

5-1-1970

## The Lake Chelan Case—Another View

Edward A. Rauscher

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Water Law Commons](#)

---

### Recommended Citation

Edward A. Rauscher, *The Lake Chelan Case—Another View*, 45 Wash. L. & Rev. 523 (1970).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol45/iss3/6>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact [cnyberg@uw.edu](mailto:cnyberg@uw.edu).

## THE LAKE CHELAN CASE— ANOTHER VIEW

Edward A. Rauscher\*

Professor Corker's analysis<sup>1</sup> of *Wilbour v. Gallagher*<sup>2</sup>—the *Lake Chelan* case—was published recently in this Review. This rejoinder states a view contrary to that of Professor Corker with respect to both the law of tidelands and shorelands in lakes which, unlike Lake Chelan, fluctuate only naturally, and the effect of the *Lake Chelan* case upon that body of law.

The original *Lake Chelan* opinion decided, briefly, that public rights incident to navigation prevent an owner from filling lands which have been periodically submerged by artificial fluctuations in the lake's level. The decision was not addressed to, and appears not to have considered, the situation of tidelands or shorelands in general. These issues were not discussed either in briefs or oral argument at that stage. Nevertheless, the court's general reference to "navigable waters" was regarded by Professor Corker as announcing a rule applicable to all tidelands and shorelands in the state. Others, including public officials, came to share Professor Corker's view of the *Lake Chelan* case and gave wide publicity to their views, with the result that much of the public, and many lawyers, apparently have accepted that position without realizing the possibility of respectable argument to the contrary. Largely in response to this view of the case, several amici curiae, myself included, proposed that without regard to the merits of *Wilbour v. Gallagher* itself, the court indicate upon rehearing that the decision was not to be understood as applying either to tidelands or to shorelands in lakes not subject to artificial fluctuation. This, and the argument of other amici who opposed rehearing, was the first instance of the court's attention being directed to the case's possible

\* Member of Seattle and Washington State Bar Associations. B.A., Vanderbilt University, 1942; LL.B., Yale University, 1948. The writer is counsel for, and a principal of, a group that owns and plans to develop tidelands in Puget Sound. He writes this response in that capacity, and in the spirit of an advocate.

1. Corker, *Thou Shalt Not Fill Public Waters Without Public Permission—Washington's Lake Chelan Decision*, 45 WASH. L. REV. 65 (1970) [hereinafter cited as Corker].

2. 77 Wash. Dec. 2d 307, 462 P.2d 232 (1969).

relevance to tidelands and shorelands. The court's denial of rehearing, on the usual form and without explanation or comment, can be understood only as indicative of a normal unwillingness to dispose of a different class of cases not before it. In fact, one amicus opposed rehearing on that very ground, while at the same time urging a broad interpretation of the opinion. My own conclusion is that the court has not ruled, even impliedly, on the decision's relevance to submerged lands other than the narrow type involved in *Wilbour v. Gallagher*, and that it will so rule only when it is presented with an appropriate case.

The Supreme Court may, some day, accept Professor Corker's thesis of the impermissibility in general of developing private lands underlying navigable waters in Washington. However, it has not done so in *Wilbour v. Gallagher*. And before it does, it will have to weigh a large body of law to the contrary, which Professor Corker has not really discussed and which was brought to the court's attention only by amici at the rehearing petition stage.

Let me first define the area of disagreement. Professor Corker and I are each in favor of conservation, the protection of our marine environment and ecology, and vigorous and adequate programs to foster and promote these interests. Disagreement does not commence there. With respect to areas beyond the line of extreme low tide in tidelands or beyond the line of navigability in lakes and rivers, no one contests the ownership of either the land beneath the water, the water itself, or the control of the water. That is all in the state.<sup>3</sup> Nor has any issue been raised with respect to nonnavigable lakes and streams. Except in such highly unusual cases as *Wilbour v. Gallagher*, there will be no relevant dispute as to uplands. And I doubt that Professor Corker and I would disagree as to the extent of the public's rights in lands remaining in the public domain. Rather, the focus of our disagreement concerns certain tidelands (land between the line of ordinary high tide and either the line of extreme low tide or the inner harbor line in tidal areas)<sup>4</sup> and

3. Moreover, all that follows in this article should be understood as recognizing the paramount federal navigational servitude, wherever that might apply.

