

THE DIMINISHING FEE

HARRY M. CROSS*

In Comment *e* of Section 5 of the *Restatement of Property* (Vol. I, 1936), "complete property" is described as the totality of rights, privileges, powers, and immunities that a person may have with regard to a particular tract of land. Thus, if by law no person can erect on his land a building more than five stories in height, complete property is correspondingly limited. In an article, "Caveat Emptor,"¹ the late Harold Potter examines the changes in English land law made by certain statutes² of that country. The essence of Mr. Potter's belief is that as a result of those acts, fee ownership in land had been changed to an ownership having fee simple duration, but in specified or limited uses. There is no doubt that in America the theory of absolute ownership is not the prevailing one,³ and dominion over use, development, misuse or other treatment of land by an owner in fee simple has materially decreased in recent decades. Whether the position which may be currently identified even closely approaches the result Mr. Potter asserts to have been reached in England, or whether the position is merely specification of complete property in the *Restatement* sense is not entirely clear. On the one hand, zoning restrictions such as the *Restatement* mentions do narrow the scope of what the fee simple owner can do with his land in a manner equally applicable to all land owners similarly situated. On the other hand, there are limitations on what an owner may do with his land which become effective only after he has moved within the area of limitation. As to the former, it may be properly said that the fee simple ownership is narrowed in fashion tending toward a position Mr. Potter emphasized, but in the other situation, it at least may be said that until the problem arose, there had not yet been a delineation of the extent of "complete property," and therefore it cannot be said that the fee simple ownership has been diminished in scope. It is the purpose of this article to explore briefly some of the areas, outside of orthodox metropolitan zoning or planning, in which there have been adjustments in the scope of fee simple ownership in the sense of absolute dominion over land. Where the law has developed to the point of some precision in the measurement of the rights of the fee owner, there may be some certainty in an assertion that the fee simple right has or has not been narrowed. But if the rules have not previously been tested by way of conflict between com-

* B.A. 1936, State College of Washington; LL.B. 1940, University of Washington; Sterling Fellow, Yale University, 1940-1941; member, Seattle, Washington State and American Bar Associations; professor of law, University of Washington, since 1943; special assistant, Attorney General, State of Washington, 1953; chairman, Committee on Planning, Rebuilding and Developing Metropolitan Communities, Section on Real Property, Probate and Trust Law, American Bar Association, 1948.

¹ *Caveat Emptor, or Conveyancing Under the Planning Act*, 13 CONVEY. (N.S.) 36 (1948).

² Agriculture Act, 1947, 10 & 11 GEO. 6, c. 48; Agricultural Holdings Act, 1948, 11 & 12 GEO. 6, c. 63; Town & Country Planning Act, 1947, 10 & 11 GEO. 6, c. 51.

³ See MacChesney, *Changing Concepts of Property*, 24 A.B.A.J. 70 (1938).

peting interests, there is no way to be sure that the particular determination illustrates the *Restatement* definition or Mr. Potter's identification. In this country, as in England, the ordinary area of information usable for delineation of the scope of fee simple ownership has expanded beyond controversies between private individuals, to include, in addition, conflicts in which there is a community, general, or public interest.

In the urban areas it probably is beyond argument that the origin of limitations on an owner's freedom to do as he might wish with his land is in the proximity of other owners or occupants of land who would be affected by the acts of the particular owner.⁴ When land use conflicts arise in areas not particularly crowded by human occupation, the problem shifts more toward the physical characteristics of land use, in a conservation sense, or toward a problem of public revenue or expense.⁵ In both of these areas in so far as the current owner is limited by extraneous forces, a factor of general welfare for the public at large is involved. Thus all conservation programs look to the ultimate benefit to the community either in the short range or in the long range. Conversations with persons active in the fields commonly labeled conservation reveal their firm conviction that sound conservation practices frequently soon, if not immediately, yield greater returns than unsound practices which a particular owner might desire to follow, and reveal the even firmer conviction that only by sound practices can the productivity of land be assured for the generations to come. Thus it is commonly asserted that the general welfare supports police power control of the current use of land without invasion of constitutional protections for the current owner. From this reasoning has developed the soil conservation district approach to achieve this long range goal.

All states, it is reported,⁶ have adopted laws which authorize the creation of such districts. As is true with a wide variety of governmental districts, a land owner, because of the wishes of his neighbors and despite his own, may find himself within a district and thereby burdened with requirements not of his own choice. It was proposed that all conservation districts should include adequate areas of land, and also should include controls over activities of persons within the area, if necessary, against their firm wishes.⁷ In many of the states there is power in soil conservation districts to adopt land use regulations, which each operator within the district must follow. Despite this authorization, apparently most conservation districts have not adopted compulsory measures, but instead have relied on voluntary cooperation aided by persuasion of the operators within the district. While there is, therefore, in many districts the power to reduce the scope of fee simple rights, there has not been the reduction which this power would permit. Rather, there has been a voluntary change of use by the owners in the exercise of the orthodox fee simple owner's choice. This

⁴The law of private nuisance illustrates this, as well as urban zoning.

