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Contested Shore: Property Rights in Reclaimed Land and the Battle for Streeterville

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Articles

CONTESTED SHORE: PROPERTY RIGHTS IN RECLAIMED LAND AND THE BATTLE FOR STREETERVILLE

Joseph D. Kearney & Thomas W. Merrill

ABSTRACT—Land reclaimed from navigable waters is a resource uniquely susceptible to conflict. The multiple reasons for this include traditional hostility to interference with navigable waterways and the weakness of rights in submerged land. In Illinois, title to land reclaimed from Lake Michigan was further clouded by a shift in judicial understanding in the late nineteenth century about who owned the submerged land, starting with an assumption of private ownership but eventually embracing state ownership. The potential for such legal uncertainty to produce conflict is vividly illustrated by the history of the area of Chicago known as Streeterville, the area of reclaimed land along Lake Michigan north of the Chicago River and east of Michigan Avenue. Beginning in the 1850s, Streeterville was subject to repeated waves of litigation, assertions of squatters' rights (most notably by George Wellington Streeter, for whom the area is named), conspiracies to obtain federal land grants based on veterans' rights, schemes in reliance on claims of Native Americans, and a public works project designed to secure the claims of wealthy riparian owners. The riparian owners eventually won the many-sided battle, but only after convincing institutions such as Northwestern University to build substantial structures on the land. The history of Streeterville suggests that when legal title to reclaimed land is highly uncertain, conflict over control of the land is likely to persist until one or more persons succeed in establishing what is perceived to be possession of the land.

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INTRODUCTION

The history of Chicago suggests that reclaimed land—that is, land artificially created where water once stood—is a resource uniquely prone to conflict. This Article recounts a particular multisided dispute over reclaimed land in the Chicago neighborhood called Streeterville.¹ The land in question was created by a combination of natural accretion, unauthorized landfilling, and a legally sanctioned public works project. The result was great uncertainty about who had title to the new *terra firma*. This uncertainty over property rights ignited a struggle lasting decades that featured not only litigation and special interest legislation but also fraud and outright violence.

The battle over property rights in Streeterville can be divided into three periods. The first, which lasted from roughly 1850 to 1885, was relatively decorous, consisting largely of litigation over rights to land formed by natural accretion. The second, from roughly 1885 to 1915, was intense and largely extralegal. This period included, most famously, gun battles between the followers of the notorious squatter, George Wellington Streeter, and private guards hired by wealthy Chicago landowners who

¹ “Streeterville” is an informal name given to an area of Chicago, just north of the Chicago River, whose boundaries are somewhat imprecise. For general purposes in this Article, we regard Streeterville as encompassing the area north of the Chicago River and south of Oak Street that lay beneath Lake Michigan when Chicago was originally founded as a city. This makes St. Clair Street roughly the western border of the area.

claimed title to the area based on riparian rights. This period also featured a conspiracy to secure the land using scrip given to the survivors of a Mexican War hero and a scheme to claim the land for a branch of the Potawatomi Indians, who had occupied the area before white settlers arrived. The third period, from roughly 1915 to 1930, was when the wealthy landowners who claimed the land by riparian rights consolidated their control over the area, abetted by construction of structures by institutions of impeccable social standing, most notably Northwestern University.

One question raised by the history of Streeterville is why it took so long for the struggle over the newly formed land to be resolved. The answer would seem to be that as long as the reclaimed land stood vacant, it remained, in the minds of many, a resource that was up for grabs—and as long as it was perceived as being up for grabs, competition to establish property rights in the land continued. This competition, in turn, discouraged development of the land, which meant that it remained vacant and hence continued to be perceived as being up for grabs. The matter was resolved only when the claimants with the most resources started to build substantial structures on the reclaimed land. This eliminated the perception that the land was open to capture and instead fostered an understanding that it was no different from other solid land that was actively possessed.

Another question posed by the history of Streeterville is why the reclaimed land in this area of the City is overwhelmingly held in private ownership, whereas the reclaimed land south of the Chicago River, in what is now Grant Park, is public. The public trust doctrine, which arose out of conflict over control of filled land in the area of Grant Park, is not the explanation.² The public trust doctrine applied to the reclaimed land in both areas but was found by the Illinois Supreme Court to pose no barrier to the grant of private ownership rights in Streeterville.³ The main reason for the difference rather is that Grant Park—as well as Lincoln Park to the north and Burnham Park to the south—came to be actively controlled by public entities such as the Chicago Park District. Reclaimed land that is actively monitored by a public entity can suppress the perception that the land is up for grabs. Such public control came late to Streeterville and applied only to the outer perimeter formed by Lake Shore Drive and associated public walkways and beaches, as we shall describe. By the time public control of the perimeter was established, private ownership of the interior had been secured by private development. Grant Park was also protected by a public dedication promising that the land in that area was “for ever to remain

² See generally Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois* Central, 71 U. CHI. L. REV. 799 (2004) (providing an overview of the public trust doctrine and its origins in controversies involving land in modern-day Grant Park).

³ See *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 152–53, 45 N.E. 830, 835 (1896).

vacant of buildings.”⁴ This public dedication was vigorously enforced by abutting private landowners, most notably Montgomery Ward.⁵ No such public dedication restricted development in Streeterville.

We begin in Part I by considering general background conditions that promote uncertainty about the ownership of reclaimed land, together with factors aggravating this uncertainty in Illinois in the latter half of the nineteenth century. We then trace, in Parts II–VI, the history of Streeterville, from its origins as Kinzie’s Addition in the 1830s, through the period of natural accretion, to Streeter’s efforts to establish squatters’ rights, to the conspiracies associated with the McKee scrip and Potawatomi claims, to the efforts of the wealthy riparian owners to secure rights through the auspices of the Lincoln Park Commission. Part VII describes how the apparent victory of the riparian owners in the *Kirk* decision of 1896 failed to end the contestation over property rights, which persisted into the 1920s. Finally, Part VIII argues that the legal uncertainty ended only with the construction of substantial structures on the reclaimed land, including Northwestern’s Chicago campus.

I. UNCERTAIN PROPERTY RIGHTS IN RECLAIMED LAND

Uncertainty about property rights in Streeterville was partially a function of certain features that are common to reclaimed land everywhere. The uncertainty was aggravated by factors that applied with particular force to Illinois in the second half of the nineteenth century. We begin in section A with the features common to reclaimed land generally and then turn in sections B and C to the Illinois-specific factors.

A. *Weak Property Rights in Submerged Land*

One reason rights to reclaimed land are uncertain is that property rights in submerged land—the substratum on which such reclaimed land rests—are weak. With respect to solid land, no one questions that soil or structures added to the land belong to the owner of the solid land.⁶ In contrast, when soil or other fill is added to submerged land, there is no equivalent understanding that the reclaimed land automatically belongs to the owner of the submerged land. Why the difference?

⁴ See Joseph D. Kearney & Thomas W. Merrill, *Private Rights in Public Lands: The Chicago Lakefront, Montgomery Ward, and the Public Dedication Doctrine*, 105 NW. U. L. REV. 1417, 1426–27 (2011) (detailing the history, means, and extent of the preservation of the land in modern-day Grant Park as open space).

⁵ See *id.* at 1464–1500.

⁶ This is a function of the *ad coelum* doctrine, short for *cuius est solum eius est usque ad coelum et ad inferos* (he who owns the soil owns to the sky and to the depths), which is in turn a manifestation of the general principle of accession. See generally Thomas W. Merrill, *Accession and Original Ownership*, 1 J. LEGAL ANALYSIS 459, 467 (2009) (providing an overview of the doctrine).

Property rights in submerged land are weak in significant part because of the strong public interest in the water that lies above the submerged land. The water itself—certainly if it is navigable—has always been regarded as an open-access resource. From Roman times to English common law to the present, navigable waters have been regarded as a resource that should be kept open to the general public for travel by boat or for fishing.⁷ In modern times, recreational uses (e.g., swimming or rafting) and so-called ecosystem services (e.g., habitat for waterfowl or spawning grounds for fish) have been added to the list of public interests in bodies of water.⁸ If these interests are to be protected, submerged land must not be developed in ways that would interfere with public values. To take the most obvious example, submerged land should not be divided into multiple parcels having exclusion rights in the overflowing water, since this would create impossible transaction-cost barriers for those wishing to use the water for navigation or fishing.⁹

Property rights in submerged land are also weak because of certain physical attributes of the resource. Submerged land is typically unoccupied and undeveloped. It is also invisible in most circumstances—it is masked by the water, which ordinarily does not permit observation of the land from the surface. Because it is normally unoccupied and invisible, it is difficult to determine if it has been disturbed or invaded. Indeed, the traditional assumption about submerged land—which is still the law with respect to the deep seas beyond the exclusive economic zone—is that it is not owned or possessed by anyone.¹⁰ Like the water above it, submerged land is commonly assumed to be an open-access resource or commons. This undoubtedly remains the public perception even with respect to submerged land near the shore or under inland lakes.

The weakness of property rights in submerged land is revealed when particular economic values associated with that land become salient, such as a desire to harvest shellfish from the submerged land, or to salvage a sunken vessel and its cargo, or to drill for oil and gas below the seabed. The invisibility of submerged land and the associated difficulty of establishing secure property rights in such land mean that competitive races often break out when such values emerge. Indeed, competitions are common with

⁷ For good historical surveys, see Patrick Deveney, *Title, Jus Publicum, and the Public Trust: An Historical Analysis*, 1 SEA GRANT L.J. 13 (1976), and Glenn J. MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*, 3 FLA. ST. U. L. REV. 511 (1975).

⁸ See A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 8:20, at 482–84 (Rowan Seidel & Barbara J. Hagen eds., 2012).

⁹ See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1382 (1993).

¹⁰ See United Nations Convention on the Law of the Sea arts. 57–58, 60, 89, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994); H.J.W. COULSON & URQUHART A. FORBES, *THE LAW RELATING TO WATERS, SEA, TIDAL, AND INLAND* 2, 13–14 (2d ed. 1902).

respect to sunken vessels,¹¹ rights to oyster beds,¹² and rights to drill for oil and gas.¹³

The legal doctrines that apply when some Act of God such as a storm or flood causes new land to appear or disappear also reveal the relative weakness of property rights in submerged lands. From Roman times to the present, a distinction has been recognized between gradual and imperceptible changes to shorelines and sudden and perceptible changes.¹⁴ Both types of changes can be seen as presenting a conflict between the owner of the submerged land and the owner of the adjacent riparian land.

Gradual and imperceptible changes—accretion, erosion, and reliction—augment or diminish the rights of the owner of the adjacent riparian land. What is particularly significant about these doctrines, for present purposes, is that the riparian owner is regarded as the one having the most significant connection to any new land. In terms of the principle of accession—which includes accretion (gradual accumulation of land) and reliction (gradual recession of water)¹⁵—the existing solid land, where possession is already securely established, is regarded as the prominent asset to which the new resource attaches. The submerged land, where ownership is not associated with any actual occupation and is invisible, has a much weaker claim on the new resource.¹⁶

Changes that are sudden and perceptible, called avulsions, do not result in any modification of property boundaries.¹⁷ If a large chunk of land suddenly washes away in a hurricane, the boundary remains as it was before, although some of the riparian owner's land is now submerged. Similarly, if a river suddenly breaks through an oxbow, isolating a parcel of

¹¹ See, e.g., *Eads v. Brazelton*, 22 Ark. 499 (1861). In modern times, the competition for wrecks is likely to pit salvors against governments, which have taken to claiming wrecks based on sovereign ownership of the vessels or the submerged land in which they are found. See, e.g., *Odyssey Marine Exploration, Inc. v. Unidentified Shipwrecked Vessel*, 657 F.3d 1159 (11th Cir. 2011) (holding that federal court lacked admiralty jurisdiction over a wreck discovered by a salvage company, given evidence submitted by the government of Spain that it was a military vessel).

¹² See, e.g., BONNIE J. MCCAY, *OYSTER WARS AND THE PUBLIC TRUST: PROPERTY, LAW, AND ECOLOGY IN NEW JERSEY HISTORY* 135–37 (1998).

¹³ See, e.g., ROBERT SUGDEN, *THE ECONOMICS OF RIGHTS, CO-OPERATION AND WELFARE* 91–93, 101–03 (Palgrave MacMillan, 2d ed. 2004) (1986) (recounting the conflict over allocation of rights to North Sea oil and how that allocation deviated from the legal rights to submerged land reflected in international law).

¹⁴ See Joseph L. Sax, *The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed*, 23 *TUL. ENVTL. L.J.* 305 (2010) (tracing the history of the distinction and its reception in American law).

¹⁵ See TARLOCK, *supra* note 8, § 3:44, at 84–85; Merrill, *supra* note 6, at 465–66.

