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Eminent Domain—Riparian Rights—Deprivation of Access to Navigable Water-way is Not Compensable.—Colberg v. State

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employee, and should not affect rules of law between the employer and the type of third party involved in *Miller*.[75]

The most convincing argument for allowing recovery by the third party is that the third party receives nothing from the workmen's compensation acts, yet he must sacrifice a common law right because of them. Workmen's compensation acts give benefits to both employers and employees which they did not have at common law in exchange for some advantages they both had at common law.[76] The third party indemnitee is not a party to this mutual sacrifice and gain, and thus he should not lose any common law rights because of it.[77] Either the act should leave the common law rights of the third party and employer unaffected, or some corresponding gain should be given the third party for the loss of his common law right to indemnity.

The question of who to protect, the third party or the employer, involves policy considerations which the legislature should consider. It is a very delicate balance for a court to strike, and the legislatures of the various states should settle the indemnity controversy one way or another. Two states, Texas and California, have enacted additions to their compensation acts, which *preclude* indemnification by a third party unless the employer and the third party have a contract which expressly provides for indemnification.[78] Thus, these two states have resolved the problem, albeit not happily for many, and it is hoped that other states will follow suit.

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Eminent Domain—Riparian Rights—Deprivation of Access to Navigable Waterway is Not Compensable.—*Colberg v. State*.[1]—Plaintiffs, Colberg, Incorporated, and Stephens Marine, Incorporated, own real property in the city of Stockton, California, riparian to the Upper Stockton Channel. For more than 60 years they have operated shipyards upon this property for the construction and repair of yachts and ocean-going vessels. The Upper Stockton Channel runs for about 5000 feet from within the confines of the city of Stockton to a turning basin adjoining that city's port. Ships and other craft now using the Upper Stockton Channel can proceed to the turning basin and from there to a navigable tidal waterway, formed by the Stockton Deep Water Ship Channel and the San Joaquin River. This waterway extends from the port of Stockton to San Francisco Bay and the open sea.

In order to improve its freeway system, the State of California proposed to construct twin stationary freeway bridges across the Upper Stockton Channel between plaintiffs' property and the turning basin.[2] The vertical

[75] See American Dist. Tel. Co. v. Kittleson, 179 F.2d 946 (8th Cir. 1950).

[76] Lunderberg v. Bierman, 241 Minn. 349, 363-65, 63 N.W.2d 355, 364-65 (1954).

[77] 2 A. Larson, supra note 39, § 76.52.

[78] Cal. Lab. Code § 3864 (West Supp. 1967); Tex. Rev. Civ. Stat. Ann. art. 8306, § 3 (1967).

[1] — Cal. 2d —, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), cert. denied, 390 U.S. 949 (1968).

[2] Pursuant to federal law, the state applied to the Secretary of the Army and the Chief of Engineers for a permit to build such bridges. 33 U.S.C. § 525(b) (1964). Ap-

clearance of these bridges is to be about 45 feet above the water line. Colberg and Stevens brought separate actions for declaratory relief, which actions were later consolidated.[3] Plaintiffs alleged, in substance, that after the construction of the proposed bridges, access to their shipyards from the San Joaquin River, the San Francisco Bay and the oceans of the world would be substantially impaired. Colberg claimed that 81 percent of its current business involved ships standing between 45 and 135 feet above the water line and Stevens claimed that 35 percent of its current business involved such ships. Both plaintiffs alleged that their properties would suffer loss and damage because of this impairment of access resulting from the state's construction of the bridges.

The trial court granted the state's motion for judgment on the pleadings. It held that the diminution of the scope of the plaintiffs' access to the navigable waterway would not constitute a taking or damaging of private property for which compensation could be required.[4] The intermediate appellate court reversed, concluding that "the project will cause compensable damage to plaintiffs' private properties if, in an appropriate proceeding, a court finds substantial impairment of their respective easements of access."[5] The state appealed, and the Supreme Court of California, in a five to two decision, vacated the court of appeal decision and affirmed the decision of the trial court. HELD: Plaintiffs' right of access from their respective riparian properties to the waters of the channel, whatever its scope as against private parties, is burdened with a servitude in favor of the state and diminution of that right as a result of the lawful exercise of the state's power to deal with its navigable waters does not entitle plaintiffs to compensation.[6] The dissent, however, felt that the impairment of the plaintiffs' right of access was substantial and peculiar, and as such, should be compensable under eminent domain compensation principles and as a matter of public policy.[7]

For many years, California's ambitious freeway development program has presented the courts of that state with claims for compensation from property owners who have suffered property damage as a result of such projects. In recent years, these courts have developed a rather liberal compensation policy, utilizing eminent domain principles, with respect to those property owners whose access to the general system of streets has been impaired.[8] The *Colberg* case, however, represents a rather severe approach,

proval of the location and plans of the bridges was granted by the federal authorities in February, 1964.

