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Public Law: Expropriation

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EXPROPRIATION

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NATURE OF THE INTEREST TAKEN

The *St. Julien* doctrine that "a public or quasi-public corporation having expropriatory powers can acquire a servitude over the land of another where the landowner consents or acquiesces in the construction of facilities for a public purpose"[1] continues to perform useful service, although the interest thus acquired may be no greater than that necessary to the expropriator's purpose. In *Rogers v. Louisiana Power & Light Co., Inc.*[2] the utility acquired a servitude by contract, then erroneously recorded it as burdening the wrong section of land; hence, although the owner of the burdened land tacitly acquiesced to the taking, the utility did not have title to the servitude. A subsequent owner, discovering the error, sought removal of the line or damages for trespass, relying upon *Lake, Inc. v. Louisiana Power and Light Co., Inc.*[3] as having overruled *St. Julien* as to electric transmission lines. The trial court held *Lake* applicable, failing to note that the *Lake* ruling was prospective only and that the case was consequently still governed by the *St. Julien* doctrine.[4] The decision's significance is twofold: Once the original landowner has acquiesced, the acquiescence of subsequent owners is unnecessary to the validity of the servitude. And any right to compensation is personal to the acquiescing owner, does not attach to the land, and can be conveyed only by express subrogation from the acquiescing owner to his vendee—a subrogation which was not present in this case.

METHODS OF COMPENSATION

Established doctrine holds that the state is unable to set off the increased value of property which becomes "frontage property" as a result of a highway widening against the value of the property

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1. *See* St. Julien v. Morgan La. & Tex. R.R. Co., 35 La. Ann. 924 (1883).
2. 391 So. 2d 30 (La. App. 3d Cir. 1980).
3. 330 So. 2d 914 (La. 1976).
4. Subsequent to the *Lake* decision, the *St. Julien* doctrine was reinstated by the legislature. *See* LA. R.S. 19:14 (Supp. 1976). *See also* M. DAKIN & M. KLEIN, EMINENT DOMAIN IN LOUISIANA 17, 40, 164 (1970 & Supp. 1978); Yiannopoulos, *The Work of the Louisiana Appellate Courts for the 1975-1976 Term—Property*, 37 LA. L. REV. 317, 326-27 (1977).

taken to accomplish the widening. To permit such an offset, the courts have stated, would be to effect compensation other than in cash, a result forbidden by the Louisiana Civil Code; any special benefits, however, can be offset against any severance damages suffered by the remainders in a partial taking, if specially pleaded.[5] The lesson has not always been well-learned. For example, in *State v. Mosely*[6] the property did in fact suffer severance damages to the remainder but also gained special benefits from new frontage; the state failed in its effort to setoff because it did not specially plead the benefits and sought to prove them solely on the basis of expert opinion without evidence.[7] The case is also of interest for its application of the rule in sequential takings that such a taking shall be at its enhanced value due to the improvement if not within the original scope of the project.[8] In *Mosely* there had not been enhancement but rather a decrease in the value of the remainder due to the improvement; the trial court was nonetheless affirmed as acting within the rule in disregarding such decrease in valuing the property.[9]

In *City of Shreveport v. Bernstein*[10] the landowner was permitted to recover rentals lost as a result of delay on the part of the city in acquiring property after its announcement of the proposed taking and offer of relocation assistance to tenants. The award was deemed within the constitutional provision that "the owner . . . be compensated to the full extent of his loss,"[11] as construed by the Louisiana Supreme Court in *State v. Constant*.[12] A similar plea for recovery of damages suffered by reason of property "taken out of commerce" was made in *State v. Van Willett*[13] but was rejected as too speculative where the subdivision lots had not been improved and the damage was said to consist in the fact that, during the state's delay in taking, houses could have been built and appropriate rentals collected.[14] A claim of business loss was also unsuccessful in *City of Shreveport v. Pupillo*[15] where evidence indicated no net income

5. *See* M. DAKIN & M. KLEIN, *supra* note 4, at 88-89, 316.

6. 390 So. 2d 951 (La. App. 2d Cir. 1980).

7. *Id.* at 956.

8. State v. Martin, 196 So. 2d 63 (La. App. 3d Cir. 1967).

9. 390 So. 2d at 956. For an award for, and severance damages to, interim improvements on sequentially taken property, *see State v. Salles*, 387 So. 2d 1278, 1284-86 (La. App. 1st Cir. 1980); for an exhaustive explanation of the "scope of the project" principle in sequential takings, *see United States v. 320 Acres of Land*, 605 F.2d 762, 781-811 (5th Cir. 1979).

10. 391 So. 2d 1331 (La. App. 2d Cir. 1980).

11. LA. CONST. art. I, § 4.

12. 369 So. 2d 699 (La. 1979).

13. 386 So. 2d 1023 (La. App. 3d Cir. 1980).