¹⁶ Where accession operates, “small objects become accessions to great ones, and not great to small.” 1 DAVID HUME, *A TREATISE OF HUMAN NATURE* 328 n.75 (David Fate Norton & Mary J. Norton eds., Clarendon Press 2007) (1739). For a modern account couched in terms of game theory, see SUGDEN, *supra* note 13.

¹⁷ See *Nebraska v. Iowa*, 143 U.S. 359, 361 (1892) (and authorities cited).

land from its previous owner, the parcel continues to belong to whoever owned it before. By and large, however, the doctrine of avulsion, like the doctrine of accretion, privileges the owner of existing solid land relative to the owner of submerged land. Ownership of solid land, which typically has been actively possessed, is not lost by sudden and perceptible acts of nature. Nor does the owner of submerged land gain a windfall through such events.

What about additions to solid land brought about by artificial filling? Artificial filling is obviously different in important respects from changes to the shoreline produced by Acts of God. Awarding title to artificially filled land to the riparian owner would create a serious moral hazard. Riparian owners would have a powerful incentive to augment their holdings by filling, even at the expense of public rights in open waters and free navigation. Consequently, courts have long assumed that riparian owners who engage in deliberate filling of submerged land, or who erect structures in the water that cause their land to be augmented by accretion, cannot claim title to the new land.¹⁸

Who then owns artificially created land? The logic of the accretion–avulsion distinction suggests that such land should belong to the owner of the submerged land. If someone dumps enough dirt on submerged land to cause it to turn to solid land, the change will be sudden and perceptible, and thus should be classified as an avulsion. If such artificial avulsions are treated like other avulsions for purposes of title, then title should remain as it was before the change took place—that is, with the owner of the submerged land. There is some authority supporting this analysis. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,¹⁹ for example, the Supreme Court concluded that Florida law could be construed as allowing the owner of submerged land (the State of Florida, as it happened) to engage in artificial filling on submerged land to create an expanded public beach, because this would be regarded under Florida law as an artificial avulsion.²⁰

Nevertheless, there are relatively few cases that explicitly treat deliberate filling as an artificial avulsion.²¹ And the precedents that do exist, including *Stop the Beach*, admit of unease about the result.²² Perhaps this is because allowing the owner of the submerged land to engage in unrestricted artificial filling as an incident of its ownership of such land

¹⁸ See, e.g., *Lovington v. Cnty. of St. Clair*, 64 Ill. 56, 65 (1872), *aff'd*, 90 U.S. (23 Wall.) 46 (1874) (riparian owner can claim accretions caused by erection of artificial structure, but only if the structure was made by some third party on other land); *Brundage v. Knox*, 279 Ill. 450, 466, 117 N.E. 123, 128 (1917) (to similar effect).

¹⁹ 130 S. Ct. 2592 (2010).

²⁰ See *id.* at 2611–12.

²¹ See 3 HENRY PHILIP FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* 2485–86 (1904).

²² See, e.g., 130 S. Ct. at 2612 (describing the result as “odd” and “counter-intuitive”).

could interfere with public rights of navigation and fishing. And even if the owner of the submerged land (commonly but not universally the state) is mindful of public rights, filling submerged land can interfere with the private rights of riparian owners by blocking access to the water or impairing other riparian rights such as the right to view the water. Perhaps in part for these reasons, the federal government—through the U.S. Army Corps of Engineers—has been given regulatory authority over any dredging and filling of navigable waters; this authority acts as a trump of state property rights in submerged land.²³

As a matter of historical practice, the treatment of artificial filling has been far from uniform or clear. We know that many states permitted or even encouraged artificial filling and often awarded newly formed landfill to abutting riparian owners.²⁴ It is also probable that surreptitious filling has been tolerated as a way of augmenting riparian land, if only because it is difficult to detect and prevent. In short, although the logic of the common law distinction between accretion and avulsion would seem to award title to land created by artificial filling to the owner of the submerged land on which the fill is placed, the actual treatment of such conduct has been mixed, creating significant uncertainty about the legal status of artificially filled land.

B. *A Changing Baseline of Title to Submerged Land*

The uncertainties that generally afflict reclaimed land were heightened in Illinois in the late nineteenth century by shifting legal understandings about who held legal title to the submerged land beneath Lake Michigan. Here it is important to trace some background about the evolution of American law concerning ownership of land under navigable waters.

In English law, an important distinction was maintained between navigable and non-navigable waters. With respect to navigable waters, the King was said to own the submerged lands, subject to the rights of all subjects to navigate and to fish.²⁵ In effect, the land was subject to a public servitude for navigation and fishing. When the American colonies declared their independence, they were held to succeed to the rights of the Crown in

²³ See Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 407 (2006); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251, 1344 (2006) (allowing the Secretary of the Army, acting through the Chief of Engineers, to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites”).

²⁴ See, e.g., HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870, at 44–68 (1983); TARLOCK, *supra* note 8, § 8:25, at 492–93.

²⁵ See Lord Mathew Hale, *De Jure Maris et Brachiorum Ejusdem*, in 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND, FROM MANUSCRIPTS 5, 6–7 (Dublin, Francis Hargrave ed., 1787). Technically, English law recognized only a presumption that lands beneath tidal waters belonged to the King. If one could produce a written grant clearly conveying the land to a private party, the grant would be upheld. In practice, this meant only that the land was not inalienable.

this respect. So the state governments were deemed to own the lands beneath navigable waters, again subject to the two historical public rights.²⁶ In 1845, the Supreme Court held that newly formed states carved out of the federal public domain were entitled to these same rights of ownership with respect to submerged lands beneath navigable waters.²⁷ This came to be known as the “equal footing” doctrine: the new states stood on an equal footing with the original states in terms of their ownership of submerged lands.²⁸

There was a complication. English law, at least as understood by American commentators, defined “navigable waters” to mean waters subject to the ebb and flow of the tides.²⁹ This made sense in the English context, with its long coastline and short rivers, most of which were tidal in the reaches where commercial traffic was important. So, in England, the Crown was deemed to be the owner of submerged lands beneath tidal waters—but submerged land under rivers, lakes, and ponds not washed by the tides was owned by the abutting riparian landowner to the centerline of the body of water.³⁰ This set of understandings can be called the “English rule” for ownership of submerged lands under non-navigable waters.³¹

America, unlike England, contained many long rivers and large internal lakes that were not tidal and yet were critical to interstate commerce. So the English definition of navigable waters did not make sense in the American context. The Supreme Court eventually recognized this: it held—initially only for purposes of admiralty jurisdiction—that “navigable” in the United States means navigable in fact.³² The Court also eventually held that “navigable” means navigable in fact for purposes of the equal footing doctrine.³³ But there was a wrinkle, and it was to contribute to confusion over rights to submerged lands. With respect to waters that were navigable in fact, the equal footing doctrine meant that each state was free to *decide for itself* how to determine title to land

²⁶ See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410–18 (1842).

²⁷ See *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228–29 (1845).

²⁸ See James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*, 32 *LAND & WATER L. REV.* 1, 34–36 (1997).

²⁹ See Daniel J. Hulsebosch, *Writs to Rights: “Navigability” and the Transformation of the Common Law in the Nineteenth Century*, 23 *CARDOZO L. REV.* 1049, 1083–90 (2002) (expressing some skepticism about whether the American commentators got English law right).

³⁰ See JOSEPH K. ANGELL, *A TREATISE ON THE COMMON LAW IN RELATION TO WATER-COURSES* 14–18 (Boston, Wells & Lilly 1824); 3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 528–29 (Boston, Little, Brown & Co., 9th ed. 1858).

³¹ See *Kearney & Merrill*, *supra* note 2, at 828.

³² See *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851).

³³ See *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 435–37 (1892).

beneath such waters.³⁴ In effect, each state could choose whether to embrace the English view of submerged land ownership with respect to such lands or, instead, what could be called the American rule, which awarded title to land under waters that were navigable in fact to the state government.³⁵

The resulting understanding of the equal footing doctrine has generated a confusing pastiche of rules in the United States about who owns submerged lands. The doctrine means, for example, that where a navigable river forms the boundary between two states, the submerged land on one side of the centerline of the river can belong to the state while on the other side a private party owns title to the submerged land.³⁶

Nor is there any requirement of internal consistency, as is illustrated by the law in Illinois. The state courts in Illinois initially applied the English rule to land beneath navigable rivers, including the Mississippi, Ohio, and Chicago Rivers.³⁷ Riparian owners whose land bordered Lake Michigan had every reason to believe that the English rule for establishing ownership of submerged land would apply to them, too. Although there was no definitive decision to this effect, the behavior of legally advised parties such as the City of Chicago and the Illinois Central Railroad was consistent with this understanding.³⁸ Starting in 1860, however, the Illinois Supreme Court began inching toward the American rule, at least for Lake Michigan and other large lakes. In that year, the court interpreted a deed that described the boundary of property as "Lake Michigan" to mean that ownership extended only to the edge of the lake.³⁹ Soon, lawyers began advising owners of riparian property on Lake Michigan that they had no claim to the bed of the lake.⁴⁰ For a time, it was unclear who did own it: The federal government? The State? The unorganized public? Although the result was foreshadowed in earlier federal decisions,⁴¹ it was not until 1896 that the Illinois Supreme Court definitively ruled that the State owned the

³⁴ In other words, federal law controlled as to whether waters were navigable, but state law controlled as to the ownership of submerged land under waters that were navigable. *See* *Packer v. Bird*, 137 U.S. 661, 666–70 (1891); *Shively v. Bowlby*, 152 U.S. 1, 40 (1894).

³⁵ *See* *Kearney & Merrill*, *supra* note 2, at 828–29.

³⁶ *See* *Louisiana v. Mississippi*, 466 U.S. 96, 98 (1984).

³⁷ *See* *Middleton v. Pritchard*, 4 Ill. (3 Scam.) 510, 518–22 (1842) (a riparian owner on the Mississippi holds title to the bed of the river to the centerline); *Ensminger v. People*, 47 Ill. 384, 388–92 (1868) (noting the same rule for the Ohio River); *City of Chicago v. Laflin*, 49 Ill. 172, 176 (1868) (applying the same rule for the Chicago River).

³⁸ *See* *Kearney & Merrill*, *supra* note 2, at 830, 837.

³⁹ *See* *Seaman v. Smith*, 24 Ill. 521, 525 (1860); *see also* *Trs. of Sch. v. Schroll*, 120 Ill. 509, 12 N.E. 243 (1887) (applying rule to a different lake).

⁴⁰ *See* *Kearney & Merrill*, *supra* note 2, at 833 n.153.

⁴¹ *See, e.g., Illinois v. Ill. Cent. R.R.*, 33 F. 730, 755–57 (N.D. Ill. 1888), *aff'd*, 146 U.S. 387 (1892).

land beneath Lake Michigan.⁴² In other words, Illinois eventually decided to follow the English rule for rivers and the American rule for Lake Michigan.

Whatever the merits and demerits of the state ownership doctrine, adoption of this understanding of title unquestionably added to uncertainty about who controls land created where water once stood. In previous writing, we have described how the tectonic shift in Illinois law from the English to the American rule with respect to title to the bed of Lake Michigan unleashed intense competition to claim the submerged land on the lakefront in Chicago. In the late 1860s, multiple groups attempted to secure legislation from the State transferring ownership of the submerged land to themselves, for purposes of constructing a new outer harbor in the lake.⁴³ The competition was won by the Illinois Central Railroad, which secured such a grant in 1869, only to have it repealed in 1873.⁴⁴ This led to litigation that was resolved only in 1902.⁴⁵ Later, the state legislature authorized a massive project filling up the lakeshore in the area now known as Grant Park.⁴⁶ This gave rise to an epic struggle over whether the newly created land would be used as a site for the construction of monumental buildings or as open space free of any substantial structures—a struggle that continues to this day.⁴⁷ The reverberations from this shift in the law also fueled the disputes over ownership of filled land in Streeterville.

C. *The Weak State*

A third factor that contributed to uncertainty about rights to filled land was the weakness of the state as a political institution. Weak state governments, such as Illinois in the late nineteenth century, could easily be prevailed upon to convey rights to submerged lands.⁴⁸ And when they retained title, they were unable to assert effective control over such lands. The states had no department of natural resources to monitor encroachment

⁴² See *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 145–47, 45 N.E. 830, 833 (1896) (State owns the bed of Lake Michigan, distinguishing rule that applies to rivers); see also *Fuller v. Shedd*, 161 Ill. 462, 44 N.E. 286 (1896) (holding that riparian owner abutting Wolf Lake owned only to the shore, not to the centerline).

⁴³ See *Kearney & Merrill*, *supra* note 2, at 842–53, 860–77.

⁴⁴ See *id.* at 860–77, 905–12.

⁴⁵ See *id.* at 912–24.

⁴⁶ See *Kearney & Merrill*, *supra* note 4, at 1435–38.