[3] Plaintiffs have substantial investments in their shipyards. If they were required to await construction of the bridges before commencing an action at law they would suffer irreparable damage resulting from interference with their business during construction. A declaratory judgment establishing compensability would enable plaintiffs to relocate their operations and minimize damages. Under these circumstances, plaintiffs were entitled to invoke declaratory relief. — Cal. 2d at —, 432 P.2d at 7, 62 Cal. Rptr. at 405.

[4] See id.

[5] Colberg, Inc. v. State, — Cal. App. 2d —, —, 55 Cal. Rptr. 159, 167 (1966).

[6] — Cal. 2d at —, 432 P.2d at 14-15, 62 Cal. Rptr. at 412-13.

[7] Id. at —, 432 P.2d at 16, 62 Cal. Rptr. at 414.

[8] See, e.g., Breidert v. Southern Pac. Co., 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964); Bacich v. Board of Control, 23 Cal. 2d 343, 144 P.2d 818 (1943).

not involving eminent domain principles, to the problem of compensating riparian owners who suffer substantial damages as a result of impairment of access to the general system of navigable waters. The contrast between California's compensation policy with respect to land access cases on the one hand, and water access cases on the other hand, seems unfortunate and provokes an examination of the state's "servitude" theory as applied to a riparian owner's rights in navigable water.

There are two basic rights associated with the ownership of riparian property. The right of access involves the right of the riparian property owner to gain access to the navigable part of the stream adjoining his land. This is considered to be a "private" right and clearly is of great value to the riparian landowner.[9] The other right involves the free navigation of a stream by a riparian owner once he has obtained access to it. This right is shared by all people of a state and is, therefore, a "public" right.[10] Article I of the California Constitution provides, in part, that "[p]rivate property shall not be taken or damaged for public use without just compensation having first been made to . . . the owner . . . ."[11] As indicated by the California Constitution, only rights of a "private" nature are compensable.[12]

In the *Colberg* case, the intermediate appellate court found that the right involved was that of free navigation since the impairment went to the plaintiffs' ability freely to navigate the waterway rather than to their ability to get from their property to the navigable part of the waterway. Though conceding that a riparian owner shares the right freely to navigate streams with the general public, the court held that such a right is "private" and compensable when a public improvement devalues a *particular* piece of land by substantially impairing that right.[13] The California Supreme Court, however, clearly did not consider the right of free navigation to be "private" for any purposes and emphasized that the plaintiffs must assert the taking of a "private" right in order to bring themselves within the protective embrace of the state constitution.[14] The plaintiffs had argued that although their private right of access would not be physically obstructed by the construction of the

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[9] United States v. River Rouge Improvement Co., 269 U.S. 411 (1926); San Francisco Sav. Union v. R.G.R. Petroleum & Mining Co., 144 Cal. 134, 77 P. 823 (1904); Marine Air Ways Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 964 (Ct. Cl. 1951), aff'd, 280 App. Div. 1021, 116 N.Y.S.2d 778 (1952); State v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964).

[10] See cases cited note 9 supra.

[11] Cal. Const. art. I, § 14.

[12] The fifth amendment of the United States Constitution commands that private property shall not be taken for public use without just compensation. The measure of that compensation is usually expressed as the "fair market value" of the property with due consideration of all its available uses. United States v. Miller, 317 U.S. 369 (1942). The most troublesome problem in establishing compensation is the determination of the extent of private property which has been taken. One method utilized in making this determination is to examine the extent to which government property rights detract from the value which otherwise might be considered part of, or incidental to, the private property rights. This method is central to the concept of "navigation servitude." Powell, Just Compensation and the Navigation Power, 31 Wash. L. Rev. 271, 273 (1956).

[13] — Cal. App. 2d at —, 55 Cal. Rptr. at 162-63.

