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HENRY H. GLASSIE

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I

Reclamations made in navigable waters present old but still perplexing questions. For example, may the government, for the improvement of navigation or other public purpose, create a new front estate between the original riparian owner and the navigable channel? May this be done without compensation? And to whom does the reclaimed area belong?

The answers are various and conflicting. In most cases, both the question of compensation and the question of ownership have been made to turn upon the seisin of the soil formerly underlying the water. Where, following the strict doctrine of Lord Hale, a technical fee in soil below high water mark is deemed to reside in the state, the solution has generally been in favor of the absolute right to reclaim submerged soil so as to bring into existence a new front estate, without compensation to the owner of the old.[1] And the improvement, it is said, need not be in aid of navigation. Any public purpose will do.[2] Where, on the contrary, the riparian owner is regarded as having either the fee in

[1] *Sage v. Mayor of New York* (1897) 154 N. Y. 61, 76, 47 N. E. 1096, 1100.

[2] *Home v. Commonwealth* (1900) 202 Mass. 422, 435, 89 N. E. 124, 129; *Comrs. of Lincoln Park v. Fahrney* (1911) 250 Ill. 256, 257, 95 N. E. 194, 195. Some cases draw a distinction between improvements in aid of navigation and improvements for other public purposes equally within the competence of the improving authority. *In re New York* (1901) 168 N. Y. 134, 144, 61 N. E. 158, 161. In *Conger v. Pierce County* (1921) 116 Wash. 27, 198 Pac. 377, a navigable tidal river was deepened and straightened for the stated purpose of correcting a tendency to overflow its banks and injure roads, bridges, and other public property. The current was thus thrown against land previously protected from erosion by a bend. Counties making the improvement under express legislative authority were held liable for the resulting washing away of the bank. The State Constitution required compensation for property damaged for public use. But if riparian land must suffer the consequences of a lawful change in the stream, there was no *injuria*. Hence the decision was made to turn upon the nature of the public purpose. On

the soil to low water mark or some qualified right of property or user therein, the answer is otherwise.[3]

The inadequacy of this method of treatment becomes apparent when it is considered that the ultimate right and final power to make improvements in navigable waters rests, not in the several states, but in the Federal Government, whereas the ownership of the submerged soil is exclusively a question of state law, and in no instance resides in the Federal Government within the limits of any state. Only in the case where the improvement is made by the same government which has the fee, is the solution grounded upon ownership clear and free from embarrassment. Even in that case a difficulty arises as soon as the law of the state owning the fee concedes a general right of access to the riparian owner.

So long as the whole question was regarded from the standpoint of seisin, the improving state, on the one hand, and the riparian owner, on the other, were treated simply as abutting landowners whose boundary was the mathematical line of ordinary high water. In this view it was not difficult to sustain the state's right to cut off access, because access was not a right.[4]

The riparian owner's exclusive right to embark from his own land, or to use the natural shore down to high water mark as a landing place, was said to belong to him, not because his land adjoined navigable waters, but because no one else could enjoy those rights without entering upon his land and thus becoming a trespasser. Whatever rights the owner has are negative. In short, access from littoral or riparian land is not a legal incident of ownership of stream-washed land, but an accident. Upon this view, also, the state's ownership of the soil under navigable water is not regarded as a technical title intended to sustain and support the public rights of navigation and fishery, but as a true proprietary right identical with ordinary property in land. The state may, therefore, not only destroy the owner's access, but in so doing create a new and valuable property for itself.[5] This view has the beauty of simplicity, and as pointed out, when the state makes the improvement on its own submerged soil in front of an owner to whom it denies any

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this point, it is hard to reconcile with *Cubbins v. Mississippi River Comm.* (1916) 241 U. S. 351, 36 Sup. Ct. 671; *Jackson v. United States* (1913) 230 U. S. 1, 33 Sup. Ct. 1011; *Hughes v. United States* (1913) 230 U. S. 24, 33 Sup. Ct. 1019; or *Bedford v. United States* (1903) 192 U. S. 217, 24 Sup. Ct. 238. There seems to be little difference between preventing a river from overflowing and injuring roads and bridges and preventing it from overflowing other adjacent property. As the stream's 'tendency' is not clearly described, one cannot say whether the case itself might not be distinguished on the principle of defensive works against 'accidental and extraordinary' overflow stressed in the *Cubbins* case. Its interest here lies in the point about public purpose.