⁴⁷ See *id.* at 1470–1517.

⁴⁸ See, e.g., *Kearney & Merrill*, *supra* note 2, at 830, 837 (discussing conveyance by the State to the Illinois Central Railroad); *Kearney & Merrill*, *supra* note 4, at 1437–38, 1479–80 (discussing grants by the State to the South Park Commissioners); *infra* Part VI (describing conveyance of submerged land by the State to the Lincoln Park Commissioners and through them to private riparian owners).

on submerged lands.⁴⁹ All this, combined with legal uncertainty about ownership and control over these lands, invited machinations by private interests seeking to capture values associated with those lands.

The relative weakness of the state governments in controlling rights to submerged lands is revealed by the evolution of another doctrine that affected the use and control of submerged lands: the privilege of riparian owners to "wharf out" to reach water deep enough to be accessible by boat. If the English rule of title to nontidal submerged land applies, then obviously a riparian owner can wharf out: such a riparian owner also owns the submerged land, and, so long as the wharf (or pier or dock) does not interfere with public rights of navigation, construction of the wharf is unproblematic.⁵⁰ The more difficult case is where the state owns the submerged land—i.e., where the waters are tidal or are navigable in fact and the American rule of ownership applies. In these circumstances, many jurisdictions, following presumed English law, have held that a riparian owner still has the right to wharf out to the navigable portion of the water, provided that there is no interference with public navigation.⁵¹ This understanding made sense at a time when the state was weak and there were few public resources for the construction of wharfs and docks. Public access to transportation by water, in such circumstances, required private initiative. As government resources grew and governments increasingly began to sponsor construction of public wharfs and piers, many jurisdictions renounced the privilege to wharf out over publicly owned submerged lands.⁵²

The legal status of the wharfing-out privilege has always been unclear, which has given rise to further uncertainties when the government has moved to restrict the privilege. If the submerged land is owned by the state as sovereign, then one view is that the privilege is a mere license, and, under the doctrine of "purprestures," the state can withdraw the privilege for any reason, or no reason at all.⁵³ Another view is that the privilege is a species of riparian property rights and can be withdrawn only if the state proves that the wharf or dock is a public nuisance.⁵⁴ This would typically

⁴⁹ Cf. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 163–66 (1973) (describing the weakness of state institutions during the nineteenth century and providing an example of an Illinois ferry regulation that was left entirely to private citizens for its enforcement).

⁵⁰ See, e.g., *City of Chicago v. Laflin*, 49 Ill. 172 (1868).

⁵¹ See, e.g., *Dutton v. Strong*, 66 U.S. (1 Black) 23, 31–32 (1861); *R.R. v. Schurmeir*, 74 U.S. (7 Wall.) 272, 286–89 (1868); *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 504 (1870); see also 1 FARNHAM, *supra* note 21, at 533 (discussing doctrine).

⁵² See, e.g., *Revell v. People*, 177 Ill. 468, 486–89, 52 N.E. 1052, 1058–59 (1898); *Oakland v. E. K. Wood Lumber Co.*, 211 Cal. 16, 22–23, 292 P. 1076, 1078–79 (1930) (per curiam); see also 1 FARNHAM, *supra* note 21, at 544–45 (discussing *Revell*).

⁵³ See 1 FARNHAM, *supra* note 21, at 541; Alfred E. McCordic & Wilson G. Crosby, *The Right of Access and the Right to Wharf Out to Navigable Water*, 4 HARV. L. REV. 14, 19–21 (1890).

⁵⁴ See 1 FARNHAM, *supra* note 21, at 537–39.

entail a judicial finding that the wharf or dock interferes with rights common to the general public, such as navigation or fishing. The understanding of which rule applies has, once again, exhibited great instability. For example, New York went from being a public nuisance state to being a public nuisance state, at roughly the same time that, in the late nineteenth century, Illinois went from being a public nuisance state to being a public nuisance state.⁵⁵ Most states today require a license from a governmental agency to build and maintain a dock or wharf; this represents a kind of intermediate position between the two polar positions that emerged at the end of the nineteenth century.⁵⁶

In short, the inherent weakness of property rights in submerged land, changing understandings about ownership of submerged land, and weak state institutions all converged in nineteenth-century Illinois to create conditions ripe for conflict among rival groups seeking to capture values associated with filled land. This, as we shall see, is a one-sentence explanation for what became the battle for Streeterville.

II. KINZIE'S ADDITION

Before Chicago became an organized community, it was a military fort and trading post. Beginning in 1803, the military outpost, Fort Dearborn, was located on the south bank of the Chicago River where Michigan Avenue is located today. Across the river, on the north bank, was a small farm and trading post belonging to one John Kinzie.⁵⁷ Kinzie first came to the area in 1804, left during the War of 1812 when the fort was burned (and thirty-eight of its occupants were killed by Potawatomi Indians), and returned in 1816, when the fort was rebuilt.⁵⁸ In 1821, a certain John Wall surveyed the area for the federal Public Land Office, following the rectangular grid system established by the Land Ordinance of 1785.⁵⁹ Wall's hand-drawn map demarcated the area occupied by Kinzie's farm as north fractional section 10, township 39 North, range 14 East, of the third principal meridian. He calculated that it contained 102.29 acres of land.⁶⁰

⁵⁵ Compare *Barnes v. Midland R.R. Terminal Co.*, 193 N.Y. 378, 85 N.E. 1093 (1908), with *Revell*, 177 Ill. 468, 52 N.E. 1052.

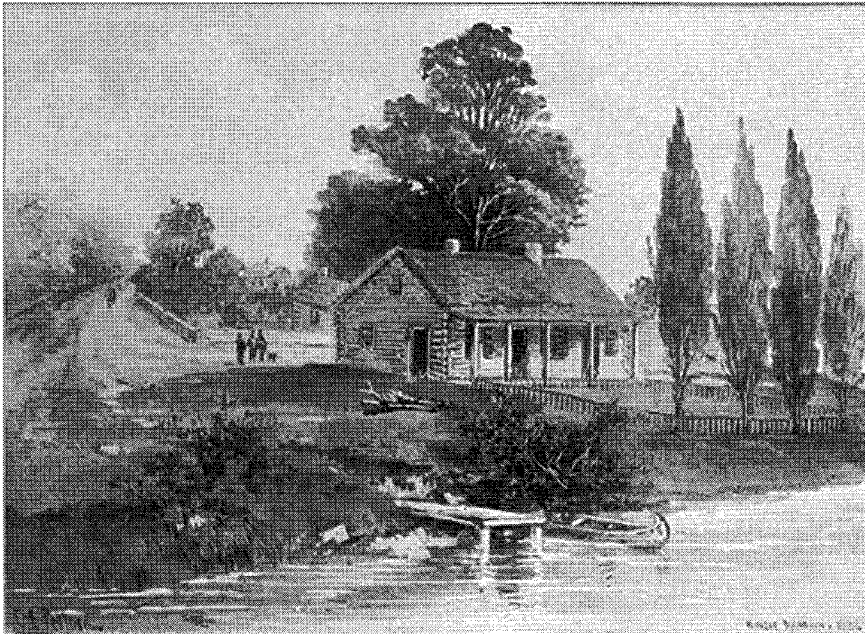
⁵⁶ See 1 FARNHAM, *supra* note 21, at 550–51.

⁵⁷ For a history of Chicago from its earliest beginnings, see ULRICH DANCKERS & JANE MEREDITH, *EARLY HISTORY OF CHICAGO* (2000).

⁵⁸ See ANNE DURKIN KEATING, *RISE UP FROM INDIAN COUNTRY: THE BATTLE OF FORT DEARBORN AND THE BIRTH OF CHICAGO* 68–70, 146–50, 170–72, 187–88, 191–92, 209–22 (2012) (recounting Kinzie's story in detail).

⁵⁹ See PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM: 1785–1820*, at 179–97 (1910) (providing a detailed examination of the Land Ordinance of 1785); see also BILL HUBBARD JR., *AMERICAN BOUNDARIES: THE NATION, THE STATES, THE RECTANGULAR SURVEY* 183–214 (2009) (summarizing the rectangular survey system in the Ordinance).

⁶⁰ See Edward O. Brown, *The Shore of Lake Michigan, A Paper Read Before the Law Club of the City of Chicago* 7–8 (Apr. 25, 1902) (recounting Wall's survey). To view the survey itself, see *Before*

FIGURE 1: KINZIE'S CABIN⁶¹

In 1831, Robert A. Kinzie, John's son, applied at the Land Office to make an entry on north fractional section 10 under the preemption acts, paying the statutory rate of \$1.25 per acre.⁶² Two years later, the younger Kinzie subdivided the tract into lots and blocks and recorded a plat that came to be known as "Kinzie's Addition" to the City of Chicago.⁶³ The land so subdivided was bounded on the south by the Chicago River, on the east by Lake Michigan, on the west by Wolcott Street (which would later become State Street), and on the north by what would become Chicago Avenue. The street running north and south nearest the lake was called "Sand Street" (later renamed St. Clair Street); at approximately Huron Street (to the north) the shore of the lake bent to the west, at which point (largely between Huron and Superior streets and altogether before Chicago Avenue) Sand Street was cut off by the water.⁶⁴ In 1837, the United States issued Robert Kinzie a patent conferring fee simple title to the tract and noting the acreage as stated on the 1821 survey.

the Canal: Early History, BRIDGEPORT, <https://www.uic.edu/orgs/LockZero/I.html> (last visited Apr. 25, 2013) [hereinafter Wall Survey].

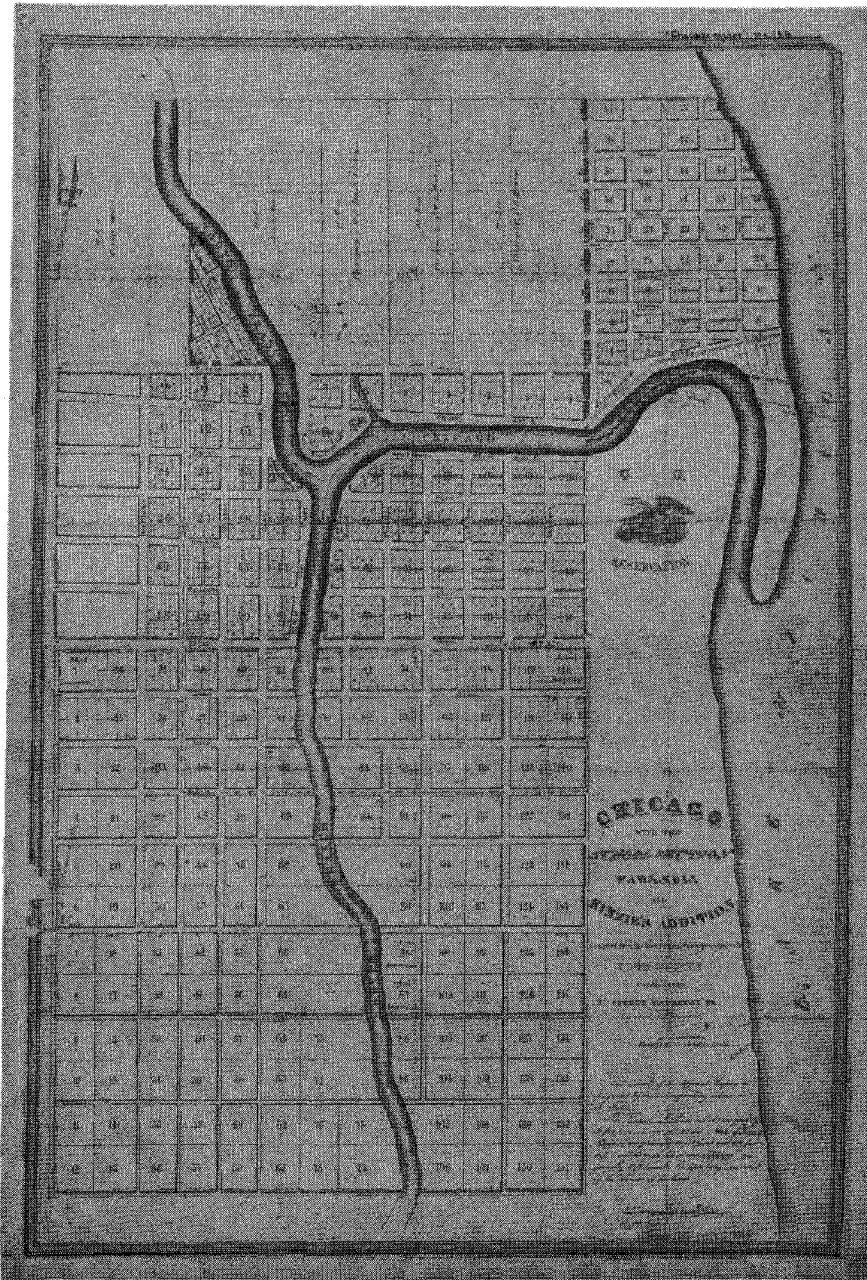
⁶¹ On file with the Chicago History Museum DN-0001288.