4. The outer boundary of second-class tidelands is the line of extreme low tide. WASH. REV. CODE § 79.01.024 (1959). The outer boundary of first-class tidelands is either the line of extreme low tide (in the case of such lands lying between one and two miles from the corporate limits of a city) or the inner harbor line (in the case of such lands within or in front of such corporate limits, or within one mile thereof). WASH. REV. CODE § 79.01.020 (1959). In both cases the upland boundary is the line of ordinary high tide, except

## The Lake Chelan Case

shorelands (land between the line of ordinary high water and the line of navigability in lakes and rivers)<sup>5</sup>—specifically those tidelands and shorelands which have passed into private ownership by sale from the state for money. Actually tidelands and shorelands constitute a relatively small portion of lands underlying tidal waters, navigable rivers and lakes, and only a small, though valuable, portion of those tidelands and shorelands are in private ownership. Specifically, our disagreement is whether privately owned tidelands and shorelands are, as Professor Corker urges, precluded from development by *Wilbour v. Gallagher*.<sup>6</sup>

That decision is probably not, as Professor Corker suggests, the ultimate judicial confrontation between public and private rights in navigable waters. Rather, it is a unique and very narrow decision, involving (1) an artificial raising of a lake (2) without the customary acquisition of the fee in the land being flooded, and for which the flowage right ran to a power company and not to the public at large. Gallagher's predecessor in title was the power company which caused Lake Chelan to be artificially raised, and the Supreme Court's opinion relies substantially upon foreign authorities which, under like circumstances, found implied dedications of the higher water levels—a doctrine which, by definition, cannot apply to submerged lands subject only to tidal and other wholly natural fluctuations. In addition, the owner, Gallagher, was putting the filled land to a use regarded by many as objectionable in a single-family residential area. The record suggests that the use of his filled land was polluting the lake water. Prior to the raising of the lake level, Gallagher's predecessor had owned

where a federal patent of uplands prior to statehood conveyed to the meander line and the meander line was below the line of ordinary high tide. The inner harbor line is defined as "a line located and established in navigable tidal waters between the line of ordinary high tide and the outer harbor line and constituting the inner boundary of the harbor area." WASH. REV. CODE § 79.01.016 (1959).

5. First- and second-class shorelands, those bordering the shores of navigable lakes or rivers which are not subject to tidal flow, lie "between the line of ordinary high water and the line of navigability." WASH. REV. CODE §§ 79.01.028, 79.01.032.

6. It is difficult to tell whether Professor Corker is saying that this is the law or that it will become the law in the wake of *Wilbour v. Gallagher*. The title of his article, the lead paragraph, and his statement of the holding ("*ownership of lands beneath navigable waters does not give the owner a right to restrict use of those waters for all the public purposes to which they are suited.*" Corker, *supra* note 1, at 68) all suggest that *Wilbour v. Gallagher* is a great decision because it *decides* that private ownership of lands underlying all navigable waters is so restricted. Yet he recognizes elsewhere that the decision has not really gone this far: "A major legal problem still unresolved is the extent to which the state has, by selling tide- or shorelands, already expressly or impliedly authorized its grantees to fill these lands." Corker, *id.* at 72.

neither land adjacent to the lake nor any shorelands in the lake. Finally, without intending to criticize counsel or attempting to explain any omissions,<sup>7</sup> neither the facts nor the law presented were adequate for proper disposition of the case before the court, much less the larger issue which Professor Corker attributes to the opinion.<sup>8</sup>

In contrast to the limited facts presented by *Wilbour*, consider the nature of private ownership of shorelands and tidelands in Washington and its historical and legal development. When Washington became a state, it assumed sole and absolute ownership of all tidelands and shore-