[3] *Mayor of Baltimore v. St. Agnes' Hospital* (1877) 48 Md. 419.

[4] *Gould v. Hudson River Ry.* (1852) 6 N. Y. 522, 541.

[5] Cf. *Shively v. Bowlby* (1894) 152 U. S. 1, 11, 14 Sup. Ct. 548, 557.

right of access, there is none to dispute its power to interpose a new front estate without compensation.

A further consequence of the denial of the right of access is, of course, that any wharf or similar structure, irrespective of its effect on navigation, is, when unlicensed, a purpresture or encroachment upon the sovereign's property. The difficulty in reconciling this conception with the actual custom and practice of freely constructing wharves, subject only to the public right of navigation and the governmental protection thereof, has led very widely to the breakdown of the strict purpresture doctrine and the concession of a private right of access distinct from the public right of navigation, although subordinate to it and to the measures taken by the government for its protection and promotion.[6]

Upon the question, then, as to the creation of a new front estate, difficulty begins as soon as access is regarded as a right. How can the existence of this right of access be reconciled with a right in the state, not merely to impair its enjoyment indirectly as an incident of the improvement of navigation,[7] but to take it away altogether by making for itself a new and valuable water front, carrying the exclusive right of access? Or, stated otherwise, can the admitted right to improve become the source of a new right of property, the creation of which is incompatible with the conceded existence of another right? Stated in terms of cases, how may the doctrine of *Sage v. Mayor of New York*[8] be harmonized with *Lyon v. Fishmongers' Company?*[9]

II

What follows is offered upon the assumption that access from riparian or littoral land to navigation is a right incident to the ownership of such land.

It should perhaps be stated in passing that in so far as ideas other than those connected with seisin operated to deny the existence of a right of access, the courts seem to have gone upon the ground that to concede such a right would mean that the owner of the adjacent soil had a claim to the natural flow of the river with which the state had no right to interfere by any erections in the bed of the river. As this would result in stripping the state of power to improve the navigation of the river by any structure affecting the natural flow of the stream, the concession of a right of access was regarded as tantamount to a negation of the acknowledged power to improve or facilitate navigation.[10]

The fallacy in this reasoning is obvious. A right of access is not to be confounded with a claim to the natural flow of the stream. It is

[6] *Brookhaven v. Smith* (1907) 188 N. Y. 74, 78, 80 N. E. 665, 666.
[7] *Rumsey v. N. Y. & N. E. Ry.* (1892) 133 N. Y. 79, 86, 30 N. E. 654, 655.
[8] *Supra* note 1.
[9] (1876, H. L.) L. R. 1 A. C. 662.
[10] *Gould v. Hudson River Ry.* (1852) 6 N. Y. 522, 543.

simply a right to get to the stream as a highway in whatsoever condition the stream may be, either naturally or as affected by artificial structures. It, like every other right of access, is subordinate to the power of the government to make the highway what its name denotes, that is to say, an adequate instrumentality for the passage of men and goods. The right of access to a highway, as such, gives no right to the perpetuation of any given condition of the highway. Neither, on the other hand, is the right necessarily destroyed because alterations in the condition of the highway may affect or impair its utilization.

Assuming, then, that access is a right, we pass to consider its nature and its relation to the powers of government.

III

The right of access is a right of property.[11] It arises as an incident of the natural location of land in contact with navigable water.[12] It is a right, therefore, which in America is good against the sovereign as well as against private individuals.

In the same waterway, however, there is a general or public right of navigation—a *jus publicum*. The right of access, therefore, cannot be so exercised as to destroy the right of navigation. They must co-exist. Now, in a certain sense, and to a certain degree, every exercise of the right of access must interfere with full freedom of navigation. Any wharf, for example, must extend over water which is navigable by some sort of craft.[13] It does not follow from that, however, either that such an impediment must be deemed an infringement of the right of navigation; or, if it were, that the individual interfered with, being affected only in common with the rest of the community, would have a legal remedy.

A power must be lodged somewhere to vindicate the right of navigation and to determine the limits and conditions of the exercise of the respective rights. This power to conserve the right of navigation and to determine the line between it and the right of access is lodged in the political state, the sovereign, and, in our system of divided powers, the ultimate and final exercise of it falls, as part of the commerce power, to the Federal Government.[14] Thus over against the right of access stands

[11] *Norwalk v. Podmore* (1913) 86 Conn. 658, 86 Atl. 582.