⁶² See Harvey M. La Follette et al., 26 Pub. Lands Dec. 453, 457 (1898).

⁶³ See *Kinzie v. Winston*, 56 Ill. 56, 59 (1870).

⁶⁴ See *id.* at 59–60; *infra* Figures 3, 6.

FIGURE 2: CHICAGO, INCLUDING KINZIE'S ADDITION (1834)⁶⁵



⁶⁵ On file with the Chicago History Museum ICHI-37308. Kinzie's Addition is the platted land in the upper right-hand corner of the map.

The natural barrier on the southern edge of Kinzie's Addition, the Chicago River, was long recognized as having great potential as a port. It was, however, unusable for navigation in its natural state: a sand bar at its mouth caused the river to curve south and made the entrance too shallow for the ships that plied the Great Lakes.⁶⁷ In 1833 and 1834, soldiers stationed at Fort Dearborn built piers on the north and south banks of the river, directing its flow straight into Lake Michigan. This alteration, supplemented by periodic dredging, turned the river into a functional port.⁶⁸ Chicago soon began its phenomenal growth as a city. Real estate values, including those in Kinzie's Addition, rose dramatically, punctuated by occasional downturns during times of financial distress.⁶⁹

The current in the southern part of Lake Michigan generally moves in a counterclockwise direction.⁷⁰ Though not anticipated when the mouth of the river was straightened by piers, this was to have a profound effect on the riparian lands to the immediate south and north. South of the river, the current caused irregular but persistent erosion of the shore. By the 1840s, the area then known as Lake Park (Grant Park today) had nearly washed away, and Michigan Avenue was in danger of collapsing into the lake.⁷¹ After much wrangling, a solution was reached when the Illinois Central Railroad agreed to construct its rail line entering the City on piers in the lake, with a breakwater just outside the right of way, thereby protecting the shore against further erosion.⁷²

North of the river, the counterclockwise current generally led to accretion rather than erosion. As early as 1837, a chart labeled "Cap. Allen's Map" (Figure 4 below), which was evidently prepared by an officer stationed at Fort Dearborn, indicated that the shoreline north of the river had moved outward into the lake from where it stood when the "work was commenced" (i.e., when the straightening of the river had occurred).⁷³ The chart showed in this area two additional sandbars forming farther offshore, on a diagonal line running from the northwest to the southeast. The 1840s saw further accretion, so that soon an estimated 1200 feet of new land had augmented the original subdivision to the east of Sand Street. It was a gift of nature—new solid land formed on what had once been submerged land.

⁶⁷ See HAROLD M. MAYER, *THE PORT OF CHICAGO AND THE ST. LAWRENCE SEAWAY* 9–11 (1957); *supra* Figure 2.

⁶⁸ See MAYER, *supra* note 67, at 10–11.

⁶⁹ See HOMER HOYT, *ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO* 33–37 (Beard Books 2000) (1933).

⁷⁰ See DOUGLAS SCHROEDER, *THE ISSUE OF THE LAKEFRONT: AN HISTORICAL CRITICAL SURVEY* 2 (1964).

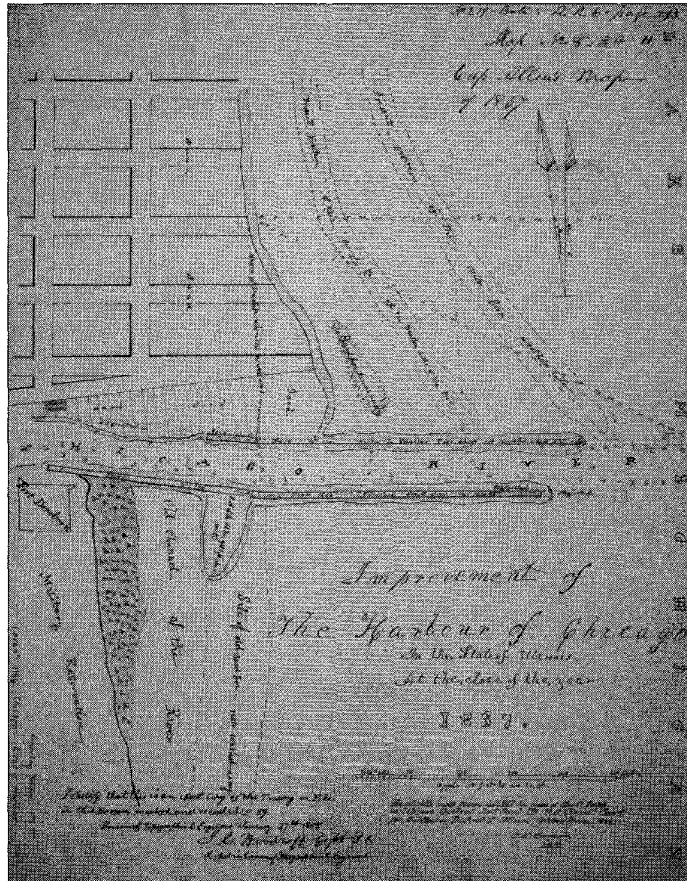
⁷¹ See Kearney & Merrill, *supra* note 4, at 1428–29.

⁷² See Kearney & Merrill, *supra* note 2, at 817–20.

⁷³ HAROLD M. MAYER & RICHARD C. WADE, *CHICAGO: GROWTH OF A METROPOLIS* 16 fig.1 (1969).

It was not long before legal maneuvering broke out over who had the right to capture the economic value associated with this new land.

FIGURE 4: CAP. ALLEN'S MAP (1837)⁷⁴



As we have seen, the doctrine of accretion provides that gradual and imperceptible deposits of new soil belong to the owner of the riparian land to which the soil attaches. Early decisions of the Illinois courts followed this recognized doctrine.⁷⁵ The idea sounds straightforward in principle, but the disputes over Kinzie's Addition suggest its application in practice to be anything but easy.

The first recorded dispute was between the United States government and Kinzie together with his grantees. The original shoreline of Kinzie's Addition (shown in Figures 2 and 3 above) ran due south, forming a right angle when the north pier extended the Chicago River into the lake on a

⁷⁴ On file with the Chicago History Museum ICHI-67019.

⁷⁵ See, e.g., *Godfrey v. City of Alton*, 12 Ill. 29 (1850); *Lovington v. Cnty. of St. Clair*, 64 Ill. 56 (1872), *aff'd*, 90 U.S. (23 Wall.) 46 (1874).

straighter line to the east (shown in Figure 4 above) than had been the case originally. The accretion, however, ran roughly on a diagonal line between the arms of this right angle (see Figure 4). Who then was the relevant riparian owner entitled to the new land—the private owners of land on the north–south arm or the federal government (as custodian of the pier) on the east–west arm? In 1850, the U.S. Attorney General gave a legal opinion that the United States, as the entity that had constructed and maintained the north pier, was entitled to claim the accretion as newly formed government land.⁷⁶ This legal reasoning seems doubtful: it was far from clear at the time that the United States retained title to the submerged land on which the pier was built (and indeed later, when the equal footing doctrine was extended to the Great Lakes, the courts established that the State of Illinois was the owner of the submerged land⁷⁷). No attempt was made by federal authorities in the aftermath of this opinion to assert control over the accreted lands. And no court ever endorsed the Attorney General’s theory.⁷⁸

Although accretion was well underway by 1850, it was some time before the first reported judicial controversy over rights to the new land appeared. The explanation may be that the accreted lands—which were nicknamed “the Sands”—became Chicago’s premier vice district.⁷⁹ The *Chicago Tribune* described the area as “the vilest and most dangerous place in Chicago,” “the resort and hiding place of all sorts of criminals, [where] the most wretched and degraded women and their miserable pimps[] congregated.”⁸⁰ Before owners of lots in Kinzie’s Addition could consider developing the new land, these inhabitants had to be removed. On April 20, 1857, after years of failed attempts, the deputy sheriff and thirty policemen, led by Mayor “Long John” Wentworth, delivered writs of ejection and tore down nine makeshift buildings.⁸¹

⁷⁶ See *Accretion at the Mouth of the Chicago River*, 5 Op. Att’y Gen. 264 (1850).

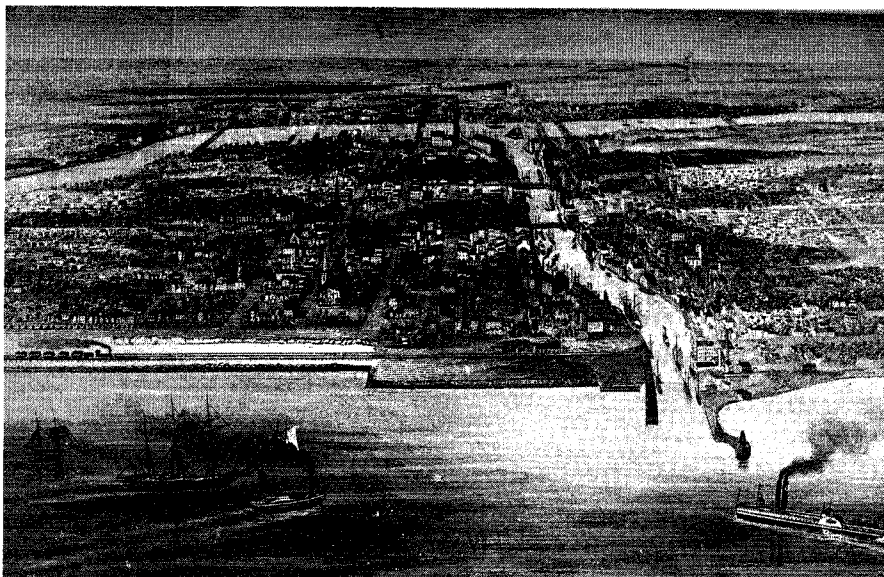
⁷⁷ See Kearney & Merrill, *supra* note 2, at 833.

⁷⁸ Which is not to say the federal rights theory went away. Much later, after controversies erupted over claims filed with federal authorities for private patents to additional reclaimed land in the area, the 1850 opinion was “the subject of grave comment and argument” among federal officials. Brown, *supra* note 60, at 10.

⁷⁹ See LIBBY HILL, *THE CHICAGO RIVER: A NATURAL AND UNNATURAL HISTORY* 80 (2000) (describing the “notorious reputation” of the area).

⁸⁰ *The Dens in the Sands Broken Up: Nine Buildings Torn Down and Six Burned*, CHI. TRIB., Apr. 21, 1857, at 1.

⁸¹ See *id.* The details of exactly how Wentworth carried out this raid are disputed. See JOHN J. FLINN & JOHN E. WILKIE, *HISTORY OF THE CHICAGO POLICE: FROM THE SETTLEMENT OF THE COMMUNITY TO THE PRESENT TIME* 82 (Chicago, Police Book Fund 1887) (explaining that “[i]t would be impossible to extract from the variety of accounts one that would stand the test of investigation” and concluding that the *Chicago Tribune* article, cited here in note 80, is the most accurate). Urban legend has it that Mayor Wentworth arranged a dogfight or horse race outside of the City in order to lure the male population away from the Sands on the day of the raid. See *id.* at 83; Kendall, *The Sands*, CHI. CRIME SCENES PROJECT (Dec. 17, 2008, 11:13 PM), <http://chicagocrimescenes.blogspot.com/2008/12/>

FIGURE 5: 1853 BIRD'S EYE VIEW OF CHICAGO⁸²

Whether or not the Wentworth raid put an end to vice in the area, enough respectability was established to convince owners with land titles in Kinzie's Addition to begin attending to the development potential of the land. The Ogden and McCormick families, owners of land in Kinzie's Addition just north of the Chicago River, formed an entity called the Chicago Dock and Canal Company, which obtained a special charter from the State in 1857.⁸³ The charter broadly authorized the company to construct on its own lands "and on the shore and in the navigable waters of Lake Michigan" various wharfs and docks "for the safety and accommodation of boats and vessels."⁸⁴ The firm eventually filled in the area north of the north pier, for a distance of a half-mile farther east into the lake, where it constructed a long slip parallel to the river called the Michigan Canal. (This still exists today, being known as the "Ogden Slip."⁸⁵) Like the extensive landfills of the Illinois Central south of the river, this massive landfill could arguably be justified under the wharfing-out privilege, on the ground that it was necessary to create the new slip and

sands.html. While no official report has ever confirmed this account, Mayor Wentworth "never denied that the story was well founded." FLINN & WILKIE, *supra*, at 83.

⁸² On file with the Chicago History Museum IChi-38871 (showing, to the right of the river, Sand Street, later renamed St. Clair Street, running north and south nearest Lake Michigan). *Cf. infra* Figure 6 (also showing Sand Street).

