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Expropriation by Ex Parte Order for Highway Purposes in Louisiana

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COMMENTS

EXPROPRIATION BY EX PARTE ORDER FOR HIGHWAY PURPOSES IN LOUISIANA

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At the risk of being immodest or, perhaps, of having an accusation of "extremism" leveled at me, I assert that the State of Louisiana enjoys the benefits of the most advanced and effective type of expropriation statute designed for the acquisition of right of way for highways and their appurtenances.[1] The provisions of this statute permit the acquisition of right of way by a declaration of taking and the statute is closely patterned after the Federal Declaration of Taking Act;[2] it is sometimes referred to as a "quick-taking statute."[3] The similarity of the state statute to the federal statute has enabled the legal representatives of the State of Louisiana and the Department of Highways to utilize the decisions of the federal jurisprudence in seeking guidance for the application and interpretation of the state statute.

Before proceeding, certain basic concepts and distinctions of the law of expropriation, as applied in Louisiana, should be made clear. As is well known, "authority is universal in support of the amplified definition of eminent domain as the power of the sovereign to take property for public use without the owner's consent upon making just compensation."[4] The terms eminent domain, condemnation, and expropriation are essentially synonymous and, of course, refer to the compulsory taking of property for public use, though "expropriation" is the proper legal terminology in Louisiana. "Appropriation" in Louisiana refers to the assumption of ownership, use, control, or possession of property without legal right. It appears that in many states "appropriation" is a stronger and more emphatic assertion of a taking than is the case in Louisiana, where "expropriation" is the firmer and more emphatic assertion of the right to take

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1. La. Acts 1954, No. 107, now LA. R.S. 48:441-460 (Supp. 1965).

2. 46 Stat. 1421-22 (1931), 40 U.S.C. §§ 258a-258e (1964).

3. State v. Hayward, 243 La. 1036, 150 So. 2d 6 (1963); State v. Dodge, 166 So. 2d 286 (La. App. 3d Cir. 1964).

4. 1 NICHOLS, EMINENT DOMAIN 4, at § 1.11 (1917).

property. The property right designated as an "easement" in other states is designated as a "servitude" in Louisiana; "easement" is foreign to the legal terminology of Louisiana. For purposes of expropriation, the word "property" may mean immovable property, whether corporeal or incorporeal (servitude).[5] Thus, the expropriation of movable property or personalty, as defined by the jurisprudence, is not permitted, which appears to be contrary to the law of eminent domain in, at least, a few states. In 1948, the use of juries in expropriation cases was abolished and it was provided that such cases should be tried before the court without a jury.[6]

Historically and prior to the adoption of appropriate constitutional and legislative provisions relating to the method of acquiring highway right of way exclusively, expropriation proceedings, both as to substantive and procedural law, were conducted in accordance with the provisions of the law commonly referred to as the general expropriation law; these provisions are interlarded throughout the code and statutory law of Louisiana and, as to the substantive law, continue to be the basis and authority for the taking of property and property rights, not only for highway purposes but also for the taking of property by all other public bodies and quasi-public bodies clothed with the power of expropriation. In 1948, in order to eliminate the extensive delays incidental to the acquisition of highway right of way under the general expropriation law, an amendment to the Constitution of Louisiana was adopted and became effective December 10, 1948.[7] This amendment provided for the taking of property for highway purposes by orders rendered ex parte prior to judgment and the deposit of the estimated compensation in the registry of the appropriate court before the taking and for the property taken. Based on this amendment, an enabling act had been adopted by the legislature in the same year[8] designed to permit the Department of Highways to take possession of a parcel of land immediately upon the deposit of the value of the property taken and damages to the remainder, if any, prior to judgment in the trial court, as determined by three appraisers appointed by the court *after* the filing of the expropriation suit. As stated, the constitutional amendment was ratified, making the

5. LA. R.S. 19:1 (1950).
6. *Id.* 19:4.
7. LA. CONST. art. VI, § 19.1.
8. LA. R.S. 19:51-66 (1950).

enabling act operative, but only one petition for expropriation was filed pursuant to this special highway procedure, since the minimum delays, though shortened, did not afford adequate relief for an expanding highway construction program and the statute never came into regular and consistent use, though its provisions are still available.

