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Compensation For The Right Of Access To Navigable Waters

where the occupier has reason to know that they may be present. All entrants, whether or not foreseeable, will be owed a duty of reasonable care where the occupier discovers, or should have discovered their presence. In the court's own words:

> A man's life or limb does not become less worthy of protection by the law . . . because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters . . . .[53]

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COMPENSATION FOR THE RIGHT OF ACCESS TO NAVIGABLE WATERS

The Constitution of the United States[1] and the constitutions of most states[2] provide that private property shall not be taken[3] for public use without just compensation. Two basic situations have arisen where a landowner claims to have been deprived of his right of access to navigable waters as a result of state action. If the government should condemn only the waterfront area of a parcel of land, cutting off the access to the water, the landowner might claim that he is entitled not only to the value of the land taken but also to the value of the right of access to the water.[4] In this context, the right of access is the landowner's right of ingress and egress, or his ability to get in and out of the water.[5] However, should a bridge be con-

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[53]443 P.2d at 568, 70 Cal. Rptr. at 104.

[1]U.S. CONST. amend. V.

[2]*E.g.*, ALA. CONST. art. 12 § 235; ARIZ. CONST. art. 2 § 17; ARK. CONST. art. 2, § 22; CAL. CONST. art. 1, § 14; COLO. CONST. art. 11, § 15; CONN. CONST. art. 1, § 11; GA. CONST. art. I, § 3; ILL. CONST. art. 2, § 13; KY. CONST. § 13; MINN. CONST. art. 1, § 13; MISS. CONST. art. 3, § 17; MO. CONST. art. I, § 26; MONT. CONST. art. III, § 14; UTAH CONST. art. I, § 22; VA. CONST. art. IV, § 58.

[3]Many state constitutions use the wording "taken or damaged." *E.g.*, ARIZ. CONST. art. 2, § 17; CAL. CONST. art. 1, § 14; MINN. CONST. art. 1, § 13; MONT. CONST. art. III, § 14; VA. CONST. art IV, § 58.

[4]*See* Yates v. City of Milwaukee, 77 U.S. (10 Wall.) 497 (1870). Thoughout this comment several terms will be mentioned: (1) right of access (2) right of ingress and egress (3) right of access to the main body of water (4) right of navigation. All of the courts which recognize a private right of access include the right of ingress and egress within this private right. Most of these courts do not extend the private right to include access to the main body of water. They exclude this by calling it the right of navigation which is a public right and therefore not one which needs to be compensated when taken.

[5]*E.g.*, Carmazi v. Board of County Comm'rs, 108 So. 2d 318 (Fla. Dist. Ct. App. 1959); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct.

structed over a river so that the ships of an upriver landowner cannot get through, the landowner, while not losing his right of ingress and egress, might claim that he is deprived of his right of access to the main body of water and thus to the commerce of the world. While most courts recognize that the right of access includes a right of ingress and egress, there has been a reluctance to extend it to include access to the main body of water.

The Court of Appeals of Kentucky was recently called upon to decide what approach it would follow in determining if the right of access to the main body of water is compensable. In *Commonwealth v. Thomas*,[6] the condemnees owned a lakefront development tract of approximately eighteen acres, the west side of which fronted on Barkley Lake. The state took 1.87 acres for a new road which left a section of approximately 0.75 acre on the west side of the condemnees' land between the road and the lake. The north side of the condemnees' land fronted on an inlet. A high earthen fill was placed across the inlet such that the portion of the condemnees' land on the north side had no access to Barley Lake. Thus the condemnees were not completely cut off from their access to Barkley Lake but only so on the north side. Yet, on the north side, they were not deprived of their access to the inlet in front of their property, only of their previous access to Barkley Lake from the north side. This caused about sixteen acres or over ninety per cent of their land to be cut off from Barkley Lake. (See Figure I). The state appealed from a judgment which awarded the condemnees damages for their right of access. The Kentucky Court recognized that many jurisdictions had denied compensation on similar facts but decided that: "[R]iparian landowners have the right of a reasonable access to the entire body of water on which their land borders; that such a right has value; and that before the state may take or impair such right, it must pay the owner just compensation therefor."[7] Policy factors were the key considerations in the court's decision. Kentucky, as a result of dam construction projects, had more miles of lake shoreline than any other state except possibly Minnesota, and there was an increase in value of riparian lands because of the demand for campsites and recreational facilities. The court stated that it would not "disregard such obvious facts."[8]

Cl. 1951), *aff'd per curiam*, 280 App. Div. 1021, 116 N.Y.S.2d 778 (1952); State *ex rel.* The Andersons v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964).

[6]427 S.W.2d 213 (Ky. 1968).

[7]*Id.* at 217.