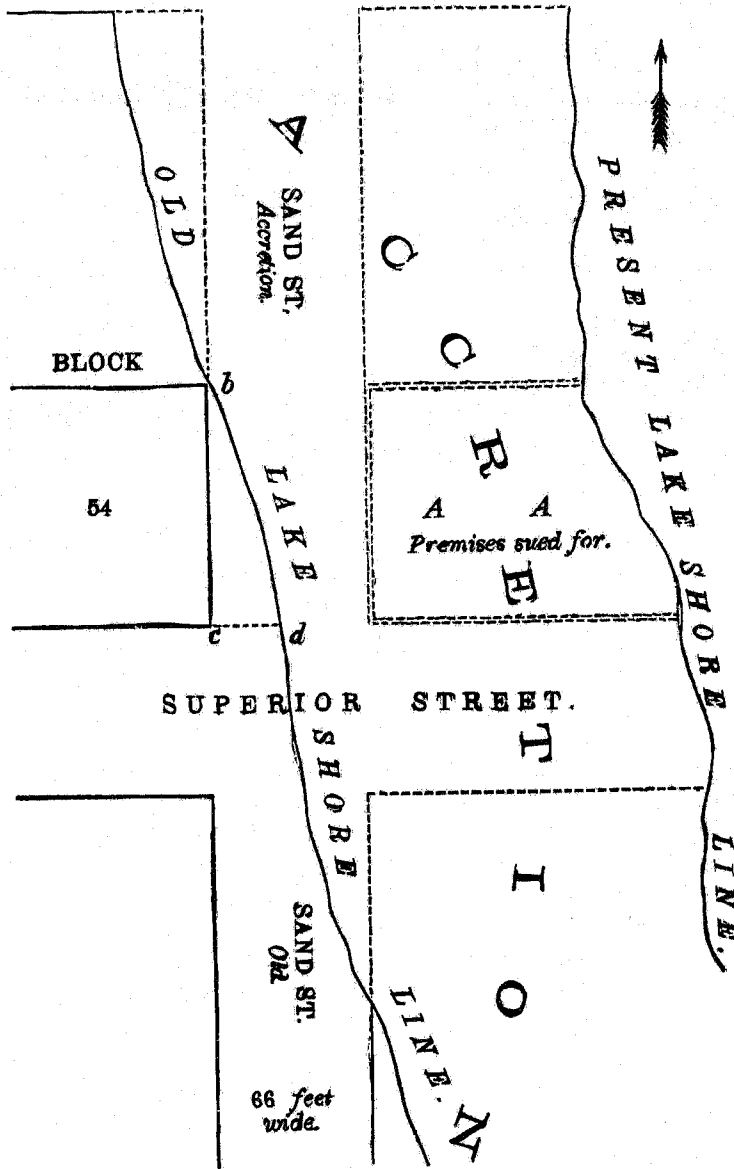
⁸³ See 1857 Ill. Laws 499.

⁸⁴ *Id.* § 4.

⁸⁵ See MAYER, *supra* note 67, at 10-12.

associated docking facilities. The new canal and wharf unquestionably accelerated the accretion occurring farther to the north.⁸⁶

FIGURE 6: ILLUSTRATION FROM *BANKS V. OGDEN* (1864)⁸⁷



⁸⁶ See REPORT OF THE SUBMERGED AND SHORE LANDS LEGISLATIVE INVESTIGATING COMMITTEE, H.R. 47th Sess., vol. 2, at 201-05 (Ill. 1911).

⁸⁷ *Banks v. Ogden*, 69 U.S. (2 Wall.) 57, 59 (1864).

Soon, various owners began investing in litigation to secure title to the new land formed by the accretion. At least seven controversies involving claims of accretion in “the Sands” are memorialized in published appellate opinions starting in the 1850s, including four opinions of the U.S. Supreme Court. One dispute arose from the fact that Water Street ran at an angle, making it difficult to identify which lot was entitled to the alluvial formations.⁸⁸ Another sprang up when the straightening of the Chicago River relocated some lots originally in Kinzie’s Addition to the south side of the river.⁸⁹ Others were created by Robert Kinzie’s 1842 bankruptcy: some of his creditors claimed that they were entitled to seize, as part of the debtor’s estate, accreted lands that formed after the bankruptcy.⁹⁰ Even further problems were created when Robert Kinzie’s widow claimed dower rights in lands that formed after his death.⁹¹

The most consequential dispute, in terms of future conflicts, concerned the legal significance of Sand Street, standing between the original subdivision and much of the newly formed land to the east (see Figure 6). If Kinzie had made a statutory dedication of the street, then under Illinois law the City of Chicago would hold fee simple title to the street, making the City the riparian owner entitled to all the newly formed land to the east.⁹² But Kinzie’s assignees argued, and the courts agreed, that Kinzie’s recordation of the subdivision occurred before Illinois had established its procedure for statutory dedications.⁹³ Consequently, Sand Street was a common law dedication, which meant the public had only an easement in the street.⁹⁴ The fee remained with the dedicator, Kinzie, and passed to his assignees.⁹⁵ This meant that owners of land on Sand (St. Clair) Street could claim, as riparian owners, title to accretions that formed to the east.

Litigation over accretions in Kinzie’s Addition persisted until 1879. Cumulatively, the decisions reveal a distinct preference for private ownership of accreted lands, perhaps because commercial development was assumed to be the preferred use for the land in question. The initial cases assume that the accretion was not the intended consequence of any deliberate human intervention. The last reported opinion, however, notes in passing that the accretions had created a half mile of new land, “partly by

⁸⁸ See *Jones v. Johnston*, 59 U.S. (18 How.) 150 (1855); *Johnston v. Jones*, 66 U.S. (1 Black) 209 (1861).

⁸⁹ See *Bates v. Ill. Cent. R.R.*, 66 U.S. (1 Black) 204 (1861).

⁹⁰ See *Kinzie v. Winston*, 14 F. Cas. 649 (Cook Cnty., Ill. Cir. Ct.) (No. 7,835), *aff’d*, 56 Ill. 56 (1870).

⁹¹ See *Chi. Dock Co. v. Kinzie*, 49 Ill. 289 (1868); *Lombard v. Kinzie*, 73 Ill. 446 (1874).

⁹² On the distinction between statutory and common law dedication, see *Kearney & Merrill*, *supra* note 4, at 1444 n.139.

⁹³ See *Banks v. Ogden*, 69 U.S. (2 Wall.) 57, 61–63, 67–68 (1864).

⁹⁴ See *id.* at 68.

⁹⁵ See *id.* at 68–69.

natural causes and partly by artificial means.”⁹⁶ This was an oblique acknowledgment that the efforts of Mother Nature had been augmented by the shovel. As Secretary of the Interior Cornelius Bliss observed later, the land had been created “at first by way of natural accretion which was afterwards accelerated by the building of piers into the lake and by the dumpage of refuse from the city.”⁹⁷

III. ONE HUNDRED SIXTY ACRES OF VACANT LAND

In the 1880s, litigation over accretion came to an end and was replaced by largely extrajudicial schemes to obtain rights to the newly formed land east of the original Kinzie’s Addition. Although the cause of this shift in the mode of conflict cannot be determined with complete confidence, the root source, we believe, was mounting uncertainty over the legal status of the new land.

One reason litigation over accretion stopped is that natural accretion was largely supplanted by artificial landfilling. All structures in Kinzie’s Addition burned to the ground in the great Chicago Fire of 1871.⁹⁸ We know that a great quantity of rubble from the fire was dumped into the lake in the area, south of the river, just east of downtown Chicago.⁹⁹ Although there is no documented evidence that rubble from structures in Kinzie’s Addition was likewise dumped into the lake in the area to the immediate east, it is probable that at least some dumping occurred here, if only to save the expense of carting it across the river to Lake Park.

It is also likely that artificial fill was deliberately used to augment the extent of the solid land. Recall that Illinois adopted the English rule for determining ownership of submerged land in the early nineteenth century, which assigned ownership of the bed of Lake Michigan to abutting riparian owners. This undoubtedly emboldened some riparian owners in Kinzie’s Addition to fill in submerged land they thought they owned.¹⁰⁰ After 1860, it appeared increasingly likely that the Illinois courts would hold that the

⁹⁶ *Chi. Dock & Canal Co. v. Kinzie*, 93 Ill. 415, 426–28 (1879).

⁹⁷ *Harvey M. La Follette et al.*, 26 Pub. Lands Dec. 453, 458 (1898).

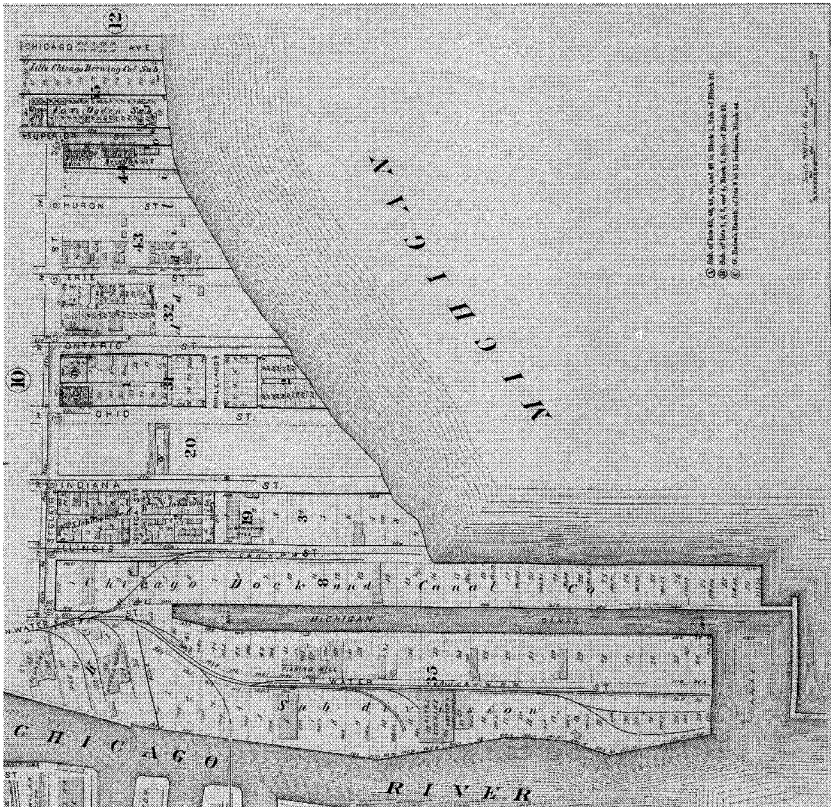
⁹⁸ See *MAYER & WADE*, *supra* note 73, at 108 fig.1 (map showing the area destroyed by the great fire of 1871). During the fire, the Sands served as a refuge for thousands of Chicagoans fleeing the flames of the City and carrying whatever possessions they could hold. HERMAN KOGAN & ROBERT CROMIE, *THE GREAT FIRE: CHICAGO 1871*, at 99 (1971). As the fire raged on and the heat became unbearable, many of those taking refuge had to take to the shallow waters. *Id.*

⁹⁹ See *Kearney & Merrill*, *supra* note 2, at 899.

¹⁰⁰ As one of the lawyers for the Lincoln Park Commissioners would later remark, “This accretion had been in the main natural, but at various points had been undoubtedly artificially aided by the shore owners who (some of them at least) thought and had been advised that they were entitled to reclaim land from the lake without limit, save as to the risk of interfering with navigable water.” *Brown*, *supra* note 60, at 10.

State owned the submerged land under the lake.¹⁰¹ Under standard riparian rights law, this would mean that any land created by artificial dumping belonged to the State.¹⁰² In any event, given the mounting uncertainty about ownership of artificial landfill, a riparian owner would be unlikely to build valuable structures or make other significant improvements on such land.