Subsequent to this effort to quicken the judicial process by which highway right of way could be acquired with increasing benefit to the Department of Highways and in a further effort to produce a faster procedure without doing violence to the basic law of the state or to the basic rights of the individual, a study was initiated by the legal section of the Department of Highways. This was particularly desirable since the earlier special highway procedure did not fully utilize the latitude inherent in the provisions of the constitutional amendment to which reference has been made.[9] The study culminated in the drafting and submission to the legislature of an act providing for a declaration of taking by ex parte order *prior* to judgment in the trial court; this act was adopted by the legislature and became effective June 24, 1954,[10] and has since been utilized exclusively for the acquisition of all rights of way in the State of Louisiana by expropriation proceedings. The several provisions of this act will be discussed in somewhat greater detail. The great difference between the 1948 special highway procedure and the statute enacted in 1954 is the delay in the actual taking of the property and vesting of title in the Department of Highways. In the former procedure, vesting of title occurred only *after* the suit had been filed, a valuation of the property made and damages, if any, assessed by appraisers appointed by the court and the appraised valuation deposited in the registry of the court; in the later procedure, vesting of title occurs *simultaneously* with the filing of the suit, the signing of the ex parte order of expropriation and the deposit of the estimated compensation in the registry of the court, *prior* to judgment in the trial court. Both of these statutes are wholly procedural in character and content and do not confer on the Department of Highways any greater substantive legal rights than those formerly enjoyed or those contained in the provisions of the general expropriation law. The title of the 1954 act specifically states that the enactment provides an *additional method* by which the

9. LA. CONST. art. VI, § 19.1.
10. LA R.S. 48:441-460 (Supp. 1965).

Department of Highways may expropriate property and *the procedure in such cases.*

As I believe is the case in most states, the right to take private property for a public use or for public utility is circumscribed by specific state constitutional limitations, as well as the applicable federal constitutional limitations. In Louisiana, these constitutional restrictions are contained primarily in two provisions of the Constitution of 1921;[11] the first reads:

> "Section 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."

and the second reads:

> "Section 15. No ex-post facto law, nor any law impairing the obligation of contracts, shall be passed; nor shall vested rights be divested, unless for purposes of public utility, and for just and adequate compensation previously paid."

These articles of the Constitution relative to restrictions on the exercise of the right of eminent domain evolved from the language of every constitution since 1845.[12] In the only prior Constitution, that of 1812, the language of the corresponding provision is obscure[13] and it was not until the adoption of the Constitution of 1879 that language was included in the organic law which provided for the payment of compensation for *damage* to private property in addition to the earlier requirement of compensation for the *taking of property.*[14] It is interesting to consider the interpretation by the Supreme Court of the applicable provision of the Constitution of 1879 in a case decided in 1889.[15]

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11. LA. CONST. art. I, § 2; art. IV, § 15 (1921).
12. La. Const. art. 109 (1845).
13. La. Const. art. VI, § 20 (1812).
14. La. Const. art. 156 (1879).
15. McMahon and Perrin v. St. Louis, A. & T. R.R., 41 La. Ann. 827, 829, 6 So. 640, 641 (1889): "Prior to the Constitution of 1879 the organic law of this State, like that of all the States of this Union, 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 and the measure of compensation due was the value of the property taken. 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,

Addressing this discussion specifically to the provisions of the 1954 statute which is currently employed in Louisiana for expropriation of property and property rights for highway purposes, I shall examine the jurisprudence predicated on and developed from the provisions of this statute during the period since its passage. In Louisiana, two factors must exist before expropriation proceedings can be instituted, that is, the landowner must refuse to yield the property required or the landowner demands an exorbitant price. Also, and in accordance with the concepts already mentioned, the essentials for an expropriation suit are: (1) that the taking must be for a public use or public utility and (2) that adequate compensation must be paid. The expropriation of property in Louisiana in a summary manner by ex parte orders and prior to judgment is authorized by the constitutional provision earlier mentioned.[16]