7. See note 24, *infra*, re the case being contested principally on a theory of prescription.

8. *E.g.*, the record does not disclose the important fact that the defendants Gallagher had a lease from the state to use the shorelands abutting the property in dispute, and that the lease would have permitted filling and the other uses which the court said were precluded in Gallagher's lots by the existence of public rights. All nine justices seemed to feel that the filling and use of the dedicated streets was wrongful, but it apparently was not brought to their attention that the streets, after being filled, were only used as streets, not as a trailer court, and that Gallagher had a permit from the Town of Chelan to fill them. An awareness of this might have affected the decision, since the reserved right to use the streets might well permit their use only as a means of access to the lake, rather than as a part of the lake itself. Query whether if the grade of these streets had ever been fixed, abutting owners would have had inverse condemnation rights resulting from any change in grade. The parties to the case tried it primarily on the basis of prescriptive rights. There was no discussion, in either the trial court or the Supreme Court, of the case's relevance to tidal areas. The law that was cited had very little relevance to these other waters, and the opinion relies exclusively upon authorities from other states, whose patterns of ownership and rights in land underlying navigable bodies of water are markedly different from ours. In one of the cases cited, *Stewart v. Turney*, 237 N.Y. 117, 142 N.E. 437 (1923), the New York Court of Appeals noted that the use of foreign law in this area is not very reliable. 142 N.E. at 440. Justice Hill's concern with the absence of public representation is understandable; just as significant was the absence of representation by other interested persons. Even the parties to the case apparently did not realize that their suit presented such broad issues. They did not present the law relevant to these larger questions, and neither did anyone else; and, quite naturally, the court appears not to have considered it. One indication that the court did not contemplate that its holding would apply generally to privately owned tidelands and shorelands is found at the beginning of its analysis: "there was no private ownership of the land under Lake Chelan in its natural state, and no right to obstruct navigation." 77 Wash. Dec. 2d at 314, 462 P.2d 237. By definition there is private ownership of land under a lake to the extent that shorelands are privately owned. Gallagher did not own shorelands in front of the land in question, but public records disclose that there are privately owned shorelands elsewhere on Lake Chelan. It might be assumed that the court was referring only to the land in front of Gallagher's property, or that it was erroneously referring to all of Lake Chelan simply because no one had called its attention to the privately owned shorelands. But it cannot be assumed that the court was denying the fact of private ownership of lands underlying all navigable waters everywhere in the state, or that it was enunciating a rule which would be co-extensive with such an assumption and applicable to all such waters. In fact, there is no justification for the belief that the court felt it was addressing itself to anything beyond the case presented and other similar situations on Lake Chelan. The decision probably is not even applicable to all of Lake Chelan. Query as to its effect on a person whose property runs to the water at both the raised and lowered level, and who, in addition, owns shorelands.

## The Lake Chelan Case

lands within its boundaries.<sup>9</sup> Quite in keeping with any inalienable responsibility on the part of the state to preserve the public's navigation rights, a very considerable body of law, constitutional and legislative in origin, decades of administrative practice and an unbroken line of judicial decisions have shaped and defined the character of private ownership of shorelands and tidelands in Washington. At some time or other the state has executed tide and shoreland leases, licenses and conveyances of almost every conceivable stripe and description. With respect to these, our Supreme Court has voiced clear and explicit recognition not only that the state can, as in many cases it did, convey fee simple absolute title to these tide and shorelands, but also that such conveyances are an expression of the state's policy to encourage development of such lands.<sup>10</sup>

The Washington Supreme Court has clearly not deemed the rights derived from private ownership of tide or shorelands to be of the rather flimsy nature suggested by Professor Corker. In *Puget Mill Co. v. State*, the Court stated:<sup>11</sup>

The decisions of this court lead to no other conclusion than that the state

9. *E.g.*, *Port of Seattle v. Oregon & W.R. Co.*, 255 U.S. 56 (1921); *Harkins v. Del Pozzi*, 50 Wn. 2d 237, 240, 310 P.2d 532, 535 (1957); *Van Sicken v. Muir*, 46 Wash. 38, 42, 89 P. 188, 189 (1907); *Eisenbach v. Hatfield*, 2 Wash. 236, 244-45, 26 P. 539, 541 (1891). The state's assertion of ownership in Article XVII, Section 1 of the Washington Constitution relates to "the beds and shores of all navigable waters in the state . . ." and is subject to the disclaimer, in Article XVII, Section 2, of swamp and tidelands patented by the United States.