FIGURE 7: ROBINSON'S ATLAS OF THE CITY OF CHICAGO (1886)¹⁰³



It is instructive to consider what the land north of the Chicago River and east of Pine Street (today Michigan Avenue) looked like in the 1880s, before the era of extrajudicial competition began. Fortunately, we have a source, *Robinson's Atlas of the City of Chicago*, which shows—in detail, as seen in Figure 7—solid land, subdivision lines, and structures as of 1886. The atlas reveals, first, that the shoreline had moved dramatically to the east, relative to what was shown by the original Wall survey of 1821 or

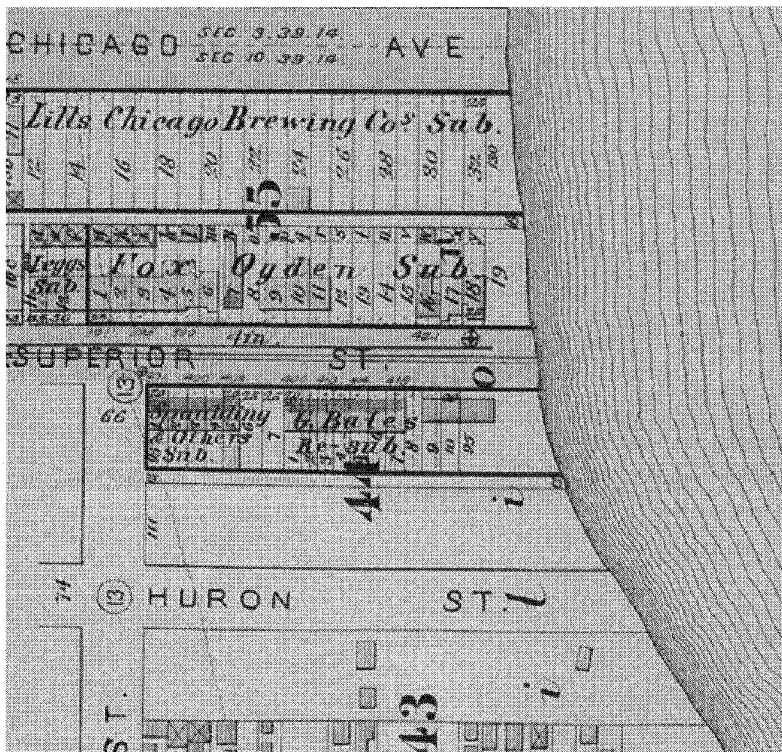
¹⁰¹ Cf. *Fuller v. Shedd*, 161 Ill. 462, 474–87, 44 N.E. 286, 290–95 (1896) (reviewing evolving jurisprudence from 1860 to 1896 on ownership of lakebeds).

¹⁰² See *supra* notes 14–20 and accompanying text.

¹⁰³ 3 E. ROBINSON, *ROBINSON'S ATLAS OF THE CITY OF CHICAGO* plate 11 (New York 1886), available at <http://encyclopedia.chicagohistory.org/pages/11064.html>.

even as suggested by the accretion cases of the 1860s and 1870s. Between the Chicago River and Illinois Street, the map shows solid land extending all the way to the east end of the north pier of the river. This was the location of the Michigan Canal previously mentioned. At Illinois Street, the shoreline retreats on a straight line sharply to the west. It then proceeds on a diagonal line to the northwest, to Superior Street, where it straightens out and heads due north again to Pearson Street (beyond the margin of Figure 7), where it again moves west. After that, the shoreline again straightens out and continues in a northerly direction to Oak Street, where Lake Shore Drive commences at the end of Pine Street and runs along the shoreline. In short, an extensive landmass, later calculated to be 160 acres,¹⁰⁴ had been formed between the river and Pearson Street, east of the original boundary of Kinzie's Addition.

FIGURE 8: LILL'S CHICAGO BREWING FROM ROBINSON'S (1886)¹⁰⁵



¹⁰⁴ This was the number of acres cited in a survey conducted by Interior Department officials in 1896. See Harvey M. La Follette et al., 26 Pub. Lands Dec. 453, 457 (1898). Although the survey was later annulled, see *infra* text accompanying notes 178–82, it was conducted by professionals and presumably accurate. Different acreage numbers are cited in other sources.

¹⁰⁵ ROBINSON, *supra* note 103.

More striking yet is the dearth of buildings in this area of newly formed land. Even the area in Figure 7 closest to the river has surprisingly few commercial structures and no houses. Most of the blocks had been subdivided into lots, but not all. All of the area between Indiana (now Grand) and Ohio remained vacant of lots, as were the eastern portion of the area between Ontario and Erie, both sides of Huron Street, and the area between Chicago and Pearson, among others. Even the areas that had been subdivided showed few or no structures. For example, as can be seen in Figure 8, the area south of Chicago Avenue, now occupied by Northwestern University, is shown as "Lills Chicago Brewing Cos. Sub." But there is only one small structure shown in the subdivision. In contrast, the land on Pine Street and on both sides of St. Clair was relatively full of structures. These areas, mostly just outside Figure 7, were, of course, part of the original Kinzie's Addition: title there was secure.

IV. THE DEESTRICT OF LAKE MICHIGAN

In the late 1880s, rather suddenly and simultaneously, four separate efforts were launched to gain title to the largely vacant land east of St. Clair Street (as Sand Street had been renamed before the Chicago Fire). As Edward O. Brown, a Chicago attorney who left the best eyewitness account of these struggles,¹⁰⁶ would write:

This large tract of land, situated in such an excellent portion of the city for residence property, but entirely unimproved, and for the time a mere barren waste, seemed to dazzle the eyes of various adventurers and speculators.

It seemed to them that it must be a sort of no-man's land, teeming with potential wealth beyond the dreams of avarice.¹⁰⁷

Success would ultimately go to a group that we shall call the "St. Clair Street owners," holders of property whose title traced to Kinzie's original patent. We discuss their efforts in Part VI, but the story lies substantially in unsuccessful efforts, one of which we discuss here and the others in Part V.

The most famous campaign—and the most persistent—was that of the legendary George Wellington Streeter, who is memorialized by a life-sized bronze statue at the intersection of Grand Avenue and McClurg Court, and for whom the area is now named.

¹⁰⁶ Brown came to Chicago in 1872, where he established the firm Peckham & Brown. See Walter Nugent, *A Catholic Progressive? The Case of Judge E.O. Brown*, 2 J. GILDED AGE & PROGRESSIVE ERA 5, 12–13 (2003). Later he was appointed chief attorney for the Lincoln Park Board of Commissioners, where he participated in suppressing the McKee scrip conspiracy and in facilitating the Lake Shore Drive extension on behalf of the St. Clair Street riparian owners. See *id.* at 12, 16–17. He delivered a lengthy address to the Law Club of the City of Chicago in 1902 recounting his version of these events, *supra* note 60, which is an invaluable source. Later he was elected a judge of the Superior Court of Cook County in 1903 and then appointed to the appellate division in 1904. See Nugent, *supra*, at 33–34.

¹⁰⁷ Brown, *supra* note 60, at 19.

Streeter's career has been well documented, and we will not attempt to offer a comprehensive account here.¹⁰⁸ Streeter was the quintessential scoundrel—profane, pugilistic, a braggart, and contemptuous of all authority. He was also a showman and a con artist.¹⁰⁹ He made, as more than one observer noted, good newspaper copy.¹¹⁰ He knew enough law to forge legal documents and defend himself in numerous trials, often successfully. There is no evidence that he understood the legal intricacies presented by property rights in submerged land. He had, however, an intuitive appreciation of how the legal uncertainties associated with that resource afflicted others. This he exploited with great skill.

Streeter's story, as recounted in an autobiographical book published by E.G. Ballard in 1914,¹¹¹ starts in the summer of 1886 when he and his second wife, Maria, outfitted a vessel named the *Reutan* to see whether it was fit to transport guns to rebels in Honduras.¹¹² Returning to Chicago from a trial run to Milwaukee, Streeter and Maria encountered a sudden gale that caused the *Reutan* to ground on a sandbar off the shore near Superior Street.¹¹³ They decided to stay put, and an island soon formed around the boat, augmented by fill obtained from contractors.¹¹⁴ For years, Streeter and Maria continued to live on the *Reutan* and fill in the submerged land around it.¹¹⁵ By 1893, as Streeter later boasted in his autobiography, "I had filled in all of the space between my boat and the shore to the west and south, and much farther to the northward"—altogether, he claimed, "a territory of one hundred and eighty-six acres."¹¹⁶ Streeter proclaimed the new land "The Deestriect of Lake Michigan," asserted that it was an independent nation—or at least independent of the

¹⁰⁸ A recent retelling, which does much to sort out fact from fiction, is WAYNE KLATT, *KING OF THE GOLD COAST: CAP'N STREETER, THE MILLIONAIRES, AND THE STORY OF LAKE SHORE DRIVE* (2011).

¹⁰⁹ In 1902, shortly after he was acquitted of murder by a hung jury, Streeter starred in a one-act play at the Chicago Metropolitan Theater, which depicted him as an American patriot and the Chicago police as acting on behalf of wealthy capitalists bent on destroying the American pioneer tradition. See Joshua Salzmann, *The Chicago Lakefront's Last Frontier: The Turnerian Mythology of Streeterville, 1886–1961*, 9 J. ILL. HIST. 201, 210–11 (2006). In the final scene, Streeter stood on stage while a giant American flag unfurled overhead. *Id.*

¹¹⁰ See, e.g., *id.* In later litigation with the publisher of his autobiography, see *infra* note 111, testimony was offered that a manuscript based on Streeter's life would be a "good seller." Affidavit of Oscar Doering at 2, *Streeter v. Ballard*, No. B3224 (Cook Cnty., Ill. Cir. Ct. June 13, 1914).

¹¹¹ EVERETT GUY BALLARD, *CAPTAIN STREETER: PIONEER* (1914). This book, which was based on interviews conducted with Streeter, is written in the first person as if it were an autobiography. See Kenneth F. Broomell & Harlow M. Church, *Streeterville Saga*, 33 J. ILL. ST. HIST. SOC'Y 153, 165 (1940).

¹¹² See BALLARD, *supra* note 111, at 214–15.

¹¹³ See *id.*

¹¹⁴ See *id.* at 217–20.

¹¹⁵ See *id.* at 218–19.

¹¹⁶ *Id.* at 220.

State of Illinois (the claim varied)—and had himself “elected” leader of this new “district” by an entourage of scruffy followers.¹¹⁷

FIGURE 9: STREETER’S “FORT” (1892)¹¹⁸



As suggested by this tale, which was mostly false,¹¹⁹ Streeter initially claimed the land east of Kinzie’s Addition by right of original discovery augmented by creation. He claimed to be the one who first discovered the land, which had emerged from the lakebed, and the one who labored to extend the land into a large tract of open space. Streeter undoubtedly contributed to, or at least invited, further artificial filling of the submerged land. But there is no way he was responsible for all of it. As discussed above, most of the land was created by natural accretion, augmented by artificial filling that occurred before Streeter arrived and later by the filling

¹¹⁷ See, e.g., Bill of Complaint of George Wellington Streeter at 8–12, *Streeter v. Healy* (Cook Cty., Ill. Super. Ct. Oct. 23, 1901).

¹¹⁸ On file with the Chicago History Museum ICHI-19835.

¹¹⁹ A more plausible version, which came out in a later fraud trial, is that Streeter’s boat was intentionally grounded on a calm summer evening, and he was allowed to leave it on dry land by Nathaniel K. Fairbank, arguably the riparian owner. Streeter then overstayed his welcome and became a squatter. See Salzmman, *supra* note 109, at 207–08.

performed by the Lincoln Park Commissioners in building the Lake Shore Drive extension after 1891.¹²⁰

Later, perhaps in emulation of rival claimants, Streeter developed an alternative theory of title. It was based on the Wall survey of 1821, which had been used to establish the original Kinzie's Addition.¹²¹ He claimed that the line on the map demarcating the shore of Lake Michigan was not a meander line but rather a boundary line.¹²² Meander lines were established by surveyors along the edge of bodies of water for purposes of ascertaining the quantity of land available for sale.¹²³ They were understood to be subject to revision in later litigation when the exact boundary would be established, depending on the facts on the ground, the applicable state law about who owned submerged land, and where the legal line of division between public and private ownership was located. Boundary lines, in contrast, were understood to be fixed delimitations of property rights established by survey, as under a metes-and-bounds survey system.¹²⁴ If the shoreline was a meander line, then Kinzie's patent would include the right to claim as property subsequent accretions. If it was a boundary line, then the accretions would arguably be part of the public domain open for claiming.

Relying on the theory that Wall's survey had established a boundary line, Streeter applied in 1895 for a patent on the "unclaimed" land outside Kinzie's Addition, invoking Maria's status as the widow of a Civil War veteran.¹²⁵ His application was rejected by the Land Office on the ground that the lands east of St. Clair Street "do not belong to the government, and, therefore, this Department has no jurisdiction to direct their survey or disposal."¹²⁶

¹²⁰ See *id.* (citing John W. Stamper, *Shaping Chicago's Shoreline*, 14 CHI. HIST. 44, 51–53 (1985–86)).

¹²¹ See Wall Survey, *supra* note 60.

¹²² See Bill of Complaint of George Wellington Streeter, *supra* note 117, at 8.

¹²³ See, e.g., *R.R. v. Schurmeir*, 74 U.S. (7 Wall.) 272 (1868); *Hardin v. Jordan*, 140 U.S. 371 (1891).

¹²⁴ On the distinction of meander lines from boundaries, see WALTER G. ROBILLARD ET AL., *BROWN'S BOUNDARY CONTROL AND LEGAL PRINCIPLES* § 9.14, at 254 (6th ed. 2009).