[12] *Lyon v. Fishmongers' Co., supra* note 9; *Saunders v. N. Y. C. & H. Ry.* (1894) 144 N. Y. 75, 38 N. E. 992; *Garitee v. Baltimore* (1879) 53 Md. 422; *Parkersburg, etc. v. Parkersburg* (1883) 107 U. S. 691, 2 Sup. Ct. 732.

[13] Hale, *de Portibus Maris,* cap. VII; *Langdon v. Mayor of New York* (1883) 93 N. Y. 129; *The Wharf Case* (1831, Md.) 3 Bland's Ch. 361, 369.

[14] *Scranton v. Wheeler* (1900) 179 U. S. 141, 163, 21 Sup. Ct. 48, 57; *Philadelphia Company v. Stimson* (1912) 223 U. S. 605, 634, 32 Sup. Ct. 340, 350; *United States v. Chandler-Dunbar Water Power Company* (1913) 229 U. S. 53, 62, 33 Sup. Ct. 667, 671; *Greenleaf-Johnson Lumber Co. v. Garrison* (1915) 237 U. S. 251, 268, 35 Sup. Ct. 551, 557; *Willink v. United States* (1916) 240 U. S. 572, 580, 36 Sup. Ct. 422, 424.

the right of the sovereign to superintend, control, and improve navigation. *This is not a right of property, but a power of government.* It is the *jus regium* of Hale's threefold classification.[15]

The right of access, since it is one exercised in or over the waterway, is subject, in its exercise, to the sovereign's continuing power to regulate and control navigation.[16] Even where such a right is most clearly recognized, any particular mode of exercising it must be in subordination to the sovereign right or power of navigation-control.[17]

Since navigation-control is a governmental power, the manner of its exercise is in essence not a justiciable but a political question. In other words, the mode of exercise, so long as it is within the scope of the power, rests in the uncontrolled judgment of the government.[18]

Regarded from the viewpoint of its exercise, this power is plainly of two kinds: (1) negative and (2) positive. In the exercise of the negative side of the power of navigation-control, the government may, in its discretion, hold that structures of any particular kind, devised as a means of access, interfere with or obstruct navigation. It may, for example, forbid, by general law, the erection of wharves altogether.[19] Or, having laid down a rule in general terms, it may delegate to executive officers authority to prescribe the extent and material of wharves, declaring all structures in contravention of such regulations to be nuisances and subject to removal.[20] This may be done although it may thereby destroy what, in respect of any particular riparian owner, is the only feasible mode of access. This is so because, as between the state and a private individual, upon the question what is an improper or unreasonable interference with navigation, not the judgment of a court but the judgment of the government alone is decisive. This is

[15] This obvious but sometimes unappreciated fact is sharply accentuated by the whole power's being placed in the *Federal* Government. It was incisively expressed many centuries ago by the head of a very different sort of government, Louis the German, in a rescript concerning the great rivers of the Empire: CUJUSCUMQUE POTESTATIS *sunt litora nostra tamen est regalis.* Cited by Vallotton, *Du Régime Jurid. des Cours d'eau intern. de l'Europe Centrale* (1913) Rev. Droit Intern. 2 serie, t. XV, p. 271.

[16] This power obviously must be exercised with a view not only to present necessities, but to the anticipated needs of the future. *Economy Light Co. v. United States* (1921) 256 U. S. 113, 123, 41 Sup. Ct. 409, 413. Cf. *v. Jhering, Geist des R. R.* (4te Aufl. 1880) III, (1) s. 364.

[17] *Lane v. Harbor Commissioners* (1898) 70 Conn. 685, 698, 40 Atl. 1058, 1062; *Bradshaw v. Duluth Co.* (1892) 52 Minn. 59, 65, 53 N. W. 1066, 1068.

[18] *United States v. Chandler-Dunbar Water Power Company, supra* note 14; *Union Bridge Co. v. U. S.* (1907) 204 U. S. 364, 386, 27 Sup. Ct. 367, 374; *Pennsylvania v. Wheeling & B. Bridge Co.* (1855, U. S.) 18 How. 421, 430; *Miller v. Mayor of New York* (1876, C. C. 2d) 13 Blatchf. 469; *Frost v. Washington County Ry.* (1901) 96 Me. 76, 51 Atl. 806.