The first serious legal attack made against its use and application was the assertion of unconstitutionality. This claim was predicated on several grounds, namely, that no provision had been made for the payment of compensation *prior* to a taking for a public purpose, that the ex parte orders of expropriation authorized could be issued only at the discretion of the trial court, that the statute permitted an ex parte taking and immediate possession without a prior opportunity to be heard and without any hearing whatsoever as to the necessity of the taking; and it was claimed that all these contentions offended both the

loss of business and the like. All such injuries, inasmuch as they resulted only from the exercise by another of his legal right, were damna absque injuria.

"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.

"As in the case of a taking the measure of compensation is the value of the property taken, so in the case of damage, the measure of compensation is the diminution in the value of the property.

"There is no warrant for extending the liability one whit beyond this. We are simply to inquire what damage has been done to the property, i.e., to its value for rental and sale. Mere consequential injuries to the owners arising from discomfort, disturbance, injury to business and the like, remain, as they were before, damna absque injuria, particular sacrifices which society has the right to inflict for the public good."

16. LA. CONST. art. VI, § 19.1 (1921): "The Legislature shall have authority to authorize the taking of property for highway purposes by orders rendered ex parte in expropriation suits prior to judgment therein provided that provision be made for deposit before such taking with a court officer for the amount of appraisals of the property so taken and damages to which the owner thereof may be entitled, if any, which appraisals may be made in such manner as may be provided by law either before or after institution of suit, and need not be by judicially appointed appraisers."

Louisiana constitutional provisions cited above, as well as others,[17] and federal constitutional due process requirements.[18] These attacks on the constitutionality of the summary procedure authorized by the 1954 statute were resolved in 1958 in a case[19] decided by the Supreme Court of Louisiana, which rejected all arguments of constitutional nullity advanced for the property owners.

The petition in an expropriation suit, pursuant to the terms of the 1954 statute, must contain the allegations required by R.S. 19:2.1 of the general expropriation law, including the requirement for a plat or plan of survey of the property to be taken and a description of the improvements situated thereon, if any, and it is practically the same petition as that which has always been used, with the addition of certain exhibits.[20] These exhibits are (1) a certified copy of the resolution adopted by the Board of Highways showing that not less than two-thirds of the Board consider the taking necessary or useful for highway purposes,

17. *Id.* art. I, § 6; art. II, §§ 1, 2; art. VII, § 3.

18. U.S. CONST. art. XIV, § 1.

19. State v. Macaluso, 235 La. 1019, 1024, 106 So. 2d 455, 456 (1958): "We cannot agree with defendants' contention that the constitutional provision grants the Legislature power to authorize only such ex parte expropriation orders as are to be issued at the discretion of the trial court. The legislative requirement that the trial court '*shall* issue an order' of expropriation upon the Department's compliance with the statutory prerequisites does not exceed the authority conferred by the constitutional provision to the Legislature 'to authorize the taking of property for highway purposes by orders rendered ex parte in expropriation suits prior to judgment therein.'

". . .

"But the evident purpose of Article VI, Section 19.1, was to authorize such ex parte takings prior to judgments formerly and otherwise prohibited by the State constitutional provisions now relied upon by the respondent property owners herein. This governing constitutional enactment, of course, overrides within its scope earlier expressions and holdings cited to the effect that the necessity of the taking is a matter for judicial determination . . . .

"Respondents' final contention is that Act 107 of 1954 offends federal due process requirements. This argument has little merit. As the United States Supreme Court stated in Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135, in upholding a State enactment similarly to the present Louisiana statute permitting an ex parte taking with immediate possession for highway purposes without any hearing whatsoever provided as to the necessity of the taking although with an eventual full judicial hearing (if desired) upon the property owner's claim for compensation, 251 U.S. 58-59, 40 S.Ct. 63:

" 'Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment. . . .