⁵See Warp, *The Legal Status of Rural Zoning*, 36 ILL. L. REV. 153 (1941), or almost any discussion of rural zoning.

⁶W. ROBERT PARKS, *SOIL CONSERVATION DISTRICTS IN ACTION* 13 (1952).

⁷*Id.* at 147.

even has been carried to the extent that farm plans of conservation practices for the particular unit are regarded in large measure as "gentlemen's agreements," rather than contractual obligations between the farmer and the district which must be carried out.⁸ Even though in a technical-legal sense compulsion to perform the contract is possible, compulsion in fact is contrary to the mores of the farm community, and there is no operative narrowing of a fee simple owner's volition as to use. On the other hand, there apparently is developing a practice which can go far toward a change in practices of individual farmers without any technical narrowing of his fee simple rights, in that mortgage lenders may condition the loan or the non-acceleration of unpaid balances on the adoption and carrying out of practices in accordance with a plan approved by a soil conservation district.⁹ In this fashion, in addition to the educational features of soil conservation district programs, there may develop a common pattern of limited practical volition in land use without in fact having any narrowing of the freedom of the fee simple owner.

In the grazing districts¹⁰ established in western states there is both direct control over what the owner may do on his land and a moving into the area of restriction in order to take advantage of certain privileges to use public land. Thus, under the Montana grazing district program, once the district is established the land owner, whether or not participating in the program of controlled use and reasonable division of grazing lands of the district, is required to make only a reasonable use of his own land in the sense of the number of head of stock which he grazes. If he participates in the grazing district program, he may use lands under the control of the grazing district, but must also make reasonable use of his own land. Under the program of the Federal Taylor Grazing Act,¹¹ a land owner is similarly required to make reasonable use of his own land for grazing and to have control of base property—either land which can supply grazing in certain amounts or times or water supply necessary for adequate grazing—in order to qualify to graze on the public lands. Thus under both types of grazing control programs, an owner in order to gain the benefit of use of lands he does not own, must conform to practices established for the district; and under the Montana program even though the owner does not desire to avail himself of the district controlled lands, he will none the less be limited in his use of his own lands, at least in the sense of not being allowed without penalty to overgraze them in a manner likely to cause his stock to graze beyond his boundaries in order to get adequate food supplies. The Montana pattern further narrows the field of legal action by the non-participating owner within a grazing district. Thus in the area of land use for grazing, a pattern of nar-

⁸ *Id.* at 61.

⁹ See Note, *Control of Land Through Contractual Provisions Designed to Prevent Waste*, [1950] Wis. L. Rev. 716.

¹⁰ On the grazing districts, see generally, 3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW 364-365 (1950); Penny and Clawson, *Administration of Grazing Districts*, 29 LAND. ECON. 23 (1953); Williams, *Group Action for Range Control in the Northern Great Plains*, 13 ROCKY MT. L. REV. 199 (1941).

¹¹ 48 STAT. 1269 (1934), as amended, 68 STAT. 151 (1954), 43 U.S.C.A. §315 (Supp. 1954).

rowing of the fee simple owner's choice of extent of use is established. The goal of these controls is the assurance of adequate continuing supplies of forage without damage to the range land.

In the area of rural zoning¹² a different motivating factor is found. Here the depletion of the natural resource, frequently timber, created areas of land having little current economic earning capacity, and resulted in enactment of rural zoning laws designed in part to prevent occupation of lands having physical qualities suitable primarily for forestry use rather than farming use. One goal of such laws is the restoration of tax revenues from such rural lands by returning them to a use such as forestry or recreation, which has economic feasibility, without at the same time giving rise to governmental expenses greater than the area could itself support. These governmental expenses take the form of costs of roads, costs of transportation of children to schools or of the establishment of schools, and costs perhaps of a social welfare type to assist those whose endeavors are inadequate to supply a livelihood because of the type of land use. The requirement of compulsory education laws that children be educated and the requirement that roads be supplied for the community, both expanded in recent decades, undoubtedly increased enormously the expense to the community at large of unwise location of the population. Such zoning laws are authorized in many of the United States, usually in the form of authority granted to counties to adopt rural zoning ordinances, and pursuant to such authority, many counties have in fact enacted these direct control laws. Here is an area where there is clearly a reduction in the scope of the fee simple owner's choices in the use of his land.