[19] *Hedges v. W. Shore Ry.* (1896) 150 N. Y. 150, 44 N. E. 691; *Cobb v. Commissioners of Lincoln Park* (1903) 202 Ill. 427, 67 N. E. 5; *Murphy v. Bullock* (1897) 20 R. I. 35, 37 Atl. 348.

[20] Cf. Act of Sept. 19, 1890 (26 Stat. at L. 426, 454).

not a denial of the right of access.[21] It means only that it may happen that, in regulating the exercise of the right of access under the power to control navigation, effective exercise of the right may be destroyed. The power is usually exercised by prescribing what amounts to a common rule, as for instance, the fixing by statute, or more commonly by some executive agency to which the power is delegated, of bulkhead or pierhead lines.[22] The establishment of such lines obviously amounts to laying down rules with respect to the extent to which artificial means of access may be constructed. The drawing of such a bulkhead or pierhead line, whether done directly by statute or by an executive officer, is a function of government and not subject to judicial review.[23] One riparian owner cannot complain, except to the executive government, that the line in front of his land is less advantageous than the line in front of the adjoining land.[24] In a word, the right of access is simply one of those rights which can be enjoyed only in subordination to an acknowledged power of the government to conserve and protect a general public interest. The execution of this power is not judicially reviewable.

Only when the power has not been otherwise exercised, that is, when it comes to abating a particular structure in waters where no regular rule has been laid down, can the judicial power be invoked to decide the question what is, or is not, an obstruction to navigation. Of course, as between private individuals, where no rule has been prescribed by the state, the question of obstruction becomes a question of fact.

The same principles govern the exercise of the positive side of the power of navigation-control. The government may not only regulate the extent to which other persons may make artificial structures in the water, but it may, in the pursuance of its power, make structures of its own, or authorize them to be made in aid of commerce by others.[25] And here, again, the extent and method of making the improvement are beyond judicial control. If the structure, for example, a sea-wall, cuts off access, the result is but an incident of the exercise of an acknowledged power and, therefore, no legal wrong. The loss of access is *damnum* but not *injuria*.[26]

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[21] *Bradshaw v. Duluth Co., supra* note 17.

[22] Act of March 3, 1899 (30 Stat. at L. 1121, 1151); Act of Feb. 20, 1900 (31 Stat. at L. 31, 32).

[23] *Greenleaf-Johnson Lumber Co. v. Garrison* (1915) 237 U. S. 251, 262, 35 Sup. Ct. 551, 555; *Willink v. United States* (1916) 240 U. S. 572, 581, 36 Sup. Ct. 422, 424.

[24] At least, in the absence of manifest bad faith. Where, for example, the proceedings themselves disclosed that harbor lines were established in order that a new 'expensive and sightly' bridge should not be marred by buildings on either side, this bald declaration of an ulterior purpose was taken as proof that the power was not exercised in good faith for the interest of navigation or any other recognized public use. *Farist Steel Co. v. City of Bridgeport* (1891) 60 Conn. 278, 292, 22 Atl. 561, 566.

[25] *Newport & C. Bridge Co. v. United States* (1881) 105 U. S. 470.

[26] *Gibson v. United States* (1897) 166 U. S. 269, 276, 17 Sup. Ct. 578, 580.

IV

But what are the limits of this doctrine? Does it then follow that, in the course of or in connection with such an improvement, a new and valuable estate may be created in which inheres the access formerly enjoyed by the riparian owner? Will not the latter naturally object that, in order to be treated as *damnum absque injuria,* the loss inflicted upon the riparian estate should be limited to the natural consequences of the exercise of the acknowledged power? If pushed beyond those consequences, will it not become an independent injury? Will it not to that extent become an act beyond the scope of the power?

The power of the sovereign to improve the river, it is objected, cannot extend to the creation, for its benefit and without compensation, of a new fast land estate within the space between the actual improvement (a sea-wall, for illustration) and the original shore, for the reason that the power to improve extends only to the improvement as such, that is to say the sea-wall and its normal consequences. *Transfer* of access to the new estate does not follow from the construction of the sea-wall. The riparian owner still has such access as he can get notwithstanding the wall. The new front estate erected between him and the water, to which estate access now attaches, is not referable to the power to improve the navigation of the stream, for the creation of such an estate is not a natural consequence of the exercise of such a power. The interposition of the new estate must be referred to something else, and it can be referred only to the end which it really accomplishes, namely, the transferring of the right of access, which is property, from the original to a new owner. In short, it is a transfer, that is, a taking of property, and it is immaterial whether that property, namely, access, is transferred to a stranger by granting the intervening estate or is retained by the sovereign for itself.