¹²⁵ KLATT, *supra* note 108, at 31. Congress had granted Civil War veterans and widows certain homestead rights involving public lands. See generally PAUL W. GATES, *PUB. LAND LAW REVIEW COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 281–83 (1968) (providing an overview of the congressional scheme and its implementation).

¹²⁶ *George W. Streeter et al.*, 21 Pub. Lands Dec. 131, 133 (1895).

FIGURE 10: STREETER'S ADVERTISING MAP (CA. 1903)¹²⁷



This led to Streeter's third device for claiming the land: he and two collaborators secured a copy of the original Kinzie patent, used acid to remove the original signatures and land description, and forged the necessary signatures and information to make it appear that Streeter had a valid federal patent to the land.¹²⁸ Before the forgery was exposed, Streeter managed to secure an abstract of title from a title company and convinced Rascher's Insurance Co. to publish a map showing a portion of the area as "Streeter's land."¹²⁹

¹²⁷ On file with the Chicago Public Library, Special Collections and Preservation Division, STR Box 1, Folder 43.

¹²⁸ See KLATT, *supra* note 108, at 70; Brown, *supra* note 60, at 32–33; Salzmann, *supra* note 109, at 208; *True Bills for Capt. Streeter*, CHI. TRIB., Feb. 1, 1902, at 3.

¹²⁹ See KLATT, *supra* note 108, at 45–46.

As he shifted back and forth from one theory to another, Streeter intuitively perceived that any claim of title would be strengthened, certainly in a psychological if not a legal sense, if he were in actual possession of some part of the land. Like the seafaring explorers of the sixteenth century, Streeter felt that it was imperative to plant a flag in the soil marking his “discovery” of the contested land. This explains his dogged efforts from 1886 to 1915 to maintain a foothold on some portion of the contested terrain. Whether it was the grounded *Reutan*, a makeshift fortress (see Figure 9 above), a tent, a shack, a boat club house, a broken-down omnibus, or a small brick building, Streeter nearly always sought to maintain some physical presence on the land.¹³⁰ The principal exceptions were when he was in jail or when others in league with him maintained a presence on the land, allowing him to live elsewhere.

FIGURE 11: STREETER AND “MA”¹³¹



Streeter’s efforts to maintain a foothold on the land were greatly assisted by the half-hearted attempts of the St. Clair Street owners to evict him. Nathaniel K. Fairbank, who had accumulated a fortune by processing lard and making soap and owned land on St. Clair between Huron and

¹³⁰ See *Saga of Streeterville—A Forty Year Real Estate War: Picturesque Squatter’s Futile Fight*, CHI. TRIB., Sept. 5, 1937, at E1.

¹³¹ On file with the Chicago History Museum ICHI-12593.

Superior streets, set the pattern here.¹³² He obtained an order of forcible entry and detainer against Streeter sometime after the *Reutan* beached but failed to enforce it before Streeter succeeded in tying the matter up in litigation.¹³³ Periodically, one or more owners would persuade the police to intervene or would hire private “detectives” to attempt to evict Streeter and his cohorts.¹³⁴ Most of these attempts were rebuffed by a show of force by Streeter and Maria, and later by Streeter and his fourth wife,¹³⁵ “Ma” Streeter (pictured in Figure 11 above).¹³⁶ On several occasions, Streeter was forced to retreat, but he always came back, by land or water.

The most serious episode occurred in 1902, when a young guard hired by an attorney for the St. Clair Street owners was shot and killed in a gun battle with Streeter’s gang.¹³⁷ Streeter was indicted for murder.¹³⁸ His first trial, in which he defended himself, ended with a hung jury; the second resulted in a manslaughter conviction. After spending less than a year in the Joliet state penitentiary, Streeter was released by a sympathetic judge.¹³⁹

What was Streeter’s objective in all this? There are occasional suggestions that he wanted to make a pest of himself to the St. Clair Street owners, whom he called “the millionaires,” in an attempt to get them to buy him off.¹⁴⁰ He was certainly a pest, but there is no indication that he ever extracted an offer of payment in return for forfeiting his “claim.” More obviously, Streeter made a living by duping unsophisticated real estate investors into buying deeds to lots in his District of Lake Michigan. At the peak of his success, before the forged deed was exposed, he sold lots out of

¹³² See KLATT, *supra* note 108, at 61; Salzmann, *supra* note 109, at 206–07.

¹³³ See *Fairbank v. Streeter*, 142 Ill. 226, 31 N.E. 494 (1892); *He Stands by the Ship*, CHI. TRIB., Sept. 10, 1890, at 1.

¹³⁴ See KLATT, *supra* note 108, at 68–69; K.C. Tessendorf, *Captain Streeter’s District of Lake Michigan*, 5 CHI. HIST. 152, 157 (1976); *The Fall of Streeterville: The Wounded*, CHI. TRIB., Nov. 15, 1915, at 2. The “hired tools,” it was said, would stand watch around the clock and, taking advantage of Streeter’s inability to guard each of his two habitations and boathouse simultaneously, would routinely cast possessions, such as Streeter’s piano and furniture, from the property at times of Streeter’s absence. BALLARD, *supra* note 111, at 232–35.

¹³⁵ There is significant confusion about Streeter’s various marriages and their status. KLATT, *supra* note 108, seems to have sorted most of it out. Streeter’s first wife, Minnie, ran away to join a vaudeville troop, likely without obtaining a divorce. See *id.* at 38. His second wife, Maria, died of injuries sustained in falling off a streetcar in 1903. See *id.* at 102. He was then married for about one month to a young girl of fifteen or sixteen named Mary Collins, who evidently believed Streeter’s claim that his land was worth millions. See *id.* at 103. She left him without seeking a divorce. *Id.* at 104. He then married Elma, or “Ma.” See *id.* at 38.

¹³⁶ See ‘Ma’ Streeter Fights On as the ‘Cap’n’ Dies, CHI. TRIB., Jan. 25, 1921, at 3. None of Streeter’s partners shied away from battle. For example, during a forceful attempt to oust Streeter and Maria from their lakefront home, she poured a pot of boiling water on five intruders, ending the battle. See *id.*

¹³⁷ See *District Battle Ends in Murder*, CHI. TRIB., Feb. 12, 1902, at 1.

¹³⁸ See *id.*; *Lay Murder to Streeter*, CHI. TRIB., Feb. 28, 1902, at 1.

¹³⁹ See KLATT, *supra* note 108, at 101–03.

¹⁴⁰ See Salzmann, *supra* note 109, at 207–08.

a parlor in the Tremont Hotel.¹⁴¹ One newspaper estimated that he had received \$100,000 in his nearly thirty-year career of engaging in sham land transactions.¹⁴²

There are two striking facts about Streeter's marathon career as a squatter. First, there is no publicly reported judicial decision holding him guilty of trespass. We know of at least two forcible entry and detainer actions—a statutory cause of action that presupposes the defendant to be in wrongful possession—brought by St. Clair owners against Streeter. The first, filed by Fairbank in 1890, resulted in a victory for Fairbank in the local justice court but was reversed on appeal by the Cook County Superior Court, where Streeter raised the defense that Fairbank's riparian rights included only natural accretion and not artificial landfilling.¹⁴³ Fairbank eventually got the original judgment reinstated by the Illinois Supreme Court, but on the hypertechnicality that the wrong judge had set the appeal bond.¹⁴⁴ The second was filed in 1901 by Louisa Healy, the widow of portrait artist George Healy, who claimed an interest in land between Pearson and Walton streets.¹⁴⁵ This resulted in an elaborate trial and a victory for Healy in the superior court, but the decision rested heavily on the determination that Streeter had been present on the land less than one year.¹⁴⁶ There was no appeal. There were numerous other legal actions against, and sometimes by, Streeter, but they involved ancillary issues such as fraud, assault, murder, or selling liquor on Sundays.¹⁴⁷ None of these proceedings brought the title of the St. Clair Street owners into question.

It is probably no coincidence that the St. Clair owners avoided a definitive judicial determination of their title in the long-running battle with Streeter. Fear of popular sympathy for the wily scoundrel may have been one reason. But a more likely explanation is that their title was doubtful—at least over much of the land in question. Streeter was correct in his defense against Fairbank, although he did not have a complete command of all the authorities that would confirm he was right. If the artificial filling of submerged land to which the State of Illinois had never given its consent had formed the ground that Streeter was occupying, then the State was the only authority that could evict him, not the St. Clair owners.¹⁴⁸

¹⁴¹ See *id.* at 207.

¹⁴² See *Chicago's 'Oasis' Raided by Police*, N.Y. TIMES, Nov. 15, 1915, at 8.

¹⁴³ See *He Is a Modern Crusoe*, CHI. TRIB., Nov. 7, 1891, at 9.

¹⁴⁴ See *Fairbank v. Streeter*, 142 Ill. 226, 31 N.E. 494 (1892).

¹⁴⁵ See *Healy v. Streeter*, No. 217933 (Cook Cnty., Ill. Super. Ct. Oct. 18, 1901).

¹⁴⁶ See *id.*

¹⁴⁷ See KLATT, *supra* note 108, at 94 (fraud trial); *id.* at 100 (assault); *id.* at 99–102 (murder); *id.* at 115 (selling liquor on Sunday).

¹⁴⁸ See *supra* text accompanying notes 98–100 (describing the artificial filling that followed the Chicago Fire).

The second striking fact about Streeter's long career is that the State of Illinois showed no interest in his agitation. This was so even though it became increasingly clear that the State held title to the submerged land out of which Streeter's "island" and the associated landfilling had allegedly emerged. Streeter had his run-ins with the Chicago police, and he fought pitched battles with private security guards hired by the St. Clair Street owners. But the State of Illinois was entirely absent from the scene. This underscores the weakness of the State as an institution at the time. The emerging legal consensus that the State owned the land sounded nice in theory, but in practice it was little different from saying that it was owned by no one at all.

V. THE MCKEE SCRIP AND POTAWATOMI CLAIMS

Captain Streeter was not the only one maneuvering to obtain property rights in the vacant land east of Kinzie's Addition. Other, more professional attempts—one involving veterans' rights and the other an Indian tribe—were afoot as well. Because they were more professional, they were more threatening to the St. Clair Street owners.

A. *The McKee Scrip Claim*

William R. McKee, a colonel with the Second Regiment Kentucky Volunteers, was killed in action during the Battle of Buena Vista in the War with Mexico.¹⁴⁹ In 1853, Congress enacted a private bill awarding each of his orphaned children a quarter section of land "to be located upon any vacant land of the United States."¹⁵⁰ As frequently happened in such cases, the McKee children sold their rights for cash.¹⁵¹ The McKee scrip, as it was called, eventually came into the hands of a group of adventurers led by Harvey M. LaFollette and Mathias Benner; they set their sights on using it to acquire the land east of the original Kinzie's Addition.¹⁵²

In 1896, the General Land Office rejected their initial application seeking a patent to the land as "vacant land of the United States."¹⁵³ Later that year, a new Commissioner of the Land Office, Silas W. Lamoreaux, was appointed. Lamoreaux proved to be much more accommodating. Indeed, as events would reveal, he almost certainly engaged in corrupt collusion with the LaFollette group.¹⁵⁴

¹⁴⁹ See WILLIAM E. RAILEY, HISTORY OF WOODFORD COUNTY, KENTUCKY 26 (photo. reprint 2002) (1938); *To End M'Kee Scrip Case*, CHI. TRIB., Nov. 22, 1896, at 11.

¹⁵⁰ An Act for the Relief of the Widow and Orphan Children of Colonel William R. McKee, Late of Lexington, Kentucky, 10 Stat. 745 (1853); *To End M'Kee Scrip Case*, *supra* note 149.

¹⁵¹ See *The M'kee Scrip*, INTER OCEAN (Chicago), Aug. 25, 1889, at 8.

¹⁵² See *Plan to Secure Lake Front Acres*, CHI. TRIB., Sep. 20, 1896, at 1.

¹⁵³ See Brown, *supra* note 60, at 20.

¹⁵⁴ See *id.* at 22; see also *One More on Lamoreaux*, CHI. TRIB., Mar. 11, 1897, at 12 (describing preferential treatment of the LaFollette group by Lamoreaux).

The LaFollette group refiled its application, and Lamoreaux quickly responded by directing a number of clerks from his office to go to Chicago to conduct a survey of “unsurveyed public land” in the tract in question.¹⁵⁵ Fairbank, one of the St. Clair owners, got wind of the planned survey and filed a protest.¹⁵⁶ This was evidently rejected, for within a month the LaFollette group filed an amended application, this time seeking to patent “Lot A of said fractional section 10, in township and range aforesaid, as described and shown on *the plat of the official survey of such lands approved October 15, 1896.*”¹⁵⁷ The new survey ordered by Lamoreaux showed all of the lands east of St. Clair as “Lot A,” which it calculated as comprising 160 acres.¹⁵⁸ Being depicted on an official survey of the Land Office, these lands were by implication deemed to be part of the federal public domain open for claiming.