While rural zoning has an element which can be characterized as conservation in the broader sense which frequently relates to timber use, there is a form of conservation measure recently enacted in certain states¹³ which controls directly what an individual owner does with his timber in order to assure that in the future there will continue to be timber growing on lands primarily suitable for such use. This pattern is well represented by the Forestry Practices Act¹⁴ of the State of Washington, under which the appropriate state official can control the cutting of timber on private land by the means of permits prerequisite to any harvesting of timber. Before such a permit will be granted the land owner or timber operator or both are required to agree to cut in such manner that there will be reforestation of the area, either by leaving seed trees or other means of natural reforestation, or by posting a bond to assure artificial reforestation by replanting. The constitutionality of the law was sustained in *State of Washington v. Dexter*.¹⁵

¹² The literature is voluminous. See, e.g., Warp, *The Legal Status of Rural Zoning*, 36 ILL. L. REV. 153 (1941); Stoltenberg, *Rural Zoning in Minnesota; An Appraisal*, 30 Land Econ. 153 (1954). For extensive discussion and analysis of the particulars of enabling statutes and enacting ordinances on rural zoning, see ERLING D. SOLBERG, RURAL ZONING IN THE UNITED STATES, AGRICULTURAL INFOR. BULL. No. 59 (1952).

¹³ See Note, *State Laws Limiting Private Owner's Right to Cut Timber*, [1952] WIS. L. REV. 186.

¹⁴ WASH. REV. CODE, c. 76.08 (1951).

¹⁵ 32 Wash. 2d 51, 201 P.2d 906 (1949), 13 A.L.R.2d 1081 (1950), Note, 25 NOTRE DAME LAW. 360 (1950).

The police power control of the land use and timber cutting operations supported in *State v. Dexter* is clearly on the basis of the general welfare for generations to come rather than a general welfare in an immediate sense.¹⁶ Comparable problems of long range planning in the use of timber resources have led to management of public timber lands with similar goals. In this respect the authorization and direction to manage public timber lands in accordance with scientific sustained yield principles can be found not only in federal¹⁷ but also in state laws.¹⁸ A serious practical problem in achieving a goal of perpetual production of timber lies in the uneconomic size for sustained yield production of many tracts in public ownership. To meet this problem authorization is given for the state official to enter into agreements with the federal agencies controlling timber resources and also with private holders of timber lands to operate tracts combining the several ownerships on sustained yield principles. In order to avail himself of the opportunity for profitable timber operations and to get publicly owned timber, a private owner here must relinquish his freedom to cut as he chooses¹⁹ and thereby move voluntarily into an area of restriction of his fee simple rights. In a somewhat similar fashion, private owners of timber lands may find themselves required to permit others to use their access roads for a reasonable price, although they may desire to prevent such use, in order to gain rights to cut publicly owned timber even though there is no organized sustained yield area. Such control practices, for instance, have been adopted in the management of the O & C Railroad grant lands in Oregon where there is a peculiarly aggravated problem of small separate timber tracts.²⁰ Further in the area of a right to make a use of another's land or access because of the needs of a major economic production area, the Washington Constitution and statutes²¹ permit a private condemnation of easements of access for logging purposes. These are illustrations of a narrowing of fee simple rights for other private purposes without necessarily any conservation goal, but rather in order to permit a paramount industry to operate effectively.

The whole area of wasteful use of natural resources is one in which various controls have been established over the years.²² Probably the most complete controls lie in the oil and gas areas where the problem has not only a conservation aspect, but

¹⁶ See Note, *Constitutionality of Reforestation or Forest Conservation Legislation*, 13 A.L.R.2d 1095 (1950); Note, 25 NOTRE DAME LAW. 673 (1950).

¹⁷ Sustained-Yield Forest Management Act, 58 STAT. 132 (1944), 16 U.S.C. §583 *et. seq.* (1946).

¹⁸ For example, WASH. REV. CODE c. 79.52 (1951).

¹⁹ Assuming no limitation such as Washington's Forestry Practices Act.

²⁰ See Ballaine, *The Revested Oregon and California Railroad Grant Plans; A Problem in Land Management*, 29 LAND ECON. 219 (1953).

²¹ WASH. CONST. ART. I, §16. WASH. REV. CODE §8.24.040 (1951). The person who avails himself of this right of condemnation is required to permit others to use his logging road at reasonable rates subject to determination by the state's Public Service Commission. This Washington constitutional provision also enables persons to condemn easements for private purposes for drains, flumes or ditches across others' land for agricultural, domestic or sanitary purposes.

²² In addition to the references to forest practices control see, for instance, Note, 168 A.L.R. 1188 (1947); 42 ILL. B. J. 648 (1954); Williams, *Conservation and the Constitution*, 6 OKLA. L. REV. 155 (1953).

also an aspect of protection of one owner with reference to other owners. Thus the commonness of the oil pool means that any use by one has a direct and immediate effect upon the use by another. The apparentness of this effect led quickly to an increase in wasteful exploitation which similarly led quickly to various control devices. Though the history of oil and gas control is relatively short, as has been said elsewhere,²³ the rules reached a full maturity in a short period of time. In the timber-use area, as with other fixed quantity natural resources, wastefulness of one owner does not have a direct and immediate effect upon others having comparable resources.²⁴ Control of timber cutting, with the requirements of reforestation, is sought for the long range future primarily, rather than as equitable division of the resource and non-wasteful use which appear to be goals of the oil and gas controls.

