to predicate liability on the mere fact that the public will receive some benefit.8 The answer to this argument is that in one case the power of eminent domain is available and in the other it is not.

Where non-recoverable injuries are found between private persons, there will also be found some element of reciprocity. Either property owner may injure the other owner's property and each takes his property knowing full well that any benefit which his property may have by reason of the present use or non-use of the adjacent land are only temporary in nature. Injury in such cases may come in the form of a deprivation of view, light, or air; and there the injured property may be said to be merely deprived of a temporary benefit and not damaged in the sense that some inherent quality is destroyed. If the injury is to be avoided, the property owner who may be injured may attempt to buy out the other owner and prevent the injury. But one with the power of eminent domain moves with proverbial sureness insofar as acquisition is concerned, and resulting injuries cannot be avoided.

Therefore the only avenue of liability on which an injured property owner in such a situation can recover are nuisance and Article 667 of the Civil Code (sic utere).

80. In considering what objections might operate against an argument in favor of a liberal interpretation of the damage provision, the following is said: "It would be a strange perversion of legal principles if the right of the owner to recover damages depended upon his ability to show that the offending structure was erected for the good of the public rather than for the profit of some individual." 2 Nichols, Eminent Domain § 6.441(1) (3d ed. 1950). Buras does adopt what appears to be the decision of the majority of jurisdictions which have passed on whether or not there has to be a pre-existing cause of action. Id. § 6.41(1).
Further, the court in Buras concedes in effect that the general rule there pronounced is not sufficient in all cases. An exception to it is made in cases concerning the grading of streets which results in injury to adjacent property. The court seems to predicate this exception on the theory that such an injury may be considered as a continuation of the injury incurred when the land for the street was originally taken, thus apparently bringing into play the rule applicable to severance damages—so long as there is a taking of a portion, the resulting damages are recoverable. Logically there need be no such continuation if the street were laid out in the beginning before any adjacent land were sold. There is some authority to the effect that an adjacent landowner in such a case has a right in the street akin to a servitude which cannot be interfered with without compensation.81 It is submitted, however, that this street exception exists because it presents an easily administered area and precedents allowing recovery in such a situation abound to such an extent that a contrary ruling would result in a major change in the law. It must be noted that the street grading situation provided the impetus for the passage of damage provisions in state constitutions; thus the principle involved there should be considered the rule rather than the exception.82

In conclusion, in view of the court's past determination to keep recovery under the provision separate from other areas of the law, it is surprising to find that now the existence of a cause of action under the constitutional provision must be determined by the existence of a cause of action under another area of the law.83 The ingrafting of the sic utere rule of Article 667 onto

81. State v. Dowling, 205 La. 1061, 18 So.2d 616 (1944); Gobelin v. Department of Highways, 200 La. 409, 8 So.2d 71 (1942).
82. 2 Nichols, Eminent Domain § 6.441(2) (3d ed. 1950): "Thus the right of a private owner to pile up a mound of earth on his own land close to his neighbor's line, or to excavate on his own land so long as he did not deprive his neighbor's soil of support, was unquestioned at common law; and yet the right of a city or town to do this same thing in the course of grading a street without liability to the adjoining owner was the chief cause of dissatisfaction with the doctrine that unless there was a taking there was no right to compensation."
83. The prior jurisprudence generally held in effect that no element of a tortious action should be construed as relative to a damaging under the Constitution. Thus under the latter, no consent was necessary to sue. See note 67 supra. The recovery was measured under the Constitution by the diminution in market value, American Tel. & Tel. Co. v. Maguire, 210 La. 740, 54 So.2d 4 (1951), and not the cost of restoration and the value of the lost use, Hebert v. T. L. James & Co., 72 So.2d 754 (La. App. 1954) and Jernigan v. Highway Comm., 5 So.2d 600 (La. App. 1942). Negligence was not a required item of proof under the Constitution, Hebert v. T. L. James & Co., supra, and Aleman v. Sewerage and Water Bd., 196 La. 428, 199 So. 380 (1940), and the one-year tort prescription did not apply, Foster v. New Orleans, 155 La. 889, 99 So. 688 (1924).
the constitutional provision will probably create confusion in this area and thereby greatly limit recovery.84

Buras also said there could be no recovery under the constitutional provision unless there could be recovery against a private individual or corporation (presumably not possessing the power of eminent domain) under Article 2315, Louisiana's general fault article. Taken literally, the language of Buras implies that general tortious conduct now falls under the constitutional provision. Since the constitutional provision is self operating, this interpretation would result in the abrogation of the rule of sovereign immunity heretofore operative in Louisiana. It is submitted that this was not intended by the court and will not follow from the Buras decision. The rule of Buras should be taken in context with the rule of Angelle.85 If this is done, it will follow that the injury must result in connection with the exercise of eminent domain and as a natural consequence of the public improvement. Furthermore, those injuries mentioned above as incidental, and non-recoverable under the rules of eminent domain, are recoverable in some respects under general tort law; but for the same reasons just mentioned Buras probably did not intend to make them now recoverable under the constitutional provision.86 Clarification of the impact of the Buras decision on tortious injuries and incidental damages will have to await a case with a factual situation similar to Angelle where plaintiff resorts to the constitutional provision.

If Buras is taken as simply an additional rule to the heretofore established rules applicable to the constitutional provision, it is submitted that recovery under that provision will be posi-

84. Concerning Article 667, see Note, 32 Tul. L. Rev. 146 (1957). The applicability of Article 667 to the state was questioned by inference in Beck v. Bob Bros. Const. Co., 72 So.2d 765, 769 (La. App. 1954), where the court said: "Surely the redactors of the Civil Code did not intend to apply this article to a municipality." It would seem that, a fortiori, they did not intend that that article be applied to the state.


86. A literal interpretation of the language used in Buras would indicate that if there exists a cause of action at the general law, then there exists a cause of action under the constitutional provision. Such a position would place Louisiana out of line with innumerable authorities if this were held to encompass those injuries described above (see notes 31-35 supra) as incidental. JAEH, EMINENT DOMAIN c. xvi (1953); 1 ORGEL, VALUATION UNDER EMINENT DOMAIN c. v (2d ed. 1933).

It was early held that certain incidental injuries (which may constitute a cause of action if occurring in another context where the actor is a private concern) are not recoverable under the constitutional provision when incurred for a public purpose. They remain as they were, damnum absque injuria. McMahon v. St. Louis, Ark. & Tex. R.R., 41 La. Ann. 827, 6 So. 640 (1889).
sible for consequential damages where: (1) there is a diminution in market value, (2) the diminution results as a natural consequence from the erection or operation of a public improvement, (3) the injury is special in degree to the affected property, and (4) there exists a cause of action for the injury under Article 667 if it had been caused by an individual.

If the injury results from street improvements, then under the exception set forth in Buras, rule four above is not applicable.

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