" '. . . [I]t is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due procedes of law in the sense of the Fourteenth Amendment merely because it precedes the ascertainment of what compensation is just. . . .' "

20. LA. R.S. 48:442 (Supp. 1965).

(2) the certificate of the Chief Engineer declaring that the width of the right of way has been fixed, as required by law, and in the interest of the general public both presently and in the future, (3) a copy of the plat or plan mentioned previously, (4) the certificate of location and design which is executed by the Director of Highways and those engineers charged with the responsibility of locating and designing highways and declares that the best modern practices and designs have been adopted for the particular project, and (5) the certificate showing the estimate of just compensation due the particular landowner, including an estimate of damages as a separate item, if any. The petition concludes with a prayer that the property be declared taken for highway purposes, that the amount of the estimate of just compensation be deposited in the registry of the court and that the property described in the petition be declared taken at the time of the deposit. These exhibits are evidence of the motivating theory of the 1954 statute that the public officers and employees engaged in the construction and maintenance of the state highway system are fully qualified and responsible public officials and have not acted arbitrarily or without proper and adequate consideration of the public needs as well as the rights of the individual.

Upon the deposit in the registry of the court of the amount estimated to be due the landowner, title to the property and property rights described in the petition vest in the Department of Highways. This estimate is made prior to filing suit by appraisers selected by the Right of Way Engineer, two of whom must be qualified as licensed realtors or qualified right of way agents in the regular employment of the Department. No delay is encountered in obtaining the estimate as it is secured prior to and during negotiations with the landowner and before filing suit. The order of expropriation signed by the judge at the time of filing suit and the receipt of the clerk of court for the money deposited are recorded in the conveyance records of the parish in which the property is situated, thus effecting notice to the public of the transfer to the Department of Highways of title to the property taken. As a corollary to the vesting of title, there is the matter of the surrender of possession by the landowner. Provision is made in the statute[21] for immediate possession in those cases in which no buildings are located wholly

21. *Id.* 48:448.

or partially on the property taken; in those cases in which any buildings are located wholly or partially on the property taken, the right of possession may be postponed by the court for any period not to exceed thirty days from the date on which the last of any parties defendant was served with notice of the expropriation.[22] Along with other portions of the 1954 statute, these provisions for vesting of title and right of entry to take possession have proved very advantageous in securing the necessary rights of way without undue delay and in permitting the construction of the project to proceed in an orderly manner in accordance with program schedules without being impeded by the strategy of delay formerly employed by the property owner; this procedure is accomplished without the loss of any legal rights by the landowner, as will be indicated.

It was not until 1960 that one of the most controversial issues engendered by the statute was settled; this was whether or not the question of necessity for the taking of the property was a judicial or legislative question. The statute provides that notice must be given every defendant property owner affected[23] who may contest the validity of the taking upon the *sole* ground that the property was not expropriated for a *public use or purpose.*[24] There is a difference between "public use" and "necessity"; the former refers to the public use or purpose to which the property is to be devoted, while the latter challenges the propriety of the taking, including the extent of the taking, its advisability, and expediency. This is a distinction some courts and many lawyers fail to recognize or seem unwilling to recognize with the result that legal pleadings continue to be filed alleging there is no necessity for the taking and confusing this with the right to contest the matter of public use. The statute provides for the filing of a motion to dismiss the expropriation suit within ten days from the date notice is served on the defendant[25] on the sole ground that the property has not been taken for a public use and that failure to file such a motion in time constitutes a waiver of all defenses to the suit except claims for compensation.[26] From the time of the adoption of this legislation, the attorneys for the Department of Highways assumed the legal position that the question of necessity was no longer a judicial

22. *Ibid.*
23. *Id.* 48:446.
24. *Id.* 48:447.
25. *Ibid.*
26. *Ibid.*

question, in view of the wording of the statute, the change in the procedure for expropriation of property for highway purposes and the annexation to the petition of the certificates of responsible officials, as well as other exhibits, all of which indicated that it was not the intent of the statute to require proof of necessity of the taking in an expropriation suit for highway purposes. However, as this statute made no change in the procedural aspects of the general expropriation law, the issue of the necessity of the taking continues to be a question which is subject to judicial review under the general law. Consequently, the case[27] decided by the Supreme Court in 1960 settled the issue of whether proof of the necessity of the taking is required.