10. Those who sat in the constitutional convention, and those who met in our early legislative assemblies, were confronted with an important problem when treating the subject of tide and shore lands. Many insisted that the state should reserve title and that the land should never be sold. Others maintained that the best interests of the state demanded that they pass into private ownership, thus becoming a subject of taxation and revenue to the state. The latter theory prevailed, subject to the qualification that the harbor area should never be disposed of. The state has invited investment in these lands upon the theory that, in private ownership, all lands lying back of the inner harbor line or the line of ordinary navigability would be reclaimed and put to useful purposes.

*State v. Sturtevant*, 76 Wash. 158, 171, 135 P. 1035, 1040 (1913). *See also Boyer v. State*, 19 Wn. 2d 134, 142 P.2d 250 (1943); *Globe Mill Co. v. Bellingham Bay Imp. Co.*, 10 Wash. 458, 38 P. 1112 (1895). One of the clearest expressions of state policy to encourage development was the Tide and Shorelands Act of 1890, which provided that one who had made improvements on tidelands for use in commerce, trade or business had a preferential right to purchase such lands, and that his preferential right was prior to that of the upland owner. Act of March 26, 1890, §11, Wash. Laws of 1889-90, at 502.

11. 93 Wash. 128, 134-35, 160 P. 310, 313 (1916).

authorities have the power to, and when conveying [second-class tide and shore lands] by deeds absolute in form do, vest in the grantees an absolute fee simple title to such lands. [citations omitted.]

. . . .

This being the nature of the plaintiffs' titles, it is elementary constitutional law that such titles cannot be impaired by any act of the state after making the deeds upon which they rest.

In *Palmer v. Peterson*,<sup>12</sup> the state's grantee of tidal oyster lands sued to enjoin trespass over the tidelands either upon foot or by boat. In affirming judgment in favor of the plaintiffs, the court said:<sup>13</sup>

It is lastly contended that inasmuch as the tide lands in controversy are covered by water to a depth of seven or eight feet at high tide, such waters are navigable, and the appellant has a lawful right to pass over the same, notwithstanding the title of the respondents. This contention cannot be sustained. The state deed is absolute in form, and carries with it the right to the exclusive possession and enjoyment of the lands granted, . . . that such a grant was within the competency of the state cannot, at this late day, be controverted.

12. 56 Wash. 74, 105 P. 179 (1909). As an imaginative afterthought to his endorsement of minimizing uncertainties in the future development of the law, Professor Corker suggests that this worthy judicial technique is somehow served by the court's forbearing to overrule two cases, *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539 (1891), and *Palmer v. Peterson*, 56 Wash. 74, 105 P. 179 (1909), where that forbearance does not otherwise comport with his interpretation of *Wilbour v. Gallagher*. Corker, *supra* note 1, at 66 n.5 and accompanying text. The court in *Wilbour* is said to have treated the *Eisenbach* case "with silence" and, what is more, that it was wise in doing so. Every indication, however, is that the court, never having considered *Eisenbach*, did not treat it at all. See note 8, *supra*. Without belaboring the extent of an oyster-land lessee's right to possession, Professor Corker's attempted limitation of *Palmer v. Peterson* in light of the *Lake Chelan* case simply begs the question whether the latter applies to tidal areas, which the court did not have before it, did not discuss, and very likely did not consider. Moreover, his assertion that the "exclusive possession" doctrine of the *Palmer* case met its demise in *Kemp v. Peterson*, 47 Wn. 2d 530, 288 P.2d 837 (1955) is extremely dubious since the *Kemp* case did not involve or present any issue of incursion of the public's right to fish in navigable waters against private interests in lands underlying navigable bodies of water. The public's right to fish navigable waters, subject to the state's authority to license and regulate, was presumably acknowledged even before the *Palmer* case in 1909; certainly it was not first recognized in the *Kemp* case. Moreover, that public right, as against an upland owner's interference with its exercise, was not said in *Kemp* to follow, *ipso jure*, a finding of navigability; rather, it was based on the state's *ownership* of the navigable river beds under Article XVII of the Washington Constitution. Thus, the public right may still be limited by a conveyance from the state to the line of navigability.