[8]It is not clear what weight these factors had on the court's reasoning, but it seems the court took judicial notice of these economic realities in finding that the condemneees had invested in the land. *Id.* at 217.

SKETCH OF CONDEMNED LAND in
Commonwealth v. Thomas, 427 S.W.2d 213 (Ky. 1968).

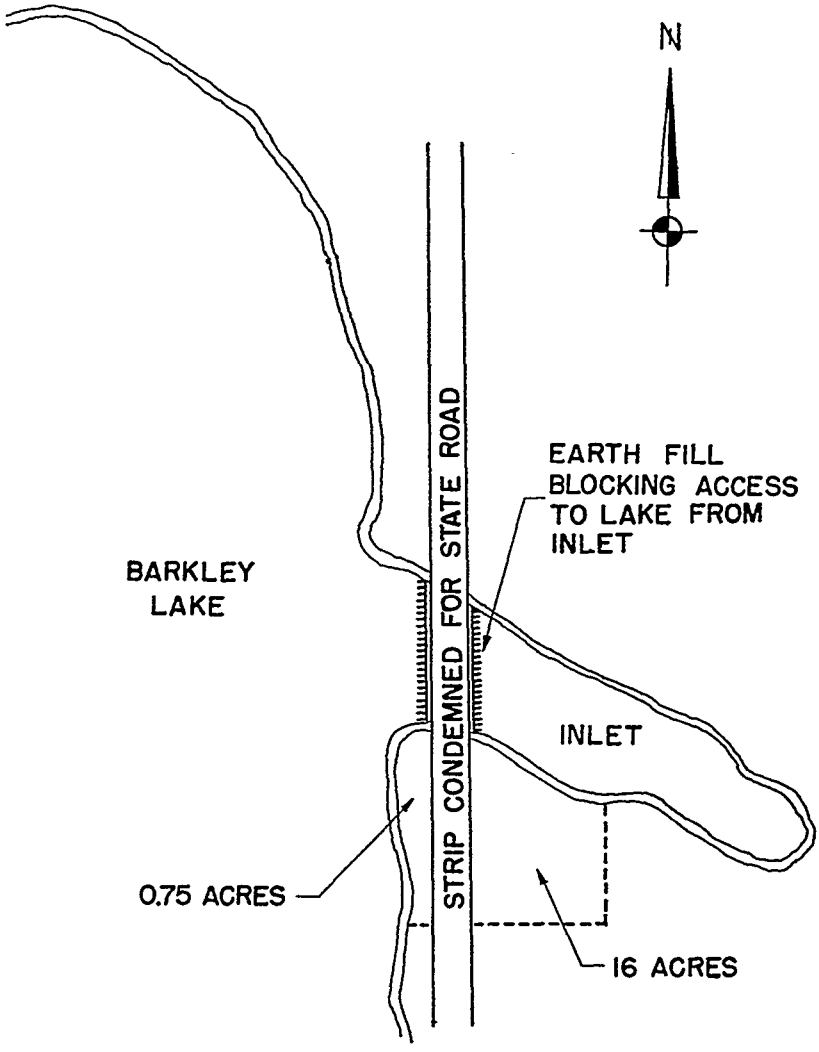

FIGURE I

The question presented in *Thomas* is not new to the law.[9] There is universal agreement among both state and federal courts that a riparian landowner must be compensated whenever there is an actual physical encroachment of his land as a result of governmental action.[10] These courts, however, do not agree upon whether there should be recognized any right of access at all, even ingress and egress, as a valuable property right and, if so, the extent of that right.

There is a dearth of authority that there is no private right of access of any type to publicly owned waters and, thus, if the landowner is deprived of such access as a result of state action there need be no compensation.[11] Jurisdictions which do recognize the right of access as a valuable property right nevertheless deny compensation if the governmental action which deprives the landowner of such a right is for the purpose of improving navigation.[12] The theory behind the

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[9]*E.g.*, Colberg, Inc. v. State, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert. denied*, 390 U.S. 949 (1968); Carmazi v. Board of County Comm'rs, 108 So. 2d 318 (Fla. Dist. Ct. App. 1959); State v. Sunapee Dam Co., 70 N.H. 458, 50 A. 108 (1901); Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921); *see* 2 P. NICHOLS, EMINENT DOMAIN § 5.792 (rev. 3d ed. 1963).

[10]*E.g.*, United States v. Lynah, 188 U.S. 445 (1903); Colberg, Inc. v. State, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Pptr. 401, 409, n.12 (1967), *cert. denied*, 390 U.S. 949 (1968); Morrison v. Clackamas County, 141 Ore. 564, 18 P.2d 814 (1933); Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921); *see* 2 P. NICHOLS, EMINENT DOMAIN § 5.7914(4) (rev. 3d ed. 1963).