With the rendition of the decisions in the two cases[28] discussed, two major issues, constitutionality and necessity of the taking, were removed from the realm of litigation in expropriation matters for highway purposes. This situation has proved to be of vast assistance to the State of Louisiana and the Department of Highways in accelerating the acquisition of right of way and the construction of highway projects throughout the state, particularly in promoting the highway program related to the National System of Interstate and Defense Highways. However, interpretations of other provisions of the statute remained to be determined by court decisions.

The statute provides for a motion to dismiss[29] an expropria-

27. State v. Guidry, 240 La. 516, 520, 124 So. 2d 531, 532 (1960): "The primary issue for our consideration is whether the question of the necessity for the taking of property expropriated by the Highway Department under Article VI, Section 19.1, of the Constitution and Act 107 of 1954 (LSA-R.S. 48:441-48:460) is subject to judicial review.

"Prior to the enactment of Act 107 of 1954 the owner of expropriated property was entitled to contest the question of necessity of the taking before the courts, and may still so do when the property has been expropriated under the general expropriation laws of the State. . . . With the adoption of constitutional Article VI, Section 19.1, and Act 107 of 1954, however, when the Highway Department expropriates property under these provisions, there are only two questions which the courts may determine: (1) the adequacy of the compensation, and (2) whether the property was taken for a public purpose. Decisions relied upon by the Court of Appeal in reaching its decision that the question of the necessity or expediency of the taking by the Highway Department for highway purposes is subject to judicial review are no longer controlling. Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such a manner as the State may designate. They are legislative questions no matter who may be charged with their decision. . . . In Louisiana, the Legislature has delegated to the Highway Department the power to determine the necessity for expropriating property for highway purposes and the owner of land expropriated has no constitutional right to have the department's decision as to the necessity thereof reviewed in judicial proceedings."

28. State v. Macaluso, 235 La. 1019, 106 So. 2d 455 (1958); State v. Guidry, 240 La. 516, 124 So. 2d 531 (1960).

29. LA. R.S. 48:447 (Supp. 1965).

tion suit by the filing of such a motion on the *sole ground* that the property is not being taken for a public use,[30] and this motion must be filed within ten days of the date of service of process. Moreover, the statute provides that the Department of Highways shall not be divested by court order of any title acquired under these provisions except where such court *finds* that the property was not taken for a public use.[31] Neither does the filing of a motion to dismiss delay the taking of possession; that no such delay can occur reasonably follows from the fact that it is now clear that title cannot be divested without the *filing* of the motion on the sole ground mentioned *and a finding* by the court that the property has not been taken for a public use. That these two conditions must coincide is quite apparent not only from the language of the statute but also from the jurisprudence of Louisiana. The following language was used by the Supreme Court in a decision[32] on this subject:

> "But, even were it otherwise, the judge was without right to set aside the order of expropriation on a motion to dismiss in the absence of a *finding* that the property was not taken for a public use. . . . Therefore, without a showing by respondent that the property was not taken for a public use, relator could not have been lawfully divested of its title. . . ." (Emphasis added.)

Neither does the filing of a motion to dismiss hold the litigation in abeyance or delay possession until disposition has been made of the motion. This phase of the development of the statute is mentioned for the reason that, originally at least, many attorneys assumed that the motion to dismiss could be filed and the lawsuit permitted to remain dormant until some further action was desired or indicated. If this were true, a defendant could, by the simple device of filing a motion to dismiss, whether bona fide or frivolous, extend and enlarge the period of time in which to file an answer. Such a possibility, if allowed by the court, would nullify the intent and purpose of the statute and continue to permit the strategy of delay by the property owner to dominate the litigation, and interfere with and deny the right of the Department of Highways to the accelerated procedure intended.