13. 56 Wash. at 75-76, 105 P. at 180.

## The Lake Chelan Case

After discussing with approval the *Illinois Central* case on which Professor Corker relies,<sup>14</sup> the *Palmer* court concluded:<sup>15</sup>

The conveyance by the state of tide lands covered and uncovered by the flow and ebb of the tide is not a substantial impairment of the interest of the public in the navigable waters of the state, and does not interfere with the paramount right of Congress to regulate commerce with foreign nations and among the several states. [citations omitted.]

The language of the court in the *Puget Mill* and *Palmer* cases, and in the leading case of *State v. Sturtevant*,<sup>16</sup> is entirely consistent with Washington's historic treatment of tidelands and shorelands. Private ownership and development of such lands and the public's right of navigation (including rights corollary to the right of navigation) have never been regarded as impinging on each other.<sup>17</sup> The reason for this is not that the state has failed to assert a public trust in, or to preserve, the public's navigation rights; it is rather that the state has con-

14. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387 (1892). The passage from that opinion cited by Professor Corker (*supra* note 1, at 75) applied only to a legislative grant, later repealed, from the State of Illinois to the Illinois Central Railroad, of lands lying easterly of the City of Chicago and one mile into Lake Michigan, a quantity of land which exceeded three times the area of Chicago's entire harbor. 146 U.S. at 454. This, the Court observed, was a very real and extensive threat to navigation, which interfered with the development and anticipated expansion of the Chicago harbor, and was equated with a grant by the state of "lands under the navigable waters of an entire harbor or bay, or of a sea or like." *Id.* at 452-53. In this respect, the rule of *Illinois Central* simply implies that the State of Washington could not convey Elliot Bay. Other lands, those extending two hundred feet from the shore, which were reclaimed by the railroad and on which permanent improvements were made, were said not to interfere "with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic . . . and cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use." *Id.* at 444. Finally, as to certain piers erected by the railroad, the Court remanded the case for a determination whether they extended into the lake "beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake; and, if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company shall be affirmed by the court . . ." *Id.* at 464. The Court thus expressly recognized vested private property rights within the line of "practical navigability," and rejected the interpretation that all lands underlying navigable bodies of water, including portions thereof which are not themselves navigable, are inappropriate for private ownership or impressed with the public trust upon which another aspect of *Illinois Central* turned. That interpretation of *Illinois Central* has been adopted by the Washington Supreme Court. *Palmer v. Peterson*, 56 Wash. 74, 105 P. 179 (1909). See also *Long Sault Dev. Co. v. Call*, 242 U.S. 272, 278 (1916); *United States v. Rio Grande Dam & Irrig. Co.*, 184 U.S. 416, 424 (1902); *Shively v. Bowlby*, 152 U.S. 1, 45 (1894).

15. 56 Wash. at 76, 105 P. at 180.

16. 76 Wash. 158, 135 P. 1035 (1913).

17. See, e.g., *Sequim Bay Canning Co. v. Bugge*, 49 Wash. 127, 131-33, 94 P. 922 (1908).

sistently determined that the private and public rights meet at, and are delineated by the inner harbor line or the line of extreme low tide (tidelands) or the line of navigability (shorelands),<sup>18</sup> a demarcation which would rebut any suggestion that all portions of navigable bodies of water, including those which are not themselves navigable and presumably to the high water mark, are now to be regarded as navigable.<sup>19</sup>

18. *E.g.*, *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913); *Palmer v. Peterson*, 56 Wash. 74, 105 P. 179 (1909). This principle was not overlooked by the court in *Wilbour v. Gallagher*. "There undoubtedly are places on the shore of the lake where developments, such as those of the defendants, would be desirable and appropriate. This presents a problem for the interested public authorities and perhaps could be solved by the establishment of harbor lines in certain areas within which fills could be made, together with carefully planned zoning by appropriate authorities to preserve for the people of this state the lake's navigational and recreational possibilities." 77 Wash. Dec. 2d at 318 n.13, 462 P.2d at 239 n.13.