Thus it comes about that, as a counter-blast against the claim to take away access without compensation, the riparian owner, in order to preserve his access, is led to lay claim to the reclaimed area which would otherwise separate him from navigation.

V

It will probably be well to have in mind the forms in which, owing to the division of sovereignty, the question presents itself: (1) Where the improvement is made by one government and the technical fee of the submerged soil is in the private proprietor. (2) Where the improvement is made by the government which has also the technical fee in the submerged soil; for example, an improvement made by the Federal Government in the District of Columbia, or in a territory before statehood. Or an improvement such as that made by New York in the Hudson River. (3) Where the improvement is made by one government and the technical fee of the submerged soil is in another government; for example, an improvement made by the United States in a state like New York, Iowa, or Alabama.

The first case is plain. Whatever practical impairment of access may result from the improvement does not work any transfer of the right of access. The original riparian estate continues the front estate and neither the federal nor the state government can lay claim to any filled land between the old shore line and the new. It is, therefore, the second and the third cases only which give rise to controversy. Yet it is to be noticed that in the first case, the power to make the improvement is just as plenary as in the other two. Why, then, should both the reclaimed land and the right of access pass without compensation to the government when, as in the second case, it makes an improvement by virtue of the same power on submerged land in which it happens to have the technical fee? The answer given is: "Because it had that fee." This is but admitting that the governmental power to improve navigation cannot in itself be a legal cause for the transfer of access.

The answer, however, seems to be doubtful because it refers an effect to a cause not related to it. Upon the conceded premise that access is recognized as a property right, ownership of the technical fee of the submerged soil did not carry of itself any right to make such soil into fast land at the expense of the existing riparian estate. The technical fee in the soil while submerged was itself subject to the right of access from the existing shore to the common highway just as the right of access, in turn, was subject to the governmental power to improve navigation. Passage over the water and submerged soil for the purpose of access is just as consistent with title in the state as passage for the purpose of navigation.[27] It does not seem possible to invoke the technical fee as a justification for taking away that to which it was itself subject.

VI

We have already seen that there are but two things upon which a translation of the right of access might be predicated: the technical fee in the soil under the stream, and the power to control and improve its navigation. Neither seems to serve. The technical fee fails because it was itself subject to the right of access over the stream and its bed. The navigation power fails because its exercise in no wise involves or requires transfer of access. Since neither separately confers the right, can they have that effect simply because they co-exist in the same legal *persona*? To make use of their accidental conjunction to transfer the right of access from the old to the new front estate does not weaken the concession that the new result is not brought about by the exercise

[27] *Boulo v. New Orleans M. T. Ry.* (1876) 55 Ala. 480, 493; *Mobile Trans. Co. v. Mobile* (1907) 153 Ala. 409, 44 So. 976. This view of the *fundus* fee, whether in state or private party, is nowise inconsistent with the recognition of other substantial rights inherent in ownership. *Matter of City of New York* (1915) 216 N. Y. 67, 77, 110 N. E. 176, 179. The exercise of such proprietary rights is simply subordinated to the normal user of the waterway by the public and the riparians.

of the only power which the government had in the premises—the power to improve navigation. It is thrown back, as before, upon that technical ownership of the submerged soil which carries no power, and especially no power to cut off the right of access over itself. The conclusion would seem to be that whether the intervening area goes to the federal or to the state government the right of access incident to the former riparian estate is taken from the owner and ought to be paid for.[28]

Before considering how this is to be worked out, it remains to consider one other form of the argument for the government claim to have the land and the access. It runs thus: Access may lawfully be impaired by an improvement of the stream. Such impairment may extend to the point of extinction. The owner of the riparian estate, therefore, has nothing to complain of when access is thus extinguished. Access being thus extinguished by the improvement, it is no concern of his, then, that the new front estate, also resulting from the improvement, has the right of access incident to its situation. In other words, the access extinguished by the improvement and the access incident to the new estate are two different things.