30. State v. Macaluso, 235 La. 1019, 106 So. 2d 455 (1958).
31. LA. R.S. 48:460 (Supp. 1965).
32. State v. Wm. T. Burton Industries, Inc., 231 La. 360, 365, 91 So. 2d 375, 377 (1956).

Related to the filing of the motion to dismiss is the period of time in which an answer may be filed by the defendant property owner. In the case of a total taking, the property owner must file an answer within thirty days from the date the defendant is served with notice.[33] In the case of a partial taking, the property owner must file an answer within one year from the date the defendant is notified in writing that the construction of the highway project for which the property was expropriated has been accepted finally.[34] The requirement that the answer be filed within the periods of time stated by the statute is not postponed or prolonged by the filing of a motion to dismiss and disposition by the court; neither is the court authorized to grant an extension of time in which to file an answer to the suit, whether or not a motion to dismiss is filed. Both of these procedural aspects of the statute have been determined by appellate courts of final resort. That an answer must be timely filed, in the case of a total taking, has been decided by two cases. In the first case,[35] no motion to dismiss had been filed but two successive extensions of time in which to answer had been granted ex parte by the court. In disposing of this case, the court decided the issue with reference to the *timely filing of an answer* pursuant to the statute. And, in the same case, the court also decided the issue with reference to granting an *extension of time* in which to file an answer. In the second case,[36] a motion to dismiss had been filed and was eventually

33. LA. R.S. 48:450 (Supp. 1965).

34. *Id.* 48:451.

35. State v. Higgins, 135 So. 2d 306, 308 (La. App. 4th Cir. 1961): "Further, LSA-R.S. 48:450 grants the defendant the right to apply for a trial to determine the fair market value of his property, provided that he files an answer within thirty days. Although we think this section clearly means that the defendant forfeits his right of action to demand additional compensation unless he meets the requirements of the statute, our interpretation thereof is further substantiated by the rationale of LSA-R.S. 48:452, which provides that the defendant waives *all defenses* by failing to file an answer timely. If the legislature had intended to reserve the right to defendant to claim additional compensation, even though he failed to answer timely it certainly would have specifically provided therefor in R.S. 48:452 as it did in LSA-R.S. 48:447.

". . .

"In reaching the foregoing conclusion, we are fully cognizant of the fact that the trial court granted the defendant two extensions of time in which to file an answer, and incidentally, these periods of time actually expired before the defendant chose to reply to the suit. However, that fact is insignificant because the extensions were unauthorized by the statutory law. The court engaged in a futile gesture when it authorized a delayed answer, which was clearly forbidden by the legislature. The courts are interpreters not creators of the law. There exists no place in our Constitution for judicial hegemony, to reason otherwise would result in chaos."

36. State v. Jackson Brewing Co., 146 So. 2d 504, 507 (La. App. 4th Cir. 1962): "In our opinion, LSA-R.S. 48:447 providing for the filing of a motion

disposed of; in this case, however, the attorneys for the property owner indulged in a calculated risk, it appears, and did not file an answer until the motion had received final disposition, though the answer was filed within thirty days of such disposition, this case being a total taking.