[14] — Cal. 2d at —, 432 P.2d at 8, 62 Cal. Rptr. at 406.

bridges downstream, it would be rendered valueless after such construction in that ships launched would be able to go nowhere. They urged that any action which renders a right valueless effectively "takes or damages" that right. Since the court was to find that any rights of access of the plaintiffs, private or otherwise, were burdened with a servitude and, therefore, non-compensable, it found it unnecessary to deal with this contention.[15]

The servitude theory relied on by the *Colberg* court is similar to, though wider in scope than, the federal servitude theory. As early as 1897, in *Gibson v. United States*,[16] the Supreme Court stated that riparian ownership is obliged to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the government in that regard. In more recent times, this principle has been referred to by the Court as the doctrine of "navigation servitude."

> When the Government exercises this servitude [derived from, but narrower than, the constitutional power to regulate commerce], it is exercising its paramount power in the interest of navigation rather than taking the private property of anyone. The owner's use of property riparian to a navigable stream long has been limited by the right of the public to use the stream in the interest of navigation. . . . There thus has been ample notice over the years that such property is subject to a dominant public interest. . . . Accordingly, it is consistent with the history and reason of the rule to deny compensation where the claimant's private title is burdened with this servitude but to award compensation where his title is not so burdened.[17]

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[15] Id.

[16] 166 U.S. 269, 276 (1897).

[17] United States v. Kansas City Life Ins. Co., 339 U.S. 799, 808 (1950). In another case the servitude is described in these terms:

> The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject.

United States v. Chicago, M., St. P. & P.R.R., 312 U.S. 592, 596-97 (1941).

Since the federal servitude relates to the stream and the stream bed, the burden is imposed on riparian rights in the use of the stream rather than on the riparian property itself. See United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940). Lands riparian to navigable streams are known as "fast lands" and the Supreme Court has said that compensation must be paid for their taking, notwithstanding the navigation servitude. See United States v. Willow River Power Co., 324 U.S. 499, 509 (1945). However, since riparian *rights* may constitute much of the value of fast lands and since just compensation is determined, at least in part, with reference to the "navigation servitude" when fast lands are taken, the riparian owner is compensated without consideration for the value which the property may have as a result of its being riparian to a navigable stream. A major Supreme Court case in this area was United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913). The Government condemned all of the property of the defendant power company consisting of a dam, locks in and along the navigable stream and fast lands adjacent thereto. The principal issue before the Court was the

Gibbons v. Ogden[18] made it clear that the delegation of the power to regulate commerce vested the national government with the power to regulate navigation. It was logical to assume that the protection and maintenance of navigation was the basis, the measure, and the limit of the regulatory power.[19] Language in the early cases reflected these assumptions as to the limitation of the congressional power.[20] The appearance of the so-called multipurpose projects constituted a marked departure from the traditional context of sovereign dealings with navigable waters.[21] Although navigation may no longer be the measure and the limit of the federal power, navigation would seem to remain, for reasons of history, the basis and the constitutional touchstone for congressional action.[22]

In establishing the power of the State of California over its navigable waters, the *Colberg* court asserted that the state holds all of its navigable waterways and the lands lying beneath them "as trustee of a public trust for the benefit of the people."[23] The state's power to control, regulate, and utilize such waters within the terms of the trust was absolute, according to the court, except as limited by the paramount supervisory power of the federal government over navigable waters. Until Congress acted on the subject, the power of the state was plenary. The court did admit, however, that the nature and extent of the trust under which the state held its navigable water-

valuation of the fast lands. Since the value of the fast lands was dependent upon the use of the flow of the stream and since this was a use subject to the federal navigation servitude, compensation for the fast lands was denied. "[T]he Government cannot be justly required to pay for an element of value which did not inhere in these parcels as upland." Id. at 76. Recently, other Supreme Court cases have further entrenched the federal navigation servitude theory. In United States v. Twin City Power Co., 350 U.S. 222 (1956), the Supreme Court ruled, five to four, that the United States as condemnor of riparian land on a navigable river need not pay the owner the value the lands have as a power dam site, even though the condemnee held the land for that purpose and the Government took the land to build its own dam. The defendant argued that the land above the ordinary high-water mark was private land and not burdened with the Government's servitude. The flaw in that reasoning, according to the Court, was that the landowner sought a value *in the flow of the stream*, a value that inhered in the Government's servitude and one that the Government could grant or withhold as it chose. The dominion of the Government over the water power and not the location of the land was determinative. The four dissenters in *Twin City* felt that compensation should be made on the basis of "fair market value" of the land at the time it was taken, including recognition of any fair market value of the land due to its riparian character. They conceded that the United States had the power to appropriate the property under eminent domain, but stated that the servitude was limited to the bed of the stream as fixed by its ordinary high-water mark. It was felt that the location of the land was always a factor and when the land condemned was outside the scope of the servitude, that the Government should be subject to the same rules of compensation as other condemnors. See United States v. Rands, 389 U.S. 121 (1967), in which a unanimous Supreme Court found the principles of the majority position in *Twin City* to be controlling.