This reasoning suffices to answer the riparian owner's claim to own, after reclamation, land which, before reclamation, was never in his seisin.[29] But as applied to access, it seems to beg the question. The former riparian owner, indeed, cannot complain of the extinction of access by the improvement. But, as we have already seen, access is not really extinguished by the improvement, but by the *claimed ownership* of the intervening area. It is true that access may be impaired to the point of extinction, but only by virtue and in exercise of the power of navigation-control, not by virtue of ownership of the submerged soil. An effect which does not result from the exercise of the power of navigation-control cannot properly be ascribed to the power. Destruction of access does not here result from the exercise of that power because, notwithstanding the improvement, the owner of the riparian estate would still enjoy whatever access might, in fact, be had from his land, were it not for the claim of ownership.

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[28] The New York Court of Appeals, reaffirming the state's right to create a new front estate without compensation for the promotion of navigation and commerce, denied its right to do so for the construction of a "speedway" from which commercial traffic was excluded. *In re New York, supra* note 2. It is hard to reconcile this case with *Sage v. Mayor of New York, supra* note 1. In both, the discussion is much concerned with the state's title to the submerged soil. There does not seem to be much difference between using the technical fee to raise up a new water front and using it to build a speedway.

It was said, indeed, that a speedway was inconsistent with the state's trust for the preservation of common rights in the stream. The point obscured is that making a *new front estate*, whether for wharf or for speedway, is not an exercise of any governmental power or 'trust' in respect of the stream. In both cases, the effect on the upland owner is to take away his access, not for any waterway purpose, but for the enrichment of the person who gets the new-made land.

[29] *Marine Ry. & Coal Co. v. United States* (1920) 49 D. C. 285, 265 Fed. 437, (1921) 42 Sup. Ct. 32.

VII

Let us now look at the matter from the other side, namely, that of ownership. Where the filling is upon soil of which the improving government owns the technical fee, to whom does the reclaimed land belong? The former riparian owner, defending himself against the consequences of being thrown back into the interior without compensation, naturally claims the land as his own.

(A) It cannot belong to him, however, for these reasons: (1) The area occupied by the improvement was never part of his tenement. He had no right in this area before, and manifestly can have no right in it now. (2) Deprivation of the right of access from one piece of land is not a grant of an estate in another piece of land. Injury to one estate cannot create a title to another. (3) Nor would the ownership of the reclaimed land be a just and true measure of the value of the access destroyed by the improvement, for, in the very nature of things, the less the value of the right of access, the greater the area of reclaimed land accruing to the upland owner.[30]

(B) If then, in this case, the reclaimed land does not belong to the riparian owner, manifestly it must belong to the government which owned the same area when submerged.[31] It is a simple instance of the principle: *Sciendum est eius manere cuius fuit.*

So much for the bare question of the ownership of the soil. We have not, however, yet arrived at a solution of the problem considered as a whole. Several alternatives present themselves: (a) the original front estate might be regarded as having been increased *in invitum* by the addition of the new-made land, in which case the riparian owner not only retains access but gets new soil; or (b) the original front estate might be regarded as retaining access over the intervening made land, the fee of which is in him who had the technical fee in the submerged soil; or (c) the right of access might be regarded as having been taken from the old front estate and transferred to the new front estate, in which case it must, of course, be compensated for. No one of these alternatives is free from theoretical as well as practical difficulties. The first is unduly generous to the private owner. The second, however good in theory, is utterly impracticable because it renders the new land useless in order to preserve for the private owner a technical

[30] A familiar mode of river and harbor improvement consists in confining the channel by building a sea-wall or revetment along its edge. The navigable portion of the stream is then deepened by dredging and the 'spoil' or material removed from the bed is deposited behind the wall. In this way, the flats or shallows between navigation, as defined by the wall, and the original upland shore are filled in *pari passu* with the deepening of the channel and so converted into fast land. Obviously the greater the stretch of shoal water in front of any upland parcel, the greater the area reclaimed between it and the wall. Thus, two estates having equal frontage on a given stream would receive land in *inverse* ratio to the value of their respective rights of access.

[31] *Marine Ry. & Coal Co. v. United States, supra* note 29.

right extremely inconvenient to exercise. The application of the third would be found embarrassing where the improvement is made by the Federal Government and the technical fee is in a state. It would amount to conferring upon the state a new property having access, for the loss of which the United States would have to compensate the former owner. And upon the same state of facts, the second alternative would be almost equally embarrassing, for the United States would, in effect, convert the state's submerged soil into fast land and grant the user thereof to the riparian owner.

The doctrinal difficulties are equally great. Solution (a) cannot be supported on any established legal principle. Appeal is made to only two: Alluvion, which is manifestly inapplicable; and an unauthorized extension of a front estate by a private stranger. But in our case, the improvement is public and lawful. There can be no reason to enrich the riparian owner at the public expense when that result is not demanded by any positive rule.