In the case of a partial taking, in which a claim to severance damage may arise, no reported case has been decided favorably to the Department of Highways under the section of the statute to the effect that any defendant may apply for a trial to determine the just and adequate compensation to which he is entitled, provided the defendant files an answer within one year from the date he is notified in writing of the final acceptance of the construction of the project.[37] This particular section has proved to be ineffective and extremely controversial, though the intent and purpose is constructive and laudable. As has been stated by the author of the act, this provision of the statute represents an experiment in procedure and its purpose is to attempt to avoid high or excessive awards based on damage, if any, which is to occur in the future. The defendant is fully protected, since the original deposit of estimated just compensation is always available to him and he is entitled to interest at the legal rate on any increase in compensation which may be awarded on the trial of the case. Under this provision, the defendant would not risk overlooking items of damage which might not be readily foreseeable and, on the other hand, the Department of Highways would not encounter the risk of being assessed for an item of damage which may not actually occur. The court can assess damages on the basis of the existing situation with justice and fairness to both parties. This procedure has proved to be extremely controversial, as stated, and cannot be said to have enjoyed the confidence or thoughtful consideration of the courts. Notwithstanding the vigorous efforts of attorneys for the Department of Highways in urging the courts to require compliance with this section of the statute, the courts have insistently and steadfastly permitted the property owner to assert

to dismiss within ten days from receipt of notice of the expropriation and LSA-R.S. 48:450 requiring that a defendant applying for a trial as to market value must file his answer 'within thirty days from the date he is served with a notice,' are clear and free from all ambiguity. There is nothing contained in either section, or in any other portion of this entire statute, which even suggests that if a motion to dismiss is filed, then the period of time in which to file an answer is extended or enlarged in the manner for which defendant contends. The language of Section 450 is not conditional, contingent or subjunctive in any manner. It is clear, positive and unambiguous. . . ."

37. LA. R.S. 48:451 (1950).

a claim for damages without compliance. One case[38] illustrates the attitude of the courts on this subject. In a second case,[39] the court supported the former view.

It is interesting to observe that in several cases, not reported, the property owners have considered it beneficial to their interests to rely on this provision and to await the completion of the project before proceeding with the litigation. It is also interesting to observe that of the four cases to date in which the Department of Highways has urged the courts to enforce compliance with the statute in this respect three cases were decided in the same appellate court; only one case in which this section was considered occurred in a different appellate court and this case involved the time when the period of a year commenced in which the property owner could act[40] rather than a consideration of the intent and purpose of the section as a whole.

It was stated earlier in this paper that the accelerated procedure now currently in use was achieved without the loss of any legal rights of the landowner. This is believed to be a correct estimate of the position of the landowner for, in addition

38. State v. Williams, 131 So. 2d 600, 605 (La. App. 3d Cir. 1961): "Before concluding, we should add that the appellant Department has re-urged on appeal a motion for continuance, based upon the premise that an action for severance damages by reason of an expropriation under LSA-R.S. 48:441 et seq. (Act 107 of 1954) is premature, 'where a portion of a * * * tract of land is expropriated,' until the landowner 'is notified in writing by the department that it has finally accepted the construction of the highway project for which the property was expropriated,' quoted language being from LSA-R.S. 48:451. From the language and context of this statutory provision, however, it is apparent that the legislature was providing the delay within which answer to such expropriation suits must be filed which seek further judicial proceedings to determine the compensation to which the landowner is entitled (if any) beyond the amount deposited with the ex parte taking (LSA-R.S. 48:445). While the Act provides that a failure to file the answer timely constitutes a waiver by the landowner of any defenses to the suit (LSA-R.S. 48:453), and thus of his right to contest the Department's deposited valuation of his property, the enactment does *not* provide that a landowner may *not* file his answer earlier than the delays provided by LSA-R.S. 48:450 and 451 and thus be able to secure an earlier judicial determination of the compensation to which he is entitled by reason of the taking."

39. State v. Davis, 149 So. 2d 164, 168 (La. App. 3d Cir. 1963): "Under LSA-R.S. 48:451 the landowner has the right to claim these damages up to a year from the date the highway department notifies him it has accepted the construction of the highway project for which the property was expropriated. Counsel re-urges the Department's contention that suits for severance damages are therefore premature until after final construction and acceptance of the highway project, although this perhaps may not take place until several years after the taking. We have previously rejected this contention and have held that the statutory provision permitting such long delay within which the landowner may judicially assert his claim for severance damages, does not prevent the landowner from filing his claim earlier and securing a more prompt judicial determination of the severance damages and loss of value to which he is entitled as a result of the taking."