[18] 22 U.S. (9 Wheat.) 1 (1824).

[19] See 2 Waters and Water Rights 9 (R. Clark ed. 1967).

[20] See, e.g., United States v. River Rouge Improvement Co., 269 U.S. 411, 418 (1926); United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899).

[21] See, e.g., United States v. Twin City Power Co., 350 U.S. 222 (1956); Arizona v. California, 283 U.S. 423 (1931).

[22] 2 Waters and Water Rights, supra note 19, at 11.

[23] — Cal. 2d at —, 432 P.2d at 8, 62 Cal. Rptr. at 406.

ways had never been defined with precision. It stated that, generally, "acts of the state with regard to its navigable waters are within trust purposes when they are done 'for purposes of commerce, navigation, and fisheries for the benefit of all the people of the state.' "[24] The court concluded that the power of California to deal with its navigable waters was considerably wider in scope than the paramount federal power. It held that the state may act relative to its waterways "in any manner consistent with the inprovement [sic] of commercial traffic and intercourse."[25] As such the state's power is not limited to improvement of navigation only.

Having established the state's power over its navigable waterways, the *Colberg* court next turned to the compensation aspect of the problem. After discussing the federal navigation servitude doctrine, the court concluded:

> [T]he law of California burdens property riparian or littoral to navigable waters with *a servitude commensurate with the power of the state over such navigable waters*, and that "when the act [of the state] is done, if it does not embrace the actual taking of property, but results merely in some injurious effect upon the property, the property owner must, for the sake of the general welfare, yield uncompensated obedience." (Gray v. Reclamation District No. 1500, . . . 174 Cal. 622, 636, 163 P. 1024, 1030.)[26] (Emphasis added.)

There is no question but that a state may exercise its governmental power over navigable waters for the benefit of all the people of the state. The problem arises, however, when the court extends the servitude doctrine of noncompensability so that it is "commensurate" with that power. The court seems to have treated the expansion of the navigation power and the expansion of the range of noncompensable losses as interchangeable questions.[27] Yet, due to the existence of the principles normally used in eminent domain proceedings, that is by no means a necessary approach. This fact is demonstrated by the approach to water access cases taken by most other states. In such highly populated and industrial states as Massachusetts, Ohio, New York and Illinois, the servitude operates only when the state acts upon its navigable waters for the purpose of improving navigation, and private rights "damaged" by acts not in aid of navigation are therefore compensable.[28] The Massachusetts court has stated that "the only specific powers which have been expressly recognized as exercisable without compensation to private parties are those to regulate and improve navigation and the fisheries."[29] Similarly, the Ohio court stated that "[w]here the state makes an improvement for a purpose other than the improvement of navigation, which destroys riparian

[24] Id. at —, 432 P.2d at 9, 62 Cal. Rptr. at 407.

[25] Id. at —, 432 P.2d at 11, 62 Cal. Rptr. at 409.

[26] Id.

[27] See 2 Waters and Water Rights, supra note 19, at 50.

[28] Beidler v. Sanitary District, 211 Ill. 628, 71 N.E. 1118 (1904); Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. 251, 173 N.E.2d 273 (1961); Marine Air Ways, Inc. v. State, 201 Misc. 349, 104 N.Y.S.2d 967 (Ct. Cl. 1951), aff'd, 280 App. Div. 1021, 116 N.Y.S.2d 778 (1952); State v. Masheter, 1 Ohio St. 2d 11, 203 N.E.2d 325 (1964).

[29] Michaelson v. Silver Beach Improvement Ass'n, 342 Mass. at 256, 173 N.E.2d at 277.

rights, the owners of such rights are entitled to compensation for the loss they have suffered."[30] These states recognize the existence and the effect of the federal navigation servitude but clearly limit its application to projects in aid of navigation. In other words, the power of the state over riparian property does not always absolve the state from its duty to compensate under eminent domain principles.