In addition to the objection that it destroys the economic utilization of the new water front by condemning it to a perpetual servitude in favor of an interior estate without an equivalent benefit to the latter, the second solution (b) conflicts with established principle in the case where the state and not the Federal Government has the fee, in that it would permit a stranger to the title to create an easement. A fundamental principle such as that ought not to be violated to accomplish such an economically detrimental result.

The third solution is the only one that seems to promise relief. Here, it must be admitted, we return again to the notion of seisin. But we return to it, not in order to justify taking away the economic value of land in which the government had no seisin, but in order to avoid giving away land in which it unquestionably had seisin and which it has converted into a new form at its own expense. This much, principle seems to require. But principle does not require us to do more. Ownership of the new land does not here necessarily carry with it the right of access. For the land when submerged was something altogether different from the land as reclaimed. The submerged land had no access and no right of access. To borrow the convenient terminology of the civilians, the land was then *in usu publico;* it is now *in patrimonio populi.* Then the state had "a technical fee" under the waterway; now the land is withdrawn from the waterway and may be sold at discretion.[32]

In raising this area above the water level and changing its character, then, the government has really done three things: (1) It has made an improvement in navigation. (2) It has converted a given area of soil

[32] "So 'gehören' auch die *res publicae* dem Staat und, wenn sie dem Gemeingebrauch entzogen sind, fallen auch sie unter die Form des gewöhnlichen Eigenthums, daraus folgt aber nicht in Mindesten dass das Gehören, das *'populi universatis esse,'* schon früher diese Form an sich tragen müsse." *v. Jhering, Geist des römischen Rechts,* (4te Aufl.) IV. s. 362, Abm. 476.

under water in which it had but a technical estate, into a corresponding area of fast land in which its dominion is freed from the uses which formerly clogged it. (3) And it has, by force of this conversion, deprived the original riparian owner of his right of access.

Why should not each of these things have its own proper legal consequences? The navigation improvement is beyond the power of any private individual to touch. The new land belongs to the government simply because, treated as a portion of the earth's surface, the same area already belonged to the government. But the access which is now an incident of the new land is really not an incident of the land which the government owned, but an incident of the land of the riparian owner. It has been transferred from the one to the other by the force of the conversion of one kind of property into property of a totally different kind. In short, it has been taken from one and given to another. It cannot be said that even this solution is free from all difficulty. For it will doubtless be pointed out that where access is impaired short of extinction, the owner is entitled to no compensation whatever for the diminution in the value of his property, whereas access totally destroyed by the interposition of a new front estate will here be fully compensated for.

Such a result is regrettable, but it is not without precedent. Inconsistencies of that sort seem to be the natural spawn of the doctrine of "taking." The difficulty is so common in the law of eminent domain, that a special metaphysic is often devised to escape from it.[33] There is always, however, a simple remedy, which the legislature is competent to afford if it will—compensation for property injuriously affected by public improvements.[34] Before we follow our British cousins on this path of justice and fair dealing, it will be necessary to get away somewhat from the current belief that the burden of every public improvement ought to be cast as far as possible upon the individuals who happen to stand in some close physical relation to it, regardless of the question whether the benefit to them is in reality greater than that to the rest of the community.

This solution, moreover, carries its own antidote. It removes the temptation to damage the riparian owner unnecessarily. Where the improvement is made solely with a view to promoting navigation, and without an eye to the acquisition of valuable water front without compensation, the riparian owner is not likely to suffer "the consequences

[33] Compare *United States v. Lynah* (1903) 188 U. S. 445, 465, 471, 23 Sup. Ct. 349, 355, 357; *United States v. Welch* (1910) 217 U. S. 333, 339, 30 Sup. Ct. 527; *Monongahela Navigation Co. v. United States* (1892) 148 U. S. 312, 336, 13 Sup. Ct. 622, 630; and *United States v. Cress* (1917) 243 U. S. 316, 327, 37 Sup. Ct. 380, 384; with *Bedford v. United States* (1904) 192 U. S. 217, 225, 24 Sup. Ct. 238, 240; and *Jackson v. United States* (1913) 230 U. S. 1, 23, 33 Sup. Ct. 1011, 1019.

[34] *Duke of Buccleuch v. Metrop. Bd. of Works* (1872, H. L.) L. R. 5 Eng. & Ir. A. C. 418.

of a public improvement" in greater measure than the improvement really requires.