Like many another legal principle, this one should not be stated without its possible qualifications. For example, ownership of tidelands, like ownership of other lands through which navigable waters can flow, may be subject to rights of navigation. In *Dawson v. McMillan*, 34 Wash. 269, 75 P. 807 (1904), the court abated a tideland owner's obstruction of a navigable channel, which ran adjacent to the plaintiff's lands and through the defendant's tidelands to its mouth in Bellingham Bay. The channel was four miles long to the point of its mouth, from which it extended another mile and a half into the Bay, and was the plaintiff's sole means of access to the Bay. The court found the channel to be navigable for general commercial purposes and that it had been so used for at least twenty years prior to its obstruction by the defendant. In view of *Palmer v. Peterson*, 56 Wash. 74, 105 P. 179 (1909), which was decided only five years later, the *Dawson* case must be understood as relating only to such channels as are navigable for general commercial purposes, and not to suggest that tidelands generally and smaller channels or sloughs therein are to be regarded as navigable. *See also Strand v. State*, 16 Wn. 2d 107, 123-28, 132 P.2d 1011 (1943); *State v. Sturtevant*, 76 Wash. 158, 165, 135 P. 1035, 1037 (1913) (shorelands). Consistent with the *Dawson* case, a navigable stream which empties within the boundaries of privately owned tidelands probably cannot be obstructed. In this respect the tideland owner is in no different position from one whose dry lands are traversed by a stream, to which he may own the bed and which is subject to the limited navigation right of transporting timber products. *See, e.g.*, *Monroe Mill Co. v. Mensel*, 35 Wash. 487, 494-95, 497-98, 77 P. 813, 815-16 (1904). In the absence of a navigable stream or channel, the plaintiff in the *Dawson* case would, under the rule of *Eisenbach v. Hatfield*, 2 Wash. 236, 253, 26 P. 539, 543-44 (1891), have had no right of access to Bellingham Bay, unless, perhaps, on the basis of some other principle, such as prescription. As its facts would indicate, the *Dawson* case has been interpreted as having particular reference to the right of an upland owner to use a navigable channel as a means of access to deep water. *See State ex rel Ham v. Superior Court*, 70 Wash. 442, 452, 126 P. 945, 949 (1912). *Smith v. Centralia*, 55 Wash. 573, 575, 104 P. 797, 798 (1909).

19. *See note 14, supra*. It is doubtful that rights which may be recognized as incidental to the right of navigation, such as swimming, boating and fishing, extend to parts of navigable bodies of water which are not themselves navigable and, therefore, are not subject to the primary navigational servitude. *See Palmer v. Peterson*, 56 Wash. 74, 105 P. 179 (1909). *See also Nelson v. DeLong*, 213 Minn. 425, 7 N.W.2d 342, 347 (1942), upon which the majority in *Wilbour v. Gallagher* relied. One other point is relevant here: Professor Corker's reference to the public's problems of access to navigable waters if the right to "traverse the surface . . . [were to terminate] at the natural high

## The Lake Chelan Case

Professor Corker feels that it was a mistake for the state to have sold tidelands and shorelands.<sup>20</sup> He may be right. But the fact is that the state did sell them, with authority and without reservation, and it is now too late to nullify those conveyances by asserting that they were subject to extended public rights incident to navigation, such that they now cannot be developed by filling. The state has used the money realized upon sale of those lands; public bodies have levied property taxes on them and on occasion have foreclosed and resold them for tax delinquencies. Thousands of acres of such lands have already been developed, with improvements valued in the high millions. For example, Harbor Island rests on filled tidelands, as do hundreds of highly developed acres surrounding it. The shoreline of Elliot Bay in downtown Seattle used to lie between First and Second Avenues, and the Norton Building is thus partly situated on filled tidelands. These are just a few examples.<sup>21</sup>