[11]*E.g.*, State v. Sunapee Dam Co., 70 N.H. 458, 50 A. 108 (1901); Stevens v. Paterson & N. R.R., 34 N.J.L. 532 (Ct. Err. & App. 1870); Eisenbach v. Hatfield, 2 Wash. 236, 26 P. 539 (1891); *see* A. JAHR, EMINENT DOMAIN § 43 (1953); 2 P. NICHOLS, EMINENT DOMAIN § 5.792 (rev. 3d ed. 1963).

[12]*E.g.*, Peck v. Alford Olsen Constr. Co., 216 Iowa 519, 245 N.W. 131 (1932); Oliver v. City of Richmond, 165 Va. 538, 178 S.E. 48 (1935); Conger v. Pierce County, 116 Wash. 27, 198 P. 377 (1921); Green Bay & M. Canal Co. v. Kaukauna Water-Power Co., 90 Wis. 370, 61 N.W. 1121 (1895); *see* 2 P. NICHOLS, EMINENT DOMAIN § 5.792 (rev. 3d ed. 1963). The federal rule is similar to this but is called the navigational servitude. It is said that the power to regulate navigation confers on the United States a dominant servitude which extends to the entire area below the high water mark. United States v. Rands, 389 U.S. 121 (1967). The navigational servitude is paramount to all interests derived from the water and thus there need be no compensation for a deprivation of any right of access. Scranton v. Wheeler, 179 U.S. 141 (1900); Gibson v. United States, 166 U.S. 269 (1897). It is mentioned in some cases that the servitude is limited to acts done in aid of navigation. United State v. River Rouge Improvement Co., 269 U.S. 411 (1926); Port of Seattle v. Oregon & Wash. R.R., 255 U.S. 56 (1921). However, the limits of the doctrine have been extensively expanded and now include the dumping of sand and silt in a stream which completely blocks all navigation and the construction of hydroelectric dams. United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961).

"improving navigation" doctrine is that the private right must yield in order to gain the highest utility of a public waterway.[13]

All of the courts which recognize the private right of access agree that an obstruction of ingress and egress to bordering waters must be compensated.[14] However, the overwhelming majority of this group holds that this right is limited to ingress and egress and does not further extend into navigable waters.[15] Thus, in a situation where a landowner is not prevented from getting in and out of the water but is denied access to the main body of water as a result of governmental action (as for example, where a low level bridge prevents passage), these courts hold that there is only a deprivation of the right of navigation which is held by the public in general.[16] Since only private rights are compensable, there need be no compensation for the public right of navigation.[17] A 1967 California case, *Colberg, Inc. v. State*,[18] expanded the rule that deprivation of the right of access as a result of state action in aid of navigation is not compensable. It held that the state has the power to deal with its navigable waters in any manner consistent with the improvement of commercial intercourse whether in aid of navigation or not.

Some dissatisfaction has been expressed with these doctrinal approaches which ignore the consequence to a landowner and look primarily to see whether a proper governmental function is being per-

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[13]Sage v. New York, 154 N.Y. 61, 47 N.E. 1096 (1897). *See also* Colberg, Inc. v. State, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), *cert denied*, 390 U.S. 949 (1968): "[T]he state, as trustee for the benefit of the people, has power to deal with its navigable waters in any manner consistent with the improvement of commercial intercourse, whether navigational or otherwise." 432 P.2d at 10, 62 Cal. Rptr. at 408.

[14]*E.g.*, Biedler v. Sanitary Dist., 211 Ill. 628, 71 N.E. 1118 (1904); Natcher v. City of Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1936); State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914).

[15]*E.g.*, Carmazi v. Board of County Comm'rs, 108 So. 2d 318 (Fla. Dist. Ct. App. 1959); Frost v. Washington County R.R., 96 Me. 76, 51 A. 806 (1901); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951), *aff'd per curiam*, 280 App. Div. 1021, 116 N.Y.S.2d 778 (1952); State *ex rel.* The Andersons v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964); Milwaukee Western Fuel Co. v. City of Milwaukee, 152 Wis. 247, 139 N.W. 540 (1913). *Contra*, Webb v. Giddens, 82 So. 2d 743 (Fla. 1955). *See also* United States Gypsum Co. v. Mystic River Bridge Authority, 329 Mass. 130, 106 N.E.2d 677 (1952) (compensation denied on common law and constitutional grounds but allowed on basis of a special statute). *See* text at note 19, *infra*.

[16]Note 25 *infra*.

[17]Note 25 *infra*.