The *quid pro quo* approach to sound land use illustrated above in the grazing district control has another illustration in the acreage limitation rules and laws in irrigation areas where, in order to be eligible for water from the irrigation project, the maximum permissible area of land owned by one person is established.²⁵ In the Columbia Basin Project this development has gone farther than in other projects, and not only is the area controlled as to maximum size, but change of boundaries, through the identification by the Bureau of Reclamation of "farm units," may be required to qualify a tract for water. These units are planned to be sufficient in size and productivity to support a family. Cognizance is taken of topographical problems and the boundaries of farm units are therefore other than merely sub-divisions of a rectangular government survey.²⁶ No owner can possess or control more than the single unit and thus the potential for fee simple ownership freedom in the irrigation project areas is greatly curtailed. It is true that on his tract the owner apparently can do what he wishes with the land. The fee owner's power prior to delivery of water is further controlled by anti-speculation restrictions on sale prices. If the land is within the district²⁷ it cannot be sold at more than its raw land value, and land in quantity beyond a farm unit size cannot be held in single ownership but must be sold.^{27a}

²³ Williams, *supra* note 22, at 156.

²⁴ It is, of course, true that there may be a direct effect on others through water runoff or erosion, but probably no, or at least only small, direct effect on other owners of nearby timber.

²⁵ 3 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, WATER RESOURCES LAW 217-237 (1950).

²⁶ Unpublished papers on Irrigation Law and Water Rights, Washington State Bar Association Annual Meeting, Sept. 1954.

²⁷ Though the outer boundaries of the district may include a particular tract of land initially, the owner of land within those outer boundaries could determine whether to place his land within the district or not. Thus it is necessary to say "if the land is within the district."

^{27a} Although not always directly related to use of the land by the owner, there are almost innumerable sorts of special governmental districts which compel an owner to support a program in which he may be uninterested. Thus, the creation of a district at the wish of the majority in an area may impose burdens on the unwilling owner to support through taxes such operations as provision of water supply, fire protection, drainage, diking, and hospitals. In the irrigation areas the support of costs of projects is sometimes spread beyond the land directly using the water by means of "conservancy" districts which impose tax obligations on urban lands benefited by business developed from the irrigated area. Direct control of what is done by the land owner (in addition to imposition of part of the cost of the

Contrasting with the rapid growth of the law of oil and gas is the pattern of the law with reference to the use of water. Even in the western state areas of water shortage, the rules have not achieved maturity. Much of the problem in this area stems from incompleteness of scientific knowledge with reference to the actions of ground water as it relates to stream or surface water.²⁸ As to the use of stream and surface water, in the western states many problems stem from controversy over applicability of riparian rights against prior appropriation concepts. Where the need for water irrigation purposes did not quickly appear, a development on the basis of common law riparian rights started.²⁹ But as the need for water for irrigation in the arid sections became clear, the inadequacy of riparian rights concepts to assure agricultural production likewise became clear. In these states, then, appropriation statutes were enacted, frequently piled on top of riparian rights doctrines despite the unavoidable conflict engendered thereby. Early controversies over the use of water for irrigation largely developed between individual owners. Later conflicts more commonly developed between groups of owners organized in irrigation districts against other groups of owners. But it still rather early became apparent that some over-all supervision of the whole problem was inevitable, and in the western states some sort of state agency having responsibility over the allocation of water is the common pattern.

In this area it is possible to illustrate both a decrease in established rights as the result of enactment of appropriation statutes and a mere identification of the scope of rights. The Oregon and Washington history illustrates the first. In the early law of these states riparian rights were recognized and there is some indication that the scope of the riparian right had a definiteness somewhat comparable to that in the states of the eastern seaboard.³⁰ But with the enactment of appropriation statutes, the problem of preservation of vested rights arose. In Oregon the statute defined the preserved right as being merely that which was presently used by a riparian owner or which would be used as a result of works presently under construction.

operation on the owner) may follow from creation of forest fire protection districts, or weed control districts requiring the owner either to control the weeds or to pay the cost of public control of the weeds, or herd law districts, by which the majority may be able to compel an owner to fence so that his herds do not run on public highways.