I concede that the state, earlier in its history, could have reserved more tidelands and shorelands for public enjoyment, that it could have preserved the riparian rights of upland owners in navigable waters, and that it might still do either with respect to such lands which have not yet passed into private ownership. But the wisdom of the policy which the state in fact has adopted<sup>22</sup> is neither relevant to the *Wilbour* case nor susceptible of treatment in the space available. If a mistake in policy was made, it was one which had no, or only the most tenuous, relation to navigation, and it cannot be rectified now by resort to that doctrine. If the public is now to acquire rights in privately owned tidelands or shorelands, it must do so by such constitutionally sanc-

water line" (Corker, *supra* note 1, at 69) ignores the fact that such waters may be bounded by privately owned property at either the outboard or inboard boundaries of shorelands or tidelands, and the problems of access would be the same in either event.

20. Corker, *supra* note 1, at 85.

21. Professor Corker suggests that tide and shoreland improvements may have been lawful when made. Corker, *supra* note 1, at 86. While he recognizes some equities favoring private owners who, prior to the *Wilbour* case, had made such improvements, he characterizes the interests of those who simply owned shore or tidelands as of that date as "mere expectations." *Id.* at 74. These expectations, though, evidently were shared by the state. See language from *State v. Sturtevant*, 76 Wash. 158, 135 P. 1035 (1913), note 10 *supra*, which, as another example of this sort of expectation, was referred to in a 1966 opinion letter from the City of Seattle Law Department to the City Planning Commission in regard to a proposed regulation of tideland development. See also *Jones v. Hammer*, 143 Wash. 525, 255 P. 955 (1927).

22. See note 10, *supra*.

tioned means as eminent domain,<sup>23</sup> grant from the owner, and prescription.<sup>24</sup>

When *Palmer v. Peterson* was decided in 1909, it was already thought to be too late to overturn the established lines between the right of navigation and private ownership of tidelands and shorelands derived from the state;<sup>25</sup> manifestly that cannot be done now. The Supreme Court should not be understood as having undertaken such upheaval in *Wilbour v. Gallagher*, certainly not without discussion of the authorities which have brought us to our present position or some attention to the private acquisitions of tidelands and shorelands and developments undertaken in reliance on them. Such an interpretation is particularly strained in view of the court's express recognition of how the result might be affected by the simple demarcation of harbor lines in Lake Chelan.<sup>26</sup> The more reasonable conclusion is that the court in *Lake Chelan* decided only the narrow case before it, that it will consider the situation of tidelands and shorelands only when

23. Professor Corker's reasoning from the Illinois Central case, 146 U.S. 387 (1892), that lands underlying "public waters . . . cannot be the subject of constitutionally vested property rights," apparently would not deny that appropriation of such lands for public use requires exercise of the power of eminent domain. Corker, *supra* note 1, at 75. The Court in *Illinois Central* recognized that even the expenses of improving lands lying beyond the line of navigability, where those expenses were incurred in reliance upon a grant of those lands from the state, ought to be compensable. 146 U.S. at 455. That case does not suggest that exercise of the power of eminent domain would be unnecessary as to lands inside the line of navigability. Moreover, in this state, a taking of improvements on such lands (*Boyer v. State*, 19 Wn. 2d 134, 142 P.2d 250 (1943) (leased lands)) and preferential rights to purchase the same (*State ex rel. Wilson v. Grays Harbor & Puget Sound R.R.*, 60 Wash. 32, 110 P. 676 (1910)) do require compensation. Further, ownership of such lands carries the right to enjoin trespass thereon in either their dry or submerged state. *Palmer v. Peterson*, 56 Wash. 74, 105 P. 179 (1909). Cf., Mr. Justice Stewart's concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 294 (1967), which indicated that the state could not defeat the constitutional prohibition against taking property without just compensation by a simple judicial declaration that such property, theretofore recognized, never existed after all. *Id.* at 296-97.