14. *Id.* at 1036-37.

15. 390 So. 2d 941 (La. App. 2d Cir. 1980).

would remain after deducting reasonable salaries for an owner-operator, and there was no income to capitalize and hence no loss. In *Pupillo* the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and regulations thereunder[16] were interpreted not to preclude a claim for such assistance by an owner who contested the amount of compensation to which he was entitled; the owner was hence not injured by the city's withdrawal of offer of relocation assistance which accompanied a rejected offer of compensation.[17] In the *Bernstein* case[18] the court also approved, as a method of determining value, a variant of the comparable sales method; gross rentals from comparable properties which had been sold were determined, and a range of rental multipliers derived, from which an appropriate multiplier was selected and applied to the gross rentals of the subject property. The procedure was held to yield an appropriate estimate of fair market value.[19]

In *Columbia Gulf Transmission Co. v. Rosteet*[20] an attempt was made to establish the highest and best use of land in its existing use as a pipeline servitude. Prior jurisprudence was adhered to in rejecting sales of similar servitudes to pipeline companies as comparables; valuation was determined properly on the basis of comparable sales of agricultural land, which was held to be the highest and best use of the subject property.[21] When there are only such sales of similar property interests to look to as comparables, however, the courts have approved their use. Thus, in *Trunkline Gas Co. v. Rawls*,[22] in which a pipeline sought expropriation of a depleted gas reservoir for gas storage purposes, the trial court properly accepted a method of valuation which utilized the sale of a comparable underground interest; the court, relying upon *Mid-Louisiana Gas Co. v. Sanchez*,[23] held that consideration of the special suitability of the property for the expropriator's use, including the presence of residue gas which could be used as a cushion, was not reversible error.

In *Monroe Redevelopment Agency v. Succession of Kusin*,[24] the court implicitly recognized the important appraisal principle that, in

16. 24 C.F.R. § 42.220-42.290 (1979).
17. 390 So. 2d at 946-48.
18. 391 So. 2d at 1333-34.
19. *Id.* at 1344. *See also* City of Shreveport v. Pupillo, 390 S. 2d 941, 945 (La. App. 2d Cir. 1980).
20. 389 So. 2d 778 (La. App. 3d Cir. 1980).
21. *See* Louisiana Intrastate Gas Corp. v. Edwards, 343 So. 2d 1166 (La. App. 3d Cir.) *writ refused*, 345 So. 2d 904 (La. 1977).
22. 394 So. 2d 1250 (La. App. 2d Cir. 1981).
23. 280 So. 2d 406 (La. App. 4th Cir. 1973).
24. 398 So. 2d 1159 (La. App. 2d Cir. 1981).

the absence of usable comparable sales data, market value is measured by the lower of two alternative appraisals—one based on capitalized estimated future income and the other derived from an estimate of replacement cost.[25] The trial court accepted a stipulation that just compensation should not be determined by capitalization of lost income because the value thus arrived at would greatly exceed the actual cost of replacing lost showroom and warehouse space. The trial court was affirmed in awarding compensation to cover the cost of purchasing land and constructing thereon replacement warehouse and display space, including removal costs. Citing *State v. Constant*[26] for the principle that the court was no longer limited to awarding fair market value but must award the owner compensation for the full amount of his economic loss, the appeals court affirmed the use of replacement cost without deduction for depreciation on the theory that existing structures had the equivalent use value of the new structures which were to replace them.[27] Neglect is more frequently the fate of the principle, however; thus, in *State v. Ransome*,[28] no comparables for the improvements being available, the trial court selected replacement cost as a basis for valuation, although the capitalized income valuation was the lesser of the two values. The underlying rationale of these two approaches as measuring fair market value was thus disregarded; an investor would pay the lesser of the two values since if he could purchase an existing investment for less than he could create such an investment for himself, the yield from both being the same, he would choose to purchase.[29] Thus, while an investor would presumably have paid only the lesser value arrived at by using income capitalization, the trial court in *Ransome* nonetheless held the greater estimated replacement cost to be the fair market value and the amount to be awarded. In *State v. Boyce Gin Co-operative*[30] the same issue arose in the context of determining severance damages, a cotton gin having been rendered unusable by virtue of front footage taken from the accesses to the property. As in *Ransome*, an estimate of the replacement cost of property was accepted by the trial court as representative of value before taking, with the salvage value of building and equipment, together with land value, as representative of the value after taking. The court referred to this "in place" value as measuring the amount, after deducting salvage and land value, sufficient to place the owner in as good a position pecuniarily as he would have

25. *See* I J. BONBRIGHT, VALUATION OF PROPERTY 176, 230-31 (1937).
26. 369 So. 2d 699 (La. 1979).
27. 398 So. 2d at 1161.
28. 392 So. 2d 490 (La. App. 1st Cir. 1980).
29. *See* M. DAKIN & M. KLEIN, *supra* note 4, at 211-12.
30. 397 So. 2d 1087 (La. App. 3d Cir. 1981).

been had his property not been taken—hence compensation "to the full extent of his loss."[31] This replacement cost was used to measure compensation despite a failure to make profitable use of the property for several years; the court justified its decision on the ground that this land was special purpose property which had value to the owners because cotton ginning probably would again become profitable, and the gin was "in place" for that future profitable use. The state concentrated on attempting to prove that no severance damages existed because access had not been impaired; it more usefully might have devoted its efforts to establishing that the owner's hopes for reestablishing profitable ginning were so speculative as to warrant only salvage and land value by way of compensation.

