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# Levee Construction - Federal Expropriation of Riparian Land

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union security agreements. The chief obstacle to amendment would be the hesitancy of Congress to let the states decide in each case what constitutes an emergency.

One certain conclusion to be drawn from the *Motor Coach Employees* decision is that the states must re-examine their labor relations policies with a view toward adoption of one which will do most toward making voluntary collective bargaining workable and keeping labor-management disputes at a minimum.

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### LEVEE CONSTRUCTION—FEDERAL EXPROPRIATION OF RIPARIAN LAND

The plaintiff's trees, which he owned separate and apart from the land they were situated on, were destroyed by a subcontractor repairing a levee for the federal government. The plaintiff is seeking damages under the Tucker Act,[1] alleging that by destroying the trees the government impliedly contracted to reimburse the owner for them. The decision herein was rendered on a motion to dismiss on the grounds that the petition did not state a cause of action. The defendant attempted to avail itself of the Louisiana constitutional provision that there can be no recovery from the state unless the property was assessed for taxes the preceding year by the state and its subdivisions.[2] The court disposed of the motion in favor of the plaintiff by relying on *Tilden v. United States*[3] and *held* that the case should be tried on its merits. *General Box Company v. United States*, 94 F. Supp. 441 (D.C. La. 1951).

The *Tilden* case, decided by this same district court, was also to recover the value of property destroyed by the federal government in the process of building a levee. There the court held that the Flood Control Act,[4] providing for the building of levees, "specifically provided for payment"[5] and the plaintiff could recover in spite of the fact that the property had not been assessed as required by the Louisiana Constitution of 1921 which provides

1. 28 U.S.C.A. § 1346(a) (1950). "The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . . (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded . . . upon any express or implied contract with the United States. . . ."

2. La. Const. of 1921, Art. XVI, § 6. "Lands and improvements thereon hereafter actually used or destroyed for levees or levee drainage purposes, . . . shall be paid for at a price not to exceed the assessed value for the preceding year; provided, that this shall not apply to batture. . . ."

3. 10 F. Supp. 377 (D.C. La. 1934).

4. 33 U.S.C.A. § 594 (1928).

5. 10 F. Supp. 377, 379 (D.C. La. 1934).

for a gratuity[6] to riparian landowners whose property is taken for levee purposes and was assessed the previous year.

Originally, riparian landowners were subjected to the burden of building and maintaining levees at their own expense by an ordinance of the French governor in 1743, and failure to comply with this ordinance resulted in the forfeiture of their lands to the sovereign. In 1866 the burden of constructing and maintaining levees was shifted entirely from the riparian landowners to the state;[7] however, the state retained the right to take riparian property for levee purposes without payment. In the Louisiana Constitution of 1898[8] provision was made for payment not to exceed the value assessed the previous year to the riparian landowners under the jurisdiction of the Orleans Levee Board.[9] In the Louisiana Constitution of 1921[10] this provision was extended to the entire state. Subsequent jurisprudence has held that the assessment for the preceding year is a condition precedent to the right of the landowners to recover for the state use of the servitude.[11] This is the Louisiana law which the federal government urged in the *Tilden* case in an attempt to escape payment.

The court left unanswered the constitutional question[12] of whether the federal government, in the absence of the provision of the Flood Control Act providing for payment, could avail itself of the state constitutional provision and pay only the assessed value of the property taken or escape payment entirely if it had not been assessed rather than pay the "just compensation" as required by the United States Constitution. For the understanding of this problem, it is essential to keep in mind the fact that at the time of the Louisiana Purchase a servitude existed on the property of all riparian landowners in favor of the public.[13]

6. This description was given the payment by the court in Dickson v. Board of Commissioners, 210 La. 121, 26 So. 2d 474 (1946).