[18]67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967). In *Colberg*, a bridge was constructed across a channel which prevented ships from reaching an upriver landowner's shipyard. For a discussion on *Colberg* see 72 DICK. L. REV. 375 (1968); 25 WASH. & LEE L. REV. 323 (1968).

formed. Two Florida cases, when taken together, seem to depart from the doctrinal approach and apply a test of fairness. In *Webb v. Giddens,*[19] a riparian landowner who was in the business of renting boats was deprived of his right of access to the main body of water when the state built a bridge across the arm of a lake. The court concluded that the right of ingress and egress would be meaningless unless there was also access to the main body of the lake. Yet, in the later case of *Carmazi v. Board of County Commissioner,*[20] a riparian landowner's right of access to the main body of a river was eliminated when a bridge was constructed downstream from his property. The river connected with a bay which now could not be reached by boat. Compensation was denied. The only damage complained of was lack of ability to reach the bay by boat with no mention of economic harm. The court distinguished *Webb* by saying that riparian rights are a field of law which is unusually dependent upon the facts and circumstances of each case. It said the *Webb* decision was based on equitable grounds as a result of the unusual facts and circumstances.

Strong dissenting opinions in two leading cases (from California and Ohio) also manifest a dissatisfaction with the doctrinal approach. The dissent in *Colberg*[21] called for a test based upon policy considerations instead of strict adherence to a doctrinal approach. If the impairment caused by governmental action is found to be substantial and peculiar (not the same as that shared by the rest of the public generally) and compensation can be given without prohibitive costs, then the injury should be compensable. But if the impairment is incidental and the cost of compensation is prohibitive, then the landowner should not be compensated. In *State ex rel. The Andersons v. Masheter,*[22] where compensation was denied for an obstruction of the right of access to the main body of water, the dissent proposed a "use value" test which would recognize that property owners on navigable waters may develop a use of the land and water for business purposes. Such landowners could establish a use above that enjoyed by the public in general thus creating a private right and, in effect, doing away with the "public right of navigation" theory.

The question of how far the right of access extends into navigable waters had not been resolved in Kentucky before *Thomas,* the prin-

[19]82 So. 2d 743 (Fla. 1955).

[20]108 So. 2d 318 (Fla. Dist. Ct. App. 1959).

[21]432 P.2d 3, 15-21, 62 Cal. Rptr. 401, 412-19 (1967).

[22]1 Ohio St. 2d 11, 203 N.E.2d 325 (1964). Here, the construction of a highway bridge prevented grain ships from reaching a riparian landowner's grain terminal.

cipal case.[23] *Thomas* did not follow the growing number of jurisdictions which limit the right of access to only ingress and egress.[24] Instead, the right of access was extended to include access to the entire body of water on which the parcel of land borders. It was contended by the state that because the land on which the fill was placed was not the land of condemnees, they had no right to complain.[25] This contention was rejected. The court was aware of contrary lines of authority and cited excerpts from *Colberg.* In *Colberg,* the court was concerned with how and why the loss of access had occurred while in *Thomas,* the court was concerned with the fact that there was a deprivation of access and that the condemnees had an interest in the loss. The fact that only the north side was deprived of access to Barkley Lake did not prevent the court from basing its decision on a different public policy ground than was followed in *Colberg.*[26] In *Colberg* the court followed a servitude doctrine the sole object of which is to protect the demands of modern commerce regardless of the harm to individual landowners. In *Thomas* the court looked first at the individual's investment[27] in the land and then weighed this interest against the demands of commerce.

The court did not attempt to set up a rigid doctrine. In future controversies the facts of a particular case will be controlling and not the "black and white principles" of inflexible decisions.[28] Even though

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[23]An earlier Kentucky case has decided that compensation must be given when a landowner is deprived of his right of access as a result of state action not in aid of navigation. Natcher v. City of Bowling Green, 264 Ky. 584, 95 S.W.2d 255 (1936).

[24]*E.g.,* Carmazi v. Board of County Comm'rs, 108 So. 2d 318 (Fla. Dist. Ct. App. 1959); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951), *aff'd per curiam,* 280 App. Div. 1021, 116 N.Y.S.2d 778 (1952); State *ex rel.* The Andersons v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964). *See also* United States Gympsum Co. v. Mystic River Bridge Authority, 329 Mass. 130, 106 N.E.2d 677 (1952) (compensation denied on common law and constitutional grounds but allowed on basis of a special statute).

[25]427 S.W.2d 213, 214 (Ky. 1967). The State was apparently trying to persuade the court to adopt a rule which would allow compensation only where there was an actual physical encroachment.

[26]The demands of modern commerce, the concentration of population in urban centers fronting on navigable waterways, the achievements of science in devising new methods of commercial intercourse—all of these factors require that the state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters held in trust for the public, should not be burdened wih [*sic*] an outmoded classification favoring one mode of utilization over another.

432 P.2d at 12, 62 Cal. Rptr. at 410.

[27]"The value is there; it is recognized by the buyer, the seller, and everyone else." 427 S.W.2d at 216.

[28]72 DICK. L. REV. 375 (1968).