24. The facts in *Wilbour v. Gallagher*, which was argued largely on the basis of prescription, would not have given rise to prescriptive rights under the standards established by the Washington Supreme Court. Three judges made this point in a separate, essentially dissenting, opinion. 77 Wash. Dec. 2d 307, 321, 462 P.2d 232, 241 (1969). The majority opinion stated that the plaintiffs had made an excellent case for prescription (*Id.* at 314, 462 P.2d at 237), but did not say whether it was good enough. Professor Corker did not feel that the plaintiffs had made a case for prescription. Corker, *supra* note 1, at 81-82.

25. *Palmer v. Peterson*, 56 Wash. 74, 76, 105 P. 179, 180 (1909).

26. See note 18, *supra*. In the case of second-class and some first-class tidelands, the outer boundary is the line of extreme low tide, so no formal demarcation is necessary. Moreover, lines of navigability, the outer boundaries of shorelands, exist in an inchoate sense even when such lines have not been formally demarcated. See, e.g., *State v. Sturtevant*, 76 Wash. 158, 165-66, 135 P. 1035, 1037-38 (1913).

## The Lake Chelan Case

that issue is appropriately presented, and that the opinion evidences no inclination to overrule established principles defining the character of private ownership of such lands in Washington.

# WASHINGTON LAW REVIEW

## EDITORIAL BOARD

LOYAL T. R. SNYDER, JR.  
*Editor-in-Chief*

G. RICHARD MORRY  
*Executive Editor*

### ARTICLES

JOHN M. STEEL  
*Articles Editor*

THOMAS E. LEA  
*Associate Editor*

BARRY D. MATSUMOTO  
*Book Review Editor*

### RECENT DEVELOPMENTS

P. WICKSTRAND DUFFORD  
*Recent Developments Editor*

G. BRUCE CLEMENT  
*Casenote Editor*

JOHN L. DEWEERDT  
*Legislative Note Editor*

ROLAND W. JOHNSON  
*Research Editor*

### ADMINISTRATION

CLIFFORD L. STILZ, JR.  
*Managing Editor*

LESLIE O. STOMSVIK  
*Associate Managing Ed.*

MICHAEL C. REDMAN  
ROBERT B. ROYAL

### COMMENTS

ROBERT M. NOSTRAND  
*Comments Editor*

WILLIAM H. WILSON  
*Associate Editor*

JOEL R. STARIN  
DONALD K. FRANKLIN  
DAVID W. ROBINSON  
RALPH I. THOMAS  
ROBERT L. GUNTER  
JOHN T. JOHN  
DAVID H. OSWALD  
WILLIAM R. TRIPPETT  
ETHEL J. WILLIAMS

### PROJECT

ROBERT L. BILOW  
*Project Editor*

RICHARD S. GIDLEY  
*Associate Editor*

## EDITORIAL STAFF

STEVEN S. ANDERSON  
THOMAS N. BUCKNELL  
RUSSELL W. BUSCH  
THOMAS F. CARR  
RICHARD B. COHEN  
KENNETH L. CORNELL  
JAMES M. DANIELSON  
JOSEPH P. DAWSON

CHARLES R. EKBERG  
STEVEN M. FULLER  
T. PETER GIERE  
MARK M. HOUGH  
LINDA C. HUBER  
LARRY A. JORDAN  
ROBERT M. KNIES  
HENRY E. LIPPEK

PATRICK E. MCBRIDE  
EARL R. MCGIMPSEY  
DAVID A. NICHOLS  
RICHARD E. SALWEN  
THOMAS E. SHELDON  
JOE L. SNYDER  
DONALD P. SWISHER  
STEVEN J. WARSHAL

## BUSINESS STAFF

MARIAN G. GALLAGHER  
*Business Manager*

MARGARET A. DARROW  
*Administrative Assistant*