State v. Centuries Memorial Park Association[32] also utilized the capitalization of anticipated income in the determination of fair market value. Some twelve acres were taken for highway purposes from a forty-six acre tract of undeveloped land held for future use by the cemetery. Conventional subdivision valuation procedures were used to determine the net income per annum from the sale of lots (including developer's profit) and to discount the anticipated proceeds from the tract taken to present value, deferred five years while the developed land was sold off. The state argued that the appropriate assumption would be that the acreage taken would have been developed and sold as part of the entire undeveloped tract in an even flow of sales over an estimated seventy-two year period. The cemetery argued that, contrary to the state's contention, the twelve acres taken by the state would be the very next tract to be developed and sold off over a period of twelve years. The latter contention prevailed in the trial court but was reversed on appeal, since the record was barren of any showing that the acreage taken had any developmental priority.[33] The choice was not unimportant to the public fisc; under the cemetery's assumption, the fair market value of the acreage taken would have been some $10,000 per acre greater than the amount awarded by the court of appeals.[34]

The rather plausible argument was presented in *Consolidated*

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31. LA. CONST. art. I, § 4.

32. 391 So. 2d 489 (La. App. 2d Cir. 1980).

33. *Id.* at 491-92.

34. Using the state's assumptions, the present value of the entire annual lot sales received over twelve years would be more advantageous to the cemetery than would the present value of 12/46 of the annual lot sales received over some seventy-two years by approximately this amount. However, to achieve the sale of the acreage taken on a priority basis would have required concentrated sales effort and some abandonment, perhaps, of the usual role of a cemetery in rowing "with muffled oars into the flowing stream of success," *Harrison v. Stanton*, 26 N.J. Super. 194, 97 A.2d 687 (N.J. 1953).

Sewerage District of Kenner v. Schulin,[35] that a city was estopped from offering less for expropriated property than the value of the property on the tax rolls. Since the assessed value was fixed by the assessor independently of the city and its governing body, however, the landowner had not relied on any "voluntary conduct" by the city; hence, the requisites of an equitable estoppel were held not to have been met. Assessed value was thus relegated to "one of many factors to be considered by the trier of fact in determining compensation."[36]

PROCEDURE

The general rule that attorney's fees are not recoverable in the absence of statute or contract has been held applicable to expropriation cases.[37] The legislature, however, has now provided for the recovery of such fees under both the general appropriation law and the quick-taking law available in highway cases. The provision generally applicable authorizes the court to award reasonable attorney fees if evidence indicates that the highest amount offered is less than the compensation awarded;[38] the highway expropriation statute provides discretionary authority to award an attorney's fee not in excess of 25 percent of the difference between award and amount deposited by the state in the registry of the court.[39] In *Consolidated Sewerage District of Kenner v. Schulin*,[40] despite reliance by counsel on the statutory provision, the appeals court chose to

35. 387 So. 2d 1369 (La. App. 4th Cir. 1980).

36. *Id.* at 1372. An interesting parallel exists in the constitutional authorization of levee districts, article XVI, section 6 of the Louisiana Constitution of 1921, that "[l]ands and improvements . . . used or destroyed for levees . . . shall be paid for at a price not to exceed the assessed value of the preceding year. . . ." Since in many levee cases the assessed value is only a fraction of the fair market value, the taking was perhaps understandably characterized as a "gratuity" in *Richardson & Bass v. Board of Levee Comm'rs*, 226 La. 761, 772, 77 So. 2d 32, 35 (1954); that characterization was said to be fitting, however, because lands for levee purposes are appropriated rather than expropriated, as are lands for sewerage purposes. For a comment on progress toward more equitable compensation for levee takings, see Dakin, *The Work of the Louisiana Legislature for the 1978 Regular Session—Expropriation*, 39 LA. L. REV. 205 (1978); *see also* Dakin, *The Work of the Louisiana Appellate Courts for the 1978-1979 Term—Expropriation*, 40 LA. L. REV. 670 (1980). Despite its status as a "gratuity" in levee cases, the "gratuity" must be paid if the landowner alleges, in accordance with constitutional provisions, that the property had been assessed the preceding year. Walker v. Natchitoches Levee & Drainage Dist., 386 So. 2d 709, 711 (La. App. 3d Cir. 1980).