40. State v. Freyer, 129 So. 2d 114 (La. App. 2d Cir. 1961).

to the preservation of the right to seek compensation in excess of the deposit made on account of just and adequate compensation, the court may order that the deposit be paid forthwith to the person or persons entitled thereto upon presentation of an appropriate written order to withdraw the same without prejudice to the rights of the landowner.[41] The statute also provides for the payment of interest at the rate of five per centum (the legal rate in Louisiana) on the amount awarded in excess of the amount deposited from the date title vested in the Department of Highways.[42] A further provision authorizes the court to make an equitable distribution of the amount finally awarded, if such judicial distribution is required.[43] Finally, in the event title of the Department of Highways is divested by reason of a finding by the court that the property expropriated has not been taken for a public use, judgment may be rendered to compensate the landowner for the period of time during which the property was in possession of the Department and to recover for the Department any award paid.[44]

These remarks, I believe, include the more important highlights of the jurisprudence established to this time affecting the more controversial provisions of the declaration of taking statute of Louisiana. There are, however, two related matters that should be placed in juxtaposition to the expropriation statute and the jurisprudence. These are the matters of an appeal of a judgment in an expropriation suit and the reservation of minerals and mineral rights to the property owner in those cases in which a fee title or full ownership is expropriated.

The 1954 statute provides "no appeal in any expropriation suit brought under these provisions shall operate to prevent or delay the vesting of title in the plaintiff"[45] and this language clearly implies that a suspensive appeal is not available. However, the statute likewise includes a section[46] to the effect that, except as provided, expropriation suits are to be tried in accordance with the general expropriation laws and these laws,[47] as well as an identical civil code enactment,[48] provide, in part:

41. LA. R.S. 48:449 (1950).
42. *Id.* 48:455.
43. *Id.* 48:457.
44. *Id.* 48:460.
45. *Id.* 48:459.
46. *Id.* 48:454.
47. *Id.* 19:13.
48. LA. CIVIL CODE art. 2634 (1870), as amended, La. Acts 1960, No. 92.

> "No party to any expropriation proceeding shall be entitled to or granted a suspensive appeal from any order, judgment, or decree rendered in such proceeding, whether such order, judgment, or decree is on the merits, exceptions, or special pleas and defenses, or any or all of them. The whole of the judgment, however, shall be subject to the decision of the appellate court on review under a devolutive appeal."

This final resolution of the question of whether a suspensive appeal is available is summarized in this excerpt:[49]

> "Articles 2634 and 2636 of the Civil Code have been amended by Act 92 of 1960 to strengthen the statement in the first sentence of Article 2634, forbidding suspensive appeals in expropriation cases. The new amendment clearly precludes suspensive appeals from any facet of an expropriation proceeding."

Prior to 1958, there was some obscurity as to the legal right of the Department of Highways to reserve to a property owner minerals and royalties with respect to the expropriation of land in full ownership. In 1958, an act[50] was adopted by the legislature that set this matter at rest and it is now established practice to include in all expropriation suits an allegation effecting such reservation where title is taken in fee or full ownership.

STATUTORY RAPE: A CRITIQUE

In the evolution of statutory criminal law two classes of crimes have emerged in which knowledge and consequently intent are no longer demanded.[1] One of these classes is "public welfare offenses." These crimes are violations of statutes designed to protect the health, safety, and welfare of the community at large and they extend, for example, to the sale of

49. *Legislative Symposium of 1960—Civil Code and Related Subject Matter*, 21 LA. L. REV. 53, 62 (1960).

50. LA. R.S.. 9:5806 (1950).

1. Smith v. State, 71 Fla. 639, 642, 71 So. 915, 916 (1916): "While all common-law crimes consist of two elements—the criminal act or omission, and the mental element, commonly called criminal intent, it is within the power of the Legislature to dispense with the necessity for a criminal intent, and to punish particular acts without regard to the mental attitude of the doer." See also Sayre, *The Present Significance of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 407 (1934); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933).