As the dissent's opinion in *Colberg* suggests, the choice between use of the navigation servitude theory and eminent domain principles is essentially based on public policy.[31] Early in the development of the federal and state governments, the need to improve the nation's waterways was urgent and this need led to the adoption of the navigation servitude theory. To extend this navigation servitude to improvements in other areas of commerce, however, may not be based on sound public policy. Indeed, the courts in California have developed a policy with respect to land access and air space cases which is directly counter to that employed in *Colberg*.

California, with its tremendous influx of population and rapid expansion of public facilities to serve this growth, has experienced difficulty in protecting the property owner's right of access to the street abutting his property and, from there, to the general system of streets, while at the same time restricting the rising costs of needed public improvements.[32] In California, the abutter's right of access has become a recognized property right, recognized not only in courtroom decisions but also in legislation.[33] California case law in this area has followed an evolutionary pattern. In *Bacich v. Board of Control*,[34] plaintiff was a homeowner on a street which was intersected at each end by a through street. As a result of construction of an approach to the San Francisco Bay Bridge, one of the intersecting streets was lowered 50 feet leaving plaintiff's property on a cul-de-sac. The court held that the plaintiff was entitled to compensation for impairment of his right of access because an owner of property abutting a public street has a property right in the nature of an easement in the street, and compensation must be given for an impairment of that right.[35] The present state of the law is perhaps best demonstrated by the 1964 case of *Breidert v. Southern Pac. Co.*[36] There the plaintiff claimed a substantial impairment of his right of access to the area street system as a result of the closing of a grade crossing ordered by the state Public Utilities Commission. The policy which emerged from *Breidert*

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[30] State v. Masheter, 1 Ohio St. 2d at 13, 203 N.E.2d at 327.

[31] — Cal. 2d at —, 432 P.2d at 15, 62 Cal. Rptr. at 413.

[32] Note, California and the Right of Access: The Dilemma Over Compensation, 38 S. Cal. L. Rev. 689, 690-91 (1965).

[33] See Cal. Sts. & H'ways Code § 100.3 (West 1956). This section provides that from and after the adoption of a resolution by the California Highway Commission declaring any section of state highway to be a freeway, such declaration shall not affect private property rights of access and any such rights taken or damaged within the meaning of Article 1, § 14 of the State Constitution for such freeway shall be acquired in a manner provided by law.

[34] 23 Cal. 2d 343, 144 P.2d 818 (1943).

[35] Id. at 349-50, 144 P.2d at 823.

[36] 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964).

was that compensation must be paid when the property owner could show a *substantial impairment* of his right of access.

> We have long recognized that the urban landowner enjoys property rights, additional to those which he exercises as a member of the public, in the street upon which his land abuts. . . . This easement consists of the right to get into the street upon which the landowner's property abuts and from there, in a reasonable manner, to the general system of public streets.[37]

Whether substantial impairment exists is a question for the court to determine under all the facts of the case. Once this determination has been made, its extent, for compensation purposes, is then determined by the jury.

The fact that the *Breidert* case set the policy in the land access area is well substantiated by subsequent cases.[38] Recently, *Smith v. San Diego*,[39] held that when a legitimate public improvement causes *special and peculiar* damage to the abutting property owner, the owner is entitled to compensation for such damage. The court stated that substantial impairment of the abutting landowner's right of access to the adjoining highway may constitute such special and peculiar damage.[40] It is interesting to note that the compensable rights associated with land access cases include not only the right to get from one's land to the street abutting his property but also the right to get from there to the general system of streets. These two rights are directly analogous to the right of access and right of navigation, respectively, in the water access cases. As previously mentioned, however, compensation has been awarded only in the land access cases.

The policy developed in the land access cases, for determining the right to compensation where no land is actually taken, could be applied consistently to water access cases such as *Colberg*. The situations are strikingly similar; the major distinction appearing to be the existence, in the water access cases, of a doctrine developed long ago to meet needs no longer involving the same urgency. Today, sound public policy would seem to require the application of similar criteria for determining a property owner's right to compensation whether the impairment was of water or land access. Such criteria might include: (1) whether the means of access left to the plaintiff after the alleged impairment were sufficient to serve a reasonable use of the property; (2) whether many others suffered a similar impairment of their right of access as a result of the improvement; (3) whether the objectives of the improvement could be accomplished in a less injurious manner; and (4) whether, considering the effect on all abutting property owners, it was likely that the cost of compensating them would unduly restrict the state's freedom

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37 Id. at 663, 394 P.2d at 721-22, 39 Cal. Rptr. 905-06.