37. Police Jury of Parish of St. James v. Borne, 198 La. 959, 5 So. 2d 301 (1941).

38. LA. R.S. 19:8 (1950 & Supp. 1974).

39. LA. R.S. 48:453 (Supp. 1954, 1974 & 1976).

40. 387 So. 2d 1369 (La. App. 4th Cir. 1980).

award attorney's fees on the more general constitutional ground that the landowner is entitled to be compensated "to the full extent of his loss."[41] The court suggested no reason for its unwillingness to rely upon statutory authority in the award,[42] unless it deemed the evidence of the highest amount offered by the expropriator as inadequate or unclear—as was the case in *Sirone v. South Central Bell Telephone Co.*[43] in which the trial court's refusal to award attorney's fees was affirmed. In *State v. Frabbiele*[44] the court affirmed the award of a substantial fee under the highway quick-taking statute[45] after noting that the trial judge had properly applied criteria formulated by the court in the earlier case of *Guillory v. Guillory.*[46]

The legislature has sought to prevent frivolous litigation by precluding recovery of costs where a tender has been made of the true value before proceedings for expropriation are begun.[47] However, in *State v. Ransome,*[48] a tender made on the trial date was held not to have been made *before* a proceeding had begun; to preclude the award of attorney's fees, tender must have been made before the filing of the expropriation suit.[49]

In *Walker v. Natchitoches Levee & Drainage District*[50] a landowner, seeking to recover for land on which a levy servitude had been taken, failed to allege that the amount sought to be recovered had been assessed as the value of the land in the preceding year as required by constitutional provision.[51] An appeals court ruled that the owner may not, for this defect, have his suit peremptorily

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41. LA. CONST. art. I, § 4.

42. 387 So. 2d at 1372-73.

43. 392 So. 2d 192 (La. App. 1st Cir. 1980).

44. 391 So. 2d 1364 (La. App. 4th Cir. 1980).

45. LA. R.S. 48:453 (Supp. 1954, 1974 & 1976).

46. 339 So. 2d 529, 531 (La. App. 4th Cir. 1976). The criteria perhaps warrant repeating:

> The factors most often considered in the determination of the fee to be awarded an attorney on the basis of quantum meruit are:
> (1) the ultimate result obtained; (2) responsibility incurred; (3) the importance of the litigation; (4) the amount involved; (5) the extent and character of the labor performed; (6) the legal knowledge and attainment and skill of the attorney; (7) the number of appearances made; (8) the intricacies of the facts and law involved; (9) the diligence and skill of counsel; (10) the court's own knowledge; and (11) the ability of the party to pay.

47. LA. R.S. 19:12 (1950 & Supp. 1974).

48. 392 So. 2d 490 (La. App. 1st Cir. 1980).

49. *Id.* at 495.

50. 386 So. 2d 709 (La. App. 3d Cir. 1980).

51. Article XVI section 6 of the 1921 constitution, continued as a statute by article XIV, section 16 of the constitution of 1974, made provision for payment, not to exceed the assessed value of the preceding year, for lands taken for levee purposes.

dismissed but, on remand, must be given an opportunity to cure the defect by amendment.[52] In *Frabbiele* it was also noted that when a court of appeals remands for the taking of evidence on the reasonableness of attorney's fees, the trial court retains its function as a trier of fact and is not relegated to the role of a transmitter of evidence to the remanding appeals court.[53]

EVIDENCE

In *State v. LeBlanc*,[54] an appeals court again recognized "the right of the trial court to determine severance damages in an amount to which no expert testified by rejecting the precise amounts to which each expert testified, such being a necessary correlative of the fact-trier's right to evaluate the weight to be given each witness's testimony."[55]

In *Tenneco, Inc. v. Harold Stream Investment Trust*,[56] the court held that presentation in evidence of a certificate of public convenience and necessity from the Federal Energy Regulatory Commission does not establish conclusively public purpose and necessity without other evidence as to the appropriateness of the route selected, even though that route is already the site of a pipeline. However, the court rejected the argument that the suit should be dismissed with prejudice since to do so would terminate forever the statutory right to expropriate the property, citing *Parish of Jefferson v. Harimaw, Inc.*[57] From the record before it the court was persuaded that the expropriator would be able to supply evidence entitling it to a right-of-way across the landowner's property.[58]

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52. LA. CODE CIV. P. art. 934.
53. 391 So. 2d at 1365.
54. 388 So. 2d 412 (La. App. 1st Cir. 1980).
55. *Id.* at 415.
56. 394 So. 2d 744 (La. App. 3d Cir. 1981).
57. 297 So. 2d 694 (La. App. 4th Cir. 1974).
58. 394 So. 2d at 750.