²⁸ See Wiel, *Law and Science: Their Cooperation in Groundwater Cases*, 13 So. CALIF. L. REV. 377 (1940). Though the knowledge of hydrologists on the scientific aspects of ground water and other water peculiarities undoubtedly has increased greatly in recent years, there has been a lack of common understanding by the public of the significance of these facts. There still exists in most areas of the country the difficulty of organizing available information on the actions of ground water because of lack of sufficient staff. Beyond even this, there is the continuing serious problem, revealed in discussions with the supervisor of hydraulics of the State of Washington, of inadequate staffs to get the basic information from the field.

²⁹ The literature is again voluminous. Recent discussions of water law development and current problems can be found in: *Symposium on American Water Rights Law*, 5 S.C.L.Q. 103 (1952); Hutchins, *History of the Conflict Between Riparian and Appropriative Rights in the Western States*, paper presented at Water Law Conference on Riparian and Appropriative Rights, University of Texas School of Law, June 1954. Extensive citation of authorities, literature, and other discussion also appears in McDUGAL AND HABER, *PROPERTY, WEALTH, LAND* c. 10 (1948).

³⁰ *Taylor v. Welch*, 6 Ore. 198 (1876); *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28 (1892). Hutchins, *supra* note 29, at 12-13.

When the constitutionality of this statute was challenged, the courts³¹ found adequate power in the state under the police power for the general welfare to support this rather drastic limitation of the land owner's right. The Washington Supreme Court held that the vested rights preserved by the appropriation statute meant only rights to the extent that the riparian owner was using or in the foreseeable future might reasonably use the water rather than rights in the orthodox common law sense.³² Thus in Washington the riparian right is cut down to a form of an appropriation right without definiteness as to volume.

In some western states the decision was reached that riparian rights were unsuited to the local conditions and hence did not exist. In these states there was an original delineation of the scope of the fee owner's right with reference to water use rather than a restriction of his right as occurred in Oregon and Washington. For instance, the Montana court in 1921 concluded that earlier statements had been mere dicta and felt at liberty to treat the problem of the existence of riparian rights as a new one. It determined that there were no riparian rights and, as a consequence, the appropriation doctrine alone applies.³³

Water rights problems took a new turn with the beginning of the withdrawal of water from the ground by means of wells. The common statute designed to allocate stream or lake water did not provide for control of the taking of ground water.³⁴ Without regard to the common pool problem of ground water, the taking of ground water inevitably affects the available supply of water under control through the earlier appropriation statutes. A further problem has developed with the change in irrigation practices and the development of scientific farming principles on the use of water to supplement natural water supplies, particularly by sprinkling.³⁵

The problem of use of ground water and the need for control for beneficial development of lands and waters has led to the enactment in a number of states of "ground water codes" which frequently adopt the prior appropriation theory.³⁶ A system of permits to appropriate has evolved comparable to that under the earlier appropriation statutes relating to stream or lake water. The problem of measurement of available supplies of ground water (disregarding the effect of withdrawal of ground water on streams or lakes) makes the certainty of the value of a withdrawal permit even more doubtful than the value of the old stream or lake water appropriation permit. As with the use of other water, it seems probable that examples exist of both the mere delineation of the extent of the owner's rights and the restriction of his rights.

³¹ *In re Hood River*, 114 Ore. 112, 227 Pac. 1065 (1924); *California-Oregon Power Company v. Beaver Portland Cement Company*, 73 F.2d 555 (9th Cir. 1934).

³² *Brown v. Chase*, 125 Wash. 542, 217 Pac. 23 (1923). See also Horowitz, *Riparian and Appropriation Rights to the Use of Water in Washington*, 7 WASH. L. REV. 197 (1932).

³³ *Mettler v. Ames Realty Company*, 61 Mont. 152, 201 Pac. 702 (1921).

³⁴ See *Bristor v. Cheatham*, 73 Ariz. 228, 240 P.2d 185 (1952), modified, 75 Ariz. 227, 255 P.2d 173 (1953).

³⁵ Note the illustration of the activity of the Georgia farmer mentioned in Agnor, *Riparian Rights in the Southeastern States*, 5 S.C.L.Q. 141 (1952).

³⁶ See, e.g., WASH. REV. CODE c. 90.44 (1951).

As to sprinkler irrigation relatively recently developed, whether from ground water or stream or lake water supplies, some certainty as to the extent of an owner's water right must be assured in order that the owner may safely undertake a program of investment in the equipment necessary to irrigate by sprinklers.³⁷ This poses for a particular owner a practical, if not a legal limitation, on what he may do with his land in agricultural areas where this method of supplementing natural water supplies is increasingly used. The enormous increase in the needs of the community for water has been noted elsewhere.³⁸ The water use problem as the result of these increasing needs and such methods as sprinkler irrigation has now spread throughout the whole of the United States and no longer is the unique problem of the western states. It is probably true, unfortunately, that these problems which have so long bothered the western states will not be adequately anticipated in the rest of the states,³⁹ but instead control or planned measures to identify the extent of the owner's right to use water will await growth of the problems to a serious point.⁴⁰