38 See, e.g., People v. Scheinman, — Cal. App. 2d —, 56 Cal. Rptr. 168 (1967); People v. Giumarra Vineyards Corp., 245 Cal. App. 2d 309, 53 Cal. Rptr. 902 (1966); People v. Wasserman, 240 Cal. App. 2d 716, 50 Cal. Rptr. 95 (1966); People v. Presley, 239 Cal. App. 2d 309, 48 Cal. Rptr. 672 (1966).

39 — Cal. App. 2d —, —, 60 Cal. Rptr. 602, 607 (1967).

40 Id.

to deal with social problems.[41] The *Colberg* court, however, summarily and unconvincingly dismissed the analogy to land access cases.[42]

Another area that provides an analogy to the water access cases is that involving diminution of property value caused by state and federal use of the air space over private property. The United States Supreme Court, in *United States v. Causby*,[43] found that frequent low flights of military aircraft over plaintiff's land caused a diminution in property value. Despite the fact that there was felt to be a servitude imposed on plaintiff's usable air space, the Court held that there was a compensable "taking" of property rights.[44] Inasmuch as the air above a defined level is said to be free of all claims of private ownership, the analogy to the navigation servitude is not inappropriate.

The California District Court of Appeal, in a 1964 case similar on its facts to *Causby*, held that since the City of San Diego had authority to acquire air space through eminent domain, its action constituted a "taking" and the city was liable to the plaintiffs for damages.[45] The action had been instituted against a commercial airline corporation to enjoin alleged nuisance and continuing trespass. The airline was leasing the municipal airport from the city which operated it. The court found that the airline was absolved of liability by the liability of the city for the taking of airspace over the plaintiffs' property. Adherence to procedure required plaintiffs to proceed against the city to recover compensation.[46]

In *Sneed v. Riverside*,[47] the court said "all of the decisions previously cited herein from the United States courts clearly declare that damage to the value of land caused by navigation within an avigation [sic] easement

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[41] Note, supra note 32, at 698.

[42] We are not persuaded that the analogy between highway access and navigational access will bear close scrutiny. The right of access to a land highway derives from the 'land service road' concept, whereby roads are conceived of as arteries constructed through condemnation of private land for the purpose of serving other land abutting on them, rather than for the purpose of serving public traffic passing over them. . . . Principles applicable to such a right cannot reasonably be extended to the case of navigable waterways, which constitute a natural resource retained within the public domain for the purpose of serving public traffic in accordance with the greatest common benefit."
— Cal. 2d at —, 432 P.2d at 13, 62 Cal. Rptr. at 411.

[43] 328 U.S. 256 (1946).

[44] Id. at 261-62, 264-66.

[45] Loma Portal Civic Club v. American Airlines, Inc., — Cal. App. 2d —, —, 37 Cal. Rptr. 253, 259, vacated, 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964). The supreme court vacated the court of appeal decision because the plaintiffs had sought only injunctive relief which, in the court's opinion, was not available. The court noted that there was no prayer for damages, nor did anything in the complaint indicate in monetary terms the amount of damages sustained. However, the court stated that "nothing herein is intended to be a determination of the rights of landowners who suffer from airplane annoyances to seek . . . compensation from the owner or operator of an airport." 61 Cal. 2d at 590-91, 394 P.2d at 554, 39 Cal. Rptr. at 714. "[I]t is clear, of course, that state courts have jurisdiction to award compensation for a 'taking' without regard to whether the overflights conform to federal law, when such relief is appropriate." Id. at 594, 394 P.2d at 555-56, 39 Cal. Rptr. at 715-16.

[46] — Cal. App. 2d at —, 37 Cal. Rptr. at 265-66.