7. La. Act 20 of 1866. See Dickson v. Board of Commissioners, 210 La. 121, 26 So. 2d 474 (1946).

8. La. Const. of 1898, Art. 312.

9. For a judicial discussion of the history of Louisiana servitudes see Dickson v. Board of Commissioners, 210 La. 121, 26 So. 2d 474 (1946), and Mayer v. Board of Commissioners, 177 La. 1119, 150 So. 295 (1933).

10. See note 2, supra.

11. LaCour v. Red River, Atchafalaya & Bayou Boeuf Levee District, 158 La. 737, 104 So. 636 (1925).

12. 10 F. Supp. 377, 379 (D.C. La. 1934). "Regardless of whether the government could, under any conditions, take property upon a navigable stream for levee purposes under the theory of necessary servitude of the civil law, without paying for it, the statute now construed [Flood Control Act, 33 U.S.C.A. §§ 702a-702n (1950)] clearly did not so contemplate, but specifically provided for payment."

13. In Eldridge v. Trezevant, 160 U.S. 452, 16 S. Ct. 345, 40 L. Ed. 490 (1896),

In *Overton v. United States*[14] the court of claims held that the federal government could take lands for levee purposes using the servitude of Article 665, Louisiana Civil Code of 1870[15] because of an article of the Louisiana Constitution of 1898[16] which conferred upon the federal government the right to use this servitude.

The United States Supreme Court in *Kohl v. United States*[17] held that the power of eminent domain possessed by the federal government is complete in itself and cannot be enlarged nor diminished by a state.[18] In the light of this decision the court of claims, by basing its decision upon Article 240 of the Louisiana Constitution of 1898,[19] was clearly in error in permitting the United States to use this servitude without payment.

The question then arises whether the federal government, under the original Louisiana Purchase, possessed in their power of eminent domain the right to use the Louisiana servitude without payment. In the case of *New Orleans v. United States*[20] the United States Supreme Court held that the federal government could not exercise any ownership at all over lands of which the perfect ownership had been vested in the common or public use. The court said, "The State of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence, no jurisdiction of the federal government, either for purposes of police or otherwise,

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the court said, ". . . in the Territory of Louisiana before its purchase by the United States and continuing to this time, . . . lands abutting on the rivers and bayous are subject to a servitude in favor of the public. . . ."

14. 45 Ct. Cl. 17 (1909).

15. Article 665, "Servitudes imposed for the public or common utility, relate to the space which is to be left for the public use by the adjacent proprietors on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works.

"All that relates to this kind of servitude is determined by the laws or particular regulations."

16. La. Const. of 1898, Art. 240. ". . . The Federal government is authorized to make such geological, topographical, hydrographical and hydrometrical surveys and investigations within the State as may be necessary to carry into effect the act of Congress to provide for the appointment of a Mississippi River Commission for the improvement of said river, from the head of Passes near its mouth to the headwaters, and to construct and protect such public works and improvements as may be ordered by Congress under the provisions of said act."

17. 91 U.S. 367 (1875).

18. Id. at 374. Accord: Kincaid v. United States, 35 F. 2d 235 (D.C. La. 1929); United States ex rel. and for Use of Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943).

19. 91 U.S. 367 (1875).

20. 35 U.S. 662 (1836).

can be exercised over this public ground, which is not common to the United States."[21]

From this we can assume that since the servitude on riparian property is not common to the United States[22] the federal government could not exercise a servitude on shores of navigable rivers and streams that have been kept in favor of the "public" for levee purposes. We see then that the holding of the court of claims was correct and in line with *New Orleans v. United States*[23] insofar as it held that the federal government could not make use of the servitude on riparian property without the constitutional provision of 1898,[24] but they overlooked the fact that the federal government's power of eminent domain cannot be enlarged nor diminished by a state[25] thus making Article 240 of the 1898 constitution ineffective insofar as it gave the federal government the right to exercise this servitude imposed by Article 665 of the Louisiana Civil Code of 1870.[26]