In the use of watercourses the problem has gone through the stage of unlimited or nearly unlimited whimsical abuse by each owner having access to waters, to a point where the indefensibility and serious consequences of such chaotic practices compel governmental control. The primary example lies in the stream pollution area. It needs only mention to recall that there developed in some states the rule that a riparian owner had a right to pollute the stream as "reasonable" use, and that this private right, with the development of an area, soon conflicted with the inconsistent right of others to pollute or to have a clean stream flowing past the riparian owner's land. Control of the individual land owner in this sense sometimes developed from controversy with other individual land owners, and by this controversy came some elements of clean stream preservation, but this alone could not survive against public pollution of streams through municipal sewage discharge.⁴¹ Such pollution, even though an invasion and therefore an interference with the scope of the land owner's right, could be continued against his wish by means of the condemnation of his right against pollution.⁴² The widespread effect to others of pollution, whether privately or municipally done, became increasingly apparent as our communities became more populous, with the result that now there is a strong trend toward control both of the private owner and the municipality in such abuse of the stream,

³⁷ See Agnor, *supra* note 35; Editorial, *Your Stake in the New Water Laws*, Better Farming (formerly Country Gentleman), Feb. 1955, p. 148.

³⁸ Maloney, *The Balance of Convenience Doctrine in the Southeastern States, Particularly as Applied to Water*, 5 S.C.L.Q. 159 (1952).

³⁹ See Roscoe Cross, *Ground Waters in the Southeastern States*, 5 S.C.L.Q. 149, 157 (1952).

⁴⁰ Methods of control, even though complete, can operate on inconsistent theories, such as a fixing of the volume of water usable to lend stability to use, or assurance that the use will be of the highest beneficial kind. See McHendric, *The Law of Underground Water*, 13 ROCKY MOUNT. L. REV. 1 (1940); Comment, *An Examination of the Need for Ground Water Legislation*, 29 NEB. L. REV. 645 (1950).

⁴¹ Agnor, *supra* note 35, at 144; Maloney, *supra* note 38, at 166; *Statutory Stream Pollution Control*, 100 U. OF PA. L. REV. 225 (1951); Jacobson, *Stream Pollution and Special Interests*, 8 WIS. L. REV. 99 (1933); 26 MISS. L. J. 106 (1954).

⁴² For example, *Snavelly v. City of Goldendale*, 10 WASH.2D 453, 117 PAC.2D 221 (1941), Note, 40 MICH. L. REV. 750 (1942).

taking the form of pollution control laws with a state agency to compel adoption of anti-pollution practices.⁴³ So here, too, the scope of the fee owner's freedom has changed materially under the pressure of effects upon others in the community.

There is an additional developing problem of stream and lake use for recreational and sport purposes resulting from pressures of the increased population. Controversy has arisen between land owners and sport fishermen, for instance. This controversy thus far appears to have been resolved in favor of the land owner if the stream is characterized as non-navigable, but in favor of the fisherman if the stream is characterized as navigable.⁴⁴ This test may resolve the problem with reference to streams for some time to come, but it is unlikely to resolve the problem with reference to such use of lakes. In Washington, the result has been the suggestion that there be introduced in the 1955 Legislature a bill to permit the use of any water in the state for such purposes, if access can be had without trespass upon private land.⁴⁵ If enacted and held constitutional, certainly such a law will make a major change in the rights of the owners of beds of non-navigable lakes.

The conflict of modern conditions and needs with the desires of an owner in using his land is also presented in the development of air travel and the construction of airports. Clearing the glide path area raises difficult problems of the vertical extent of the area of ownership of the nearby land proprietor. Here it may be that a definition of the extent of his right is being evolved rather than a direct limitation of his right. The case of *United States v. Causby*⁴⁶ makes it clear that the vertical extension of the area owned by the surface owner can reach into the zone necessary for approach or take off from airports. On the other hand, it appears to be beyond argument that ordinary flight at safe flight heights is not an interference with the surface owner's ownership rights however bothersome they may be to his peace of mind or rest. The attempt to minimize the expense of airport operation, particularly with reference to approach and take off zones, has been made by the use of zoning areas around airports to prohibit the erection of structures of such a height as to interfere with normal use of the airport. Such direct control of the owner's use of his land differs only in kind from the control by any other zoning and its propriety is to be tested in terms of reasonableness of the exercise of the police power.⁴⁷ If necessary, pursuant to statutory authority, the involuntary relinquishment of this

⁴³ See, for example, WASH. REV. CODE c. 90.48 (1951); Note, *Statutory Stream Pollution Control*, 100 U. OF PA. L. REV. 225 (1951); and the discussion in Chapter 15 of WILLIAM F. SCHULZ, JR., *CONSERVATION LAW AND ADMINISTRATION—A CASE STUDY OF LAW AND RESOURCE USE IN PENNSYLVANIA* (1953).