[47] 218 Cal. App. 2d 205, 210, 32 Cal. Rptr. 318, 321 (1963).

amounts to a taking within the meaning of the Fifth Amendment."[48] The court found that when airspace immediately above private property is taken from the individual, reducing the value of his property, and conferred upon the public for public use, eminent domain principles are applicable.[49] The court emphasized the words of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*:[50]

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[51]

In *Colberg*, the California Supreme Court stated that "[t]he limits of the servitude are reached . . . and just compensation must be paid . . . when permanent physical encroachment upon or invasion of land riparian to the navigable waterways . . . results."[52] However, when an improvement is undertaken which impairs the right of access, property has been taken or damaged, and under the California Constitution, compensation should be awarded. Requiring the actual appropriation of the "property" does not realistically take into account the deprivation which may be suffered by one whose land is physically untouched.[53] This is supported by the existence of the phrase "or damaged" in Article I, Section 14 of the California Constitution. The fifth amendment merely states "nor shall private property be taken for public use without just compensation." One of the main factors that caused many states to add the words "or damaged" to their constitutions was the recognition of potential deprivation of property rights short of actual physical appropriation.

California imposes a servitude on the right of access to navigable waters, but not on the right of access to streets or rights in air space. The application of the navigation servitude theory to projects in aid of navigation is a well established historical policy, developed at a time when a large proportion of interstate commerce involved navigation. However, the extension of this theory to projects not in aid of navigation seems to be an illogical and inequitable reliance on outmoded concepts and seems to ignore the fact that commerce today is much more complex and broader than it was when the navigation servitude concept originated.

The substantial-impairment test, which is applied in order to determine the right to compensation in California highway access and air navigation

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[48] Id. at 210, 32 Cal. Rptr. at 321.

[49] While height restriction zoning has long been recognized as a valid exercise of the police power, there has been a reluctance to extend this method to the protection of approaches to airports; instead, air easements with payment of compensation appear to be the more acceptable, although not undisputed, method of protecting approach zones. Id. at 209, 32 Cal. Rptr. at 320.

[50] 260 U.S. 393 (1922).

[51] Id. at 416.

[52] — Cal. 2d at —, 432 P.2d at 11, 62 Cal. Rptr. at 409.

[53] Rose v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942); Hilltop Properties Inc. v. State, 233 Cal. App. 2d 349, 43 Cal. Rptr. 605 (1965); Los Angeles Athletic Club v. Long Beach, 128 Cal. App. 427, 17 P.2d 1061 (1932); Note, supra note 32, at 690.

cases, and which was advocated by the dissent in *Colberg*, provides a just framework within which considerations of public and private needs can be balanced. As in land access cases, the policy toward compensation in water access cases should be formulated in a manner consistent with a concept of just compensation as one of loss distribution, *i.e.*, several individuals should not be required to withstand a disproportionate burden of the cost of improvements. The *Colberg* court, while upholding the broad state power with respect to the use of navigable waters, should have limited application of the navigation servitude to its historical meaning, *i.e.*, in aid of navigation. The court could thus have devoted its attention to the accommodation process between conflicting interests, rather than seek a solution by invoking the navigation servitude which precludes any effort to articulate relevant policy considerations.

RUTH R. BUDD

Income Taxation—Internal Revenue Code of 1954—Sections 162, 337—Corporate Liquidation—Sale of Capital Assets—Deductibility of Expenses.—***Alphaco, Inc. v. Nelson.***[1]—Petitioner corporation incurred brokers' commissions and accountants' and attorneys' fees in effecting the sale of its capital assets while undergoing a complete liquidation which qualified for treatment under Section 337 of the Internal Revenue Code of 1954.[2] Under section 337, no gain or loss was to be recognized on the sale of these capital assets and, accordingly, the capital gain actually realized on the transaction did not increase the tax liability of the corporation. On its tax return, petitioner claimed a deduction from ordinary income for the commissions and fees relating to the sale as ordinary and necessary business expenses under Section 162 of the Code.[3] The district director disallowed the deduction on the basis that the expenditures were capital expenses rather than ordinary and necessary expenses, and were controlled by section 1016[4] rather than section 162. Upon suit for refund, the district court agreed with the taxpayer. On appeal by the Government, the Seventh Circuit Court of Appeals HELD: Reversed. Fees incurred in the sale of capital assets pursuant to corporate

[1] 385 F.2d 244 (7th Cir. 1967).

[2] Section 337 states in part:

> (a) General Rule.
> If—
>
> (1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and
>
> (2) within the 12-month period begining on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period.

[3] Section 162 states in part that "[t]here shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business . . . ."

[4] Int. Rev. Code of 1954 [hereinafter cited as IRC], § 1016 provides in part that "[p]roper adjustment in respect of the property shall in all cases be made—(1) for expenditures, receipts, losses, or other items, properly chargeable to capital account . . . ."