In view of Article XVI, Section 6, of the Louisiana Constitution of 1921 and in view of the conclusion that the federal government cannot avail itself of the servitude on riparian property even if the federal statute providing for levee building did not provide for payment,[27] the riparian landowner can demand payment for his property taken for levee purposes. In the case of the state or a state agency expropriating the property he can demand the assessed value of the property providing it was assessed for the previous year[28] and if the federal government makes use of

21. This case was relied on in Van Brocklin v. State of Tennessee, 117 U.S. 151 (1885), where the court held, "The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high water mark, vest in the state, and not in the United States." And again in United States v. Illinois Central Railroad Company, 154 U.S. 225 (1893), the court relied on the *New Orleans* case and said, "The United States possess no jurisdiction to control or regulate, within a State, the execution of trusts or uses created for the benefit of the public, or of particular communities or bodies therein."

22. Board of Levee Inspectors of Chicot County v. Crittenden, 94 F. 613 (C.C.A. 8th, 1899).

23. See 91 U.S. 367 (1875).

24. See note 16, supra.

25. See note 18, supra.

26. In the Louisiana Constitution of 1921 there is no article corresponding to Article 240 of the Louisiana Constitution of 1898; however, in the light of the fact that the federal government's power of eminent domain cannot be enlarged nor diminished by a state any attempt to give a state constitutional or legislative provision such an interpretation, as the Court of Claims gave Article 240 of the Louisiana Constitution of 1898, would be unjustified.

27. The complex legal problem of whether the federal government in expropriating land for public use takes only a servitude or easement, or title to the land is outside the scope of this note.

28. La. Const. of 1921, Art. XVI, § 6.

his land he may demand a "reasonable price"[29] or "just compensation."[30]

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MINERAL RIGHTS—RIGHT TO PARTITION—SERVITUDES CREATED BY RESERVATION IN SALE OF LAND

Defendant bought a 4000 acre tract of land, the vendor retaining one-half of the minerals. The plaintiff then bought the vendor's interest and brought suit against defendant for partition, claiming that, as owner of one-half of the minerals, he was a co-owner with the defendant. *Held*, that the plaintiff owned a complete servitude, an entire right to explore on the defendant's land and to retain one-half of the minerals extracted, and therefore he was not entitled to partition. *Starr Davis Oil Company v. Webber*, 218 La. 231, 48 So. 2d 906 (1950).

There is no question as to the nature of this servitude which the plaintiff owned. The courts have repeatedly held that a sale or reservation of the minerals in a tract of land constitutes a sale or reservation of a right to go upon all parts of the land and to explore for minerals and to retain the amount stipulated in the contract.[1]

At the time of the sale and until minerals are actually produced from the land, there is nothing which can be the subject of ownership by this conveyance except a right of search, with the right to keep half of the minerals, if and when found. It is only this right of search with which we are concerned in this attempt to partition.

Before there can be a partition there must be co-ownership.[2] Land held by co-owners may be partitioned[3] either in kind or by

29. 33 U.S.C.A. § 702d (1950).

30. 33 U.S.C.A. § 595 (1950); U. S. Const., Amend. V.

1. Rives v. Gulf Refining Co., 133 La. 178, 62 So. 623 (1913). See also Palmer Corp. v. Moore, 171 La. 774, 132 So. 229 (1930), and list of cases there. For a more recent case see Standard Oil Co. v. Futral, 204 La. 215, 15 So. 2d 65 (1943).

2. See Daggett, Mineral Rights in Louisiana 230-46 (1949).

3. Art. 1289, La. Civil Code of 1870: "No one can be compelled to hold property with another, unless the contrary has been agreed upon; anyone has a right to demand the division of a thing held in common, by the action of partition."

Art. 1308: "The action of partition will not only lie between co-heirs and co-legatees, but between all persons who hold property in common, from whatever cause they may hold in common."

Art. 1311: "Partitions can be sued for not only by the majority of heirs, but by each of them, so that one heir alone can force all the rest to partition at his instance."

Moreover, co-owners of land cannot explore for minerals on the common