⁴⁴ Compare *Elder v. Delcour*, 269 S.W.2d 17 (Mo. 1954), and *Burnquist v. Bollenbach*, 63 N.W.2d 278 (Minn. 1954), Note, 38 MINN. L. REV. 685 (1954). The distinction between navigability which prevents private ownership of the bed of a body of water and navigability which permits such recreational use is noted in the *Elder* case. It is not unique to Missouri. Cf. *State ex. rel. Davis v. Superior Court*, 84 Wash. 252, 146 Pac. 609 (1915) (non-navigable as to ownership, but navigable for transportation of logs).

⁴⁵ Interview with Assistant Attorney General of the State of Washington assigned to the State Game Department.

⁴⁶ 328 U.S. 256 (1946).

⁴⁷ The problems are discussed generally in E. C. YOKLEY, *ZONING LAW AND PRACTICE* c. 16 (2d ed. 1953); Young, *Airport Zoning*, [1954] ILL. LAW FORUM 261.

area of his ownership can be compelled through condemnation under state or federal statutes.⁴⁸ This, too, is no more than the limitation of an owner's freedom in connection with other public needs.

But in the condemnation area generally, a change of view as to the necessary public relationship to the right taken illustrates a narrowing of the freedom from interference (albeit paid-for interference) with the land owner's complete dominion of his land: that is, the change of concept so that the power of eminent domain can be used for public *purposes*,⁴⁹ as distinct from public *use*, greatly increases the number of things which can be accomplished by the organized public as compared with the result when exercise of the power was limited to taking for direct use of a governmental agency. Thus all redevelopment or public housing and comparable acquisitions, which either primarily benefit particular individuals or by which the areas acquired are turned over for development to private enterprise, represent a narrowing of the fee owner's absolute dominion free of interference not only by private persons but also by the government itself.

The freedom enjoyed by owners to develop their land without control by others which existed before population became so great has disappeared through a variety of devices. The most sweeping restrictions may well be those of the zoning controls, but it is also recognized that there have long been controls of a police power nature as regards health and fire protection, as well as controls embodied in the electrical, plumbing, and building codes of municipal ordinances. While these controls are not technically encumbrances upon the title of the owner,⁵⁰ they do seriously limit his use of the premises. Such controls of ordinances are not secret, but they are frequently not widely known, with a result, common no doubt in many communities in addition to Seattle, that purchasers of properties who anticipate making a particular use of their premises learn the use cannot lawfully be made, and hence discover their investment is unfortunate.⁵¹ A common illustration of this problem is when persons invest their small savings in large, old, single-family homes anticipating change to a multi-family use, only to discover that zoning restrictions prevent such use, or that building code restrictions require major expenses to fit the structure for an existing multi-family use.

One of the more dramatic illustrations of what has been here characterized as moving into the area of restrictions appears in the case of *Marsh v. Alabama*⁵² in which the Supreme Court held in effect that the use of private property (a company-owned town) in a fashion that gave it the appearance of a general business area of a municipality resulted in the loss of control over entrance upon the area.

In the area of the law of fixtures, modern conditions may have led to change

⁴⁸ In the sense that easements in the air space may be condemned. 54 STAT. 1235 (1940), 62 STAT. 1216 (1948), 49 U.S.C. 452(c) (Supp. 1952); WASH. REV. CODE 14.08.050 (1951).

⁴⁹ McDougal and Mueller, *Public Purpose in Public Housing; An Anachronism Reburied*, 52 YALE LAW J. 42 (1942).

⁵⁰ By the usual rule: PATTON ON TITLES §350 (1938).

⁵¹ Letter to author from Superintendent of Buildings, Seattle, Washington.

⁵² 326 U.S. 501 (1946).

in the rights of the land owner. It would appear desirable that there be a general extension of a concept of "agricultural" fixtures comparable to the concept of "trade" fixtures, to assist farm tenants in efficient use of the land. This is the rule in some jurisdictions, though not everywhere.⁵³ Further, the modern development of pre-fabricated structures poses interesting problems of analogy to trade machines as distinct from trade buildings under the fixtures rules. All of these things mean change from the orthodox position held by the land owner.