To repeat, a just solution would appear to be: The area reclaimed belongs in full ownership to the holder of the technical fee in the same area while submerged, but the right of access incident to the old front estate must be regarded as appropriated, taken, and annexed to the new land. The former owner is, therefore, to be compensated for its value.

This view, it is submitted, receives some aid from the reasoning by which, in *United States v. Cress*,[35] Mr. Justice Pitney held a diminution in the value of land affected by a public improvement equivalent to the taking of an interest to the extent of the diminution. There, a "permanent liability to intermittent overflow," depreciating the value of land, was treated not as an injury to the land,[36] but as an actual appropriation of it, and hence as a taking requiring constitutional compensation and also warranting recovery as upon an implied contract to pay the price. To the objection that the owner still had his property, it was said that "if any substantial enjoyment of the land still remains to the owner, it may be treated as a *partial* instead of a total *divesting* of his property in the land." And the owner might be compensated, upon the analogy of the condemnation of an interest less than a fee, to the extent of the right and interest necessary to effectuate the public purpose. In that case there was, of course, an actual "invasion" of the land itself, but the reasoning does not turn upon it. Moreover, *United States v. Welch*[37] goes to show that that is not absolutely indispensable, for there compensation was allowed for the destruction of an easement by physical action on the servient, not the dominant, tenement. In *United States v. Cress*[38] also, recovery was allowed for the destruction of the power of a mill dam in a non-navigable creek by the backing up of waters resulting from an improvement of a navigable stream further down. The right of the owner of the land under the creek to have the water flow away unobstructed was called a right existing "by the law of nature as an inseparable part of the land."[39] The right of a riparian owner on a navigable stream, not to the unchanged flow of the stream, but to get to the stream itself, would seem to have quite as firm a foundation, and to be just as much an inseparable part of the land. The point of both cases is that the destruction, by the improvement, of value normally inherent in the land is treated as a *transfer* of property to the extent of the value lost.

It seems but a step from the doctrine of those cases to the view here suggested. While we have no invasion, there is an additional element which may also serve to turn the scale on the side of appropriation.

[35] *Supra* note 33.

[36] *Otis Co. v. Ludlow Co.* (1906) 201 U. S. 140, 153, 156, 26 Sup. Ct. 353, 354, 356.

[37] *Supra* note 33.

[38] *Supra* note 33.

[39] 243 U. S. 316, 330, 37 Sup. Ct. 380, 386.

The government does not merely deprive the owner of something in order to effectuate a governmental purpose as in these cases, but it actually enriches itself by the acquisition of a definite beneficial interest having money value. Why should that not be treated as "taken"?

One more question remains to be answered. In the event that the Federal Government makes the improvement, but the state owns the technical fee, who is to compensate the riparian owner for his lost access? The Federal Government which made, or the state which gets, the reclaimed land?

The difficulty thus presented is perhaps not so formidable as it seems. Clearly, compensation should be made by the one to whom the new land goes. Since the state, although it did not make the improvement, gets the land with all the value accruing from the right of access, it should make compensation to the owner for the access taken away by force of the ownership thus asserted. This result does not seem inconsistent with legal principle. For the state, if it asserts title to the new-made land, may well be treated as accepting the burden as well as the benefit. If it refuses to accept the burden of compensating the owner for his right of access, the state may properly be regarded as disclaiming title to the reclaimed land, which the riparian owner should be permitted to take. It is a fair choice.

In either event, the situation of the state has not been altered to its prejudice. The state, *ex hypothesi*, having already recognized the owner's right of access, surely cannot object to paying for it if it takes it with the new land. If the value of the new land with access does not equal the value of access to the original riparian estate, then the state, declining to take it, relinquishes to the riparian owner no more than it has already in effect given him by recognizing access as a property right.

In conclusion, it may be remarked that we have here one more illustration of the impracticability of solving the concrete problems of everyday life by a process of deduction from some general concept or principle, whether that of seisin or any other. Even in this simple matter we find a genuine, substantial, social and economic interest on each side. Any solution by deduction must disappoint one or the other. One of the interests, to be sure, is much greater than the other. But that does not necessarily require the total sacrifice of the lesser. A reasonable solution can apparently be reached by giving it legal recognition, so far as economically valid, and thereby bringing the two conflicting interests into fairly harmonious adjustment.