The development of modern highways has posed problems for the owners of land fronting on such traffic arteries. The most obvious ones affect the nature of the easements the land owner has with reference to the highway, but there are also problems as to the nature of the highway right itself, *i.e.*, who owns the fee of the highway area? A name frequently applied to new major highways is also descriptive of the problem posed by other construction, that is, the "limited access" highway.⁵⁴ Here engineers assert modern traffic conditions require that the number and methods of access to the thoroughfare be limited. The immediate and direct result is that many owners cannot get directly to the traveled way from their abutting land. It has long been stated that as an incident of ownership of land abutting on a highway there is the right of access to the highway. In these limited access highways (or freeways or throughways, as they are variously called) such direct access is eliminated. The problem in new highway construction properly appears to be one of identifying that the access right has never come into existence—not that the access right is destroyed (or purchased through condemnation). Certainly as to land abutting these new style roads, there is a substantial difference in the magnitude of rights from those existing as to land abutting on the old style roads, so that the usual statement of the abutting owner's right has lost its general applicability, even though there is no limitation of the owner's right on the new road. The problem also arises when an existing road, with its multiple access invasions, is to be converted to a limited access road. Here the law probably requires furnishing a substitute access to the thoroughfare, or the condemnation or purchase of the rights of direct access which the abutting owner formerly had. Either of these may be prohibitively expensive to the highway program and so not done, but the existence of this new concept of highway development has changed the abutting owner's practical position with reference to highway access.

Traffic problems can also impose barriers to full freedom of the abutting land owner in other ways. For instance, a problem confronting the Attorney General of the State of Washington concerns the compensability of changing the direction of traffic on the road abutting a particular land owner's tract, so that to reach the community in which he has customarily traded, he must travel approximately twice as far as formerly. On the highway fronting his property he can now only turn to

⁵³ See Cotton, *Regulation of Farm Landlord-Tenant Relationships*, 4 LAW AND CONTEMP. PROB. 508, 517-520 (1937); Note, 22 MINN. L. REV. 563 (1938).

⁵⁴ Illustrative discussions in the growing volume of literature: Cunnyngham, *The Limited-Access Highway From a Lawyer's Viewpoint*, 13 MO. LAW REV. 19 (1948); Comment, *Freeways and the Rights of Abutting Owners*, 3 STAN. L. REV. 298 (1951).

the right, and to reach the community which lies to the left of his tract, he must first reach an interchange to the new half of the highway which carries all of the traffic going to the left. The land owner's contention is that he has been substantially deprived of his right of access as an abutting owner for which he must be paid. The problem of circuitry of travel has long bothered the courts in problems of closing streets, highways, and other thoroughways.⁵⁵

A direct control on what the land owner may do with his premises frequently is found in the traffic-need area as regards owners of corner lots in municipalities. The necessity that the traffic approaching on each of the intersecting streets be visible from the other requires the corner lot not to be used in such fashion as to obstruct the view. Engineering standards help to determine the area which must be so freed of obstructions. It is not uncommon to find that municipal ordinances do in fact prohibit use of corner tracts in such a fashion as to obstruct the view.⁵⁶ In less speedy times, this sort of control or limitation on the land owner's use, of course, was not only unknown but unnecessary. Modern conditions again impose pressures which limit the owner's use of his land. Safe traffic conditions on streets and highways lead to other limitations on the land owner's use, particularly those involving distractions which might interfere with safe driving. It is not uncommon thus to find ordinances controlling the erection of signs within easy vision of the thoroughfare. Whether this power to control can be extended so far as the highway traffic engineers might desire may be doubtful, unless the authority is clearly granted by appropriate legislation.⁵⁷ If there is such legislation, its effectiveness in the constitutional sense would appear to depend upon its reasonableness when the need for safe traffic conditions is measured against the desirability of freedom of use by the land owner.

Much of the change in the fee owner's control with reference to his land is the result of planning to meet problems in particular areas, frequently conservation programs. It is unfortunately true that much of the limitation has come from piecemeal attack on fragments of an over-all problem, and mere casual reading of the volumes in the *Report of the President's Water Resources Policy Commission* makes crystal clear that unified attack even on the water problems has not yet been made. Undoubtedly it is true that as Mr. MacChesney said in 1938: "Private ownership has by no means disappeared. It has, however, undergone considerable change."⁵⁸ The change does not warrant the use of the title Mr. Potter felt appropriate for one of his articles, "The Twilight of Landowning,"⁵⁹ although it may justify the title, "The Diminishing Fee."

⁵⁵ Note, 29 IOWA. L. REV. 643 (1944); Comment, 18 U. OF SO. CALIF. L. REV. 42 (1944); 32 CALIF. L. REV. 95 (1944).

⁵⁶ See, UNIVERSITY OF WASHINGTON, MUNICIPAL REGULATION OF TRAFFIC VIEW OBSTRUCTIONS, REPORT NO. 122 (Bureau of Governmental Research and Services, 1953).

⁵⁷ Cf. *Ellis v. Ohio Turnpike Commission*, 126 OHIO ST. 86, 120 N.E.2d 719 (1954).

⁵⁸ *Changing Concepts of Property*, 24 A.B.A.J. 70, 73 (1938).

⁵⁹ 12 CONVEY. (N.S.) 3 (1947).