After the applicants and the St. Clair Street objectors filed further evidentiary affidavits, Lamoreaux signed a written opinion on February 20, 1897, awarding a patent to the entire 160 acres to the McKee scrip claimants.¹⁵⁹ Lamoreaux put the decision in a sealed envelope and left it with his deputy, with instructions that it was to be opened and officially “promulgated” the following Tuesday, February 23, after the holiday for Washington’s birthday.¹⁶⁰ Lamoreaux then left Washington for a health spa.¹⁶¹

We should note at this point that, once promulgated, decisions by the Commissioner of the Land Office awarding patents to federal lands were very difficult to reverse.¹⁶² A rival applicant could appeal to the Secretary of the Interior, but the established practice was that the Secretary would not take additional evidence and would reverse a decision only based on clear error appearing on the record made by the Commissioner.¹⁶³ Courts were

¹⁵⁵ See Harvey M. La Follette et al., 26 Pub. Lands Dec. 453, 454 (1898).

¹⁵⁶ See *id.*; see also Brown, *supra* note 60, at 20 (describing how the survey was ordered without notice to those in possession of the land).

¹⁵⁷ Harvey M. La Follette et al., 26 Pub. Lands Dec. 453, 455 (1898) (emphasis added); see Brown, *supra* note 60, at 20.

¹⁵⁸ See *Lake-Front Arguments Closed*, CHI. TRIB., Nov. 26, 1896, at 5.

¹⁵⁹ See Brown, *supra* note 60, at 22; *Says Benner Has Won*, CHI. TRIB., Mar. 7, 1897, at 1.

¹⁶⁰ Brown, *supra* note 60, at 22; *May Be a Scandal*, CHI. TRIB., Mar. 9, 1897, at 1.

¹⁶¹ See Brown, *supra* note 60, at 23 (noting that Lamoreaux left Washington for White Sulphur Springs).

¹⁶² See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856) (noting that it had been “repeatedly decided” that the resolution of claims to public lands by officers of the Public Land Office were “conclusive, either upon the particular facts involved . . . or upon the whole title”). See generally Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801–1829*, 116 YALE L.J. 1636, 1696–1734 (2007) (discussing the development of the Public Land Office and the limited role of courts in adjudicating public land disputes in the nineteenth century).

¹⁶³ Rule of Practice 81 provided the right to appeal to the Secretary of the Interior regarding “any question relating to the disposal of the public lands and to private land claims, except in case of

even more reluctant to intervene. Courts generally treated decisions to award land patents as an unreviewable matter of administrative discretion, except perhaps for instances of proven fraud.¹⁶⁴

Lamoreaux's decision and the projected date of promulgation came in the waning days of President Grover Cleveland's Administration. Part of the plan, evidently, was to release the decision sufficiently close to the turnover of administrations that it could not be easily reversed.¹⁶⁵ It was also alleged, later, that the schemers planned to use photographic copies of the Lamoreaux opinion to sell lots to investors in Europe before any word of a reversal could reach them.¹⁶⁶ The St. Clair owners nevertheless got wind that something was up. Being well connected, they interceded with President Cleveland, who directed that no action be taken to promulgate any decision on the McKee scrip application without his approval.¹⁶⁷

The nervous owners also sent an emissary to Washington to obtain further assurances that no action would be taken by either the outgoing Cleveland Administration or the incoming McKinley Administration before further inquiry could be made into the matter.¹⁶⁸ Upon receiving the required assurances, the emissary left Washington to return to Chicago by train shortly after the inauguration.¹⁶⁹ On the morning of Sunday, March 7, he stepped off the train in Harrisburg, Pennsylvania, to purchase a Chicago paper, where he read an article proclaiming that the LaFollette application had been granted, complete with extensive quotations from the Lamoreaux opinion.¹⁷⁰ A flurry of panicked telegrams ensued.

It turned out Lamoreaux had secretly given a copy of the decision to the LaFollette applicants, and they had leaked it to the press.¹⁷¹ Fortunately for the St. Clair owners, the official copy still sat unopened in the sealed envelope in Washington.

interlocutory orders and decisions, and orders for hearing or other matter resting in the discretion of the Commissioner." Rules of Practice, Revised, 4 Pub. Lands Dec. 35, 46 (1885). But Rule of Practice 72 prevented parties from submitting additional evidence to the Commissioner or Secretary of the Interior once the contest was closed before the local land officers, unless such new evidence was offered under stipulation of the parties or as the basis for a new trial. *See id.* at 45. Furthermore, the Secretary of the Interior could not reverse a Commissioner's decision once the Secretary's predecessor had affirmed the decision or denied the appeal. *See State of Oregon*, 3 Pub. Lands Dec. 595, 596 (1885).

¹⁶⁴ *See Johnson v. Towsley*, 80 U.S. (13 Wall.) 72, 81-84 (1871); *Moore v. Robbins*, 96 U.S. 530, 533-34 (1877). Courts began offering limited review later in the nineteenth century in cases alleging fraud or perjury, and even later for alleged errors of law. *See Mashaw, supra* note 162, at 1726-27. But whether such review would lie in any particular case continued to be a matter of uncertainty.

¹⁶⁵ *See Brown, supra* note 60, at 23-24.

¹⁶⁶ *See id.* at 24.

¹⁶⁷ *See id.* at 23.

¹⁶⁸ *See id.* at 24-26.

¹⁶⁹ *See id.* at 26.

¹⁷⁰ *See id.* The article may have been *Say Scrip Owners Win*, CHI. TIMES-HERALD, Mar. 7, 1897, at 1, or *Says Benner Has Won*, *supra* note 159.

¹⁷¹ *See Brown, supra* note 60, at 27; *May Be a Scandal, supra* note 160.

When the new Secretary of the Interior, Cornelius Bliss, learned of the premature publication of the decision, he demanded an explanation from Lamoreaux, who was convalescing in Wisconsin.¹⁷² Lamoreaux lamely confessed he had given a copy of the decision to “a party,” but with instructions that it was not to be released until promulgated.¹⁷³ Furious about the irregularity, and clearly suspicious about Lamoreaux’s role in the affair, Bliss demanded that Lamoreaux grant an immediate rehearing on the application.¹⁷⁴ Lamoreaux issued the order and was allowed to resign before the rehearing took place, without any further action taken against him.¹⁷⁵

On rehearing, Lamoreaux’s successor, Binger Hermann, rejected the application.¹⁷⁶ LaFollette appealed the decision to Bliss, who affirmed in a published opinion, which bears the notation that it was “approved” by Willis Van Devanter, the future Supreme Court Justice, then serving as Assistant Attorney General.¹⁷⁷

LaFollette’s strongest contention on appeal, for which he was able to cite a number of Land Office precedents, was that the order for the survey in 1896 was a final determination that the land in question was public land and that the determination was *res judicata* and binding on the Department. Bliss rejected the argument, reasoning that the approval of a survey should not bar the Department from reexamining the question of public title “at any time before the legal title has passed from the United States.”¹⁷⁸ The decisions cited by LaFollette, to the extent they suggested to the contrary, were overruled.¹⁷⁹

On the merits, Bliss concluded that the eastern line of north fractional section 10, as shown on the Wall survey of 1821, was a meander line, not a boundary line.¹⁸⁰ Thus, by referring to the Wall survey in the 1837 patent issued to Robert A. Kinzie, the United States parted with all interest in the land up to the shoreline of Lake Michigan.¹⁸¹ All federal interest to the shore having been parted with, there were no federal public lands available to claim in the area. The survey ordered by Lamoreaux in 1896 was annulled because the land surveyed was not part of the public domain.¹⁸²

¹⁷² See Brown, *supra* note 60, at 27; *Lamoreux Is Hit Hard*, CHI. TRIB., Mar. 14, 1897, at 2.

¹⁷³ Brown, *supra* note 60, at 27; *Scrip Report Cast Aside*, CHI. DAILY NEWS, Mar. 13, 1897, at 1.

¹⁷⁴ See Brown, *supra* note 60, at 27–28; *A Land Office Scandal*, N.Y. TIMES, Mar. 14, 1897, at 1.

¹⁷⁵ See Brown, *supra* note 60, at 28; *Lamoreux’s Resignation Accepted*, CHI. TRIB., Mar. 20, 1897, at 9.

¹⁷⁶ See *Decision Against M’Kee Scrip Holders*, CHI. TRIB., May 22, 1897, at 1; *Scrip Claim Thrown Out*, CHI. DAILY NEWS, May 26, 1897, at 1.

¹⁷⁷ See Harvey M. La Follette et al., 26 Pub. Lands Dec. 453, 474 (1898) (notation of approval).

¹⁷⁸ *Id.* at 464.

¹⁷⁹ See *id.* at 465.

¹⁸⁰ See *id.* at 473–74; *Scrip Case Is Lost*, CHI. TRIB., Apr. 3, 1898, at 11; *M’Kee Claimants Are Defeated*, CHI. CHRON., Apr. 3, 1898, at 11.

¹⁸¹ See Harvey M. La Follette et al., 26 Pub. Lands Dec. 453, 473–74 (1898).

¹⁸² See *id.* at 474.

The opinion said nothing about who in fact was the owner of the 160 acres east of Kinzie's Addition. Bliss noted only that after the original patent was issued to Kinzie, the United States "ceased to be a riparian proprietor and is therefore not entitled to subsequent accretions."¹⁸³

The scheme did not immediately die away. Several years later, we still read of deeds based on the "McKee scrip" being recorded by unsuspecting out-of-state investors.¹⁸⁴ The St. Clair owners scoffed at these claims, but the land, despite its prime location, remained largely undeveloped.

B. *The Potawatomi Claim*

A rival scheme, which drew on some of the same arguments as the McKee scrip claim, sought to claim the newly formed land for a band of the Potawatomi Indians. Before European settlers had arrived, the Potawatomi inhabited the area where Chicago is located.¹⁸⁵ In the Treaty of Greenville of 1795, the United States promised the Potawatomi that they could continue to occupy this area and that their right of occupancy would be disturbed only if they entered into a further agreement with the United States disclaiming occupancy.¹⁸⁶ In the Treaty of Chicago of 1833 and the follow-up Treaty of 1846, the Potawatomi agreed to relinquish their claim to five million acres of land in Wisconsin, Michigan, and Illinois, in return for cash and an equivalent number of acres west of the Mississippi.¹⁸⁷ These treaties were understood to extinguish the Potawatomi's right of occupancy, which was a precondition to opening the lands to sale by the federal government.¹⁸⁸ No mention was made in any of these treaties of the submerged land beneath Lake Michigan.

One band of the tribe, known as the Catholic Potawatomi, received permission to remain in the St. Joseph River Valley in southwest Michigan.¹⁸⁹ In the second half of the nineteenth century, the Catholic Potawatomi, led by an elected business committee, pursued multiple claims for breaches of treaty obligations before Congress and the federal Court of

¹⁸³ *Id.*

¹⁸⁴ See, e.g., *In Real Estate Circles*, CHI. TRIB., Oct. 13, 1901, at 29; *Deed Filed to Shore Land Held Under a Scrip Claim*, CHI. TRIB., July 25, 1902, at 12.

¹⁸⁵ See KEATING, *supra* note 58, at 12–14.

¹⁸⁶ See Treaty of Greenville art. V, Aug. 3, 1795, 7 Stat. 49.

¹⁸⁷ See Treaty with the Chippewas, etc. arts. I–III, Sept. 26, 1833, 7 Stat. 431; Treaty with the Pottowautomic Nation arts. II–IV, June 5 and 17, 1846, 9 Stat. 853.

¹⁸⁸ See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 584–85 (1823); see also STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER 178–88* (2005) (providing background on the Indians' right of occupancy).

¹⁸⁹ For background, see JAMES A. CLIFTON, *SIMON POKAGON AND THE SAND-BAR CASE: MICHIGAN POTAWATOMI INDIANS SUE FOR CHICAGO'S LAKE FRONT* (n.d.) [hereinafter CLIFTON, SIMON POKAGON]. A shorter and more accessible version of this account can be found in JAMES A. CLIFTON, *THE POKAGONS, 1683–1983: CATHOLIC POTAWATOMI INDIANS OF THE ST. JOSEPH RIVER VALLEY 112–16* (1984).

Claims, with some success. The self-declared chief of the Catholic Potawatomi during this period, Simon Pokagon, was a colorful figure who spent more time on the lecture circuit than he did in the St. Joseph River Valley. His speaking career was evidently resented by other members of the tribe, and they deposed him from his position as chairman of the business committee.¹⁹⁰ Perhaps in an effort to regain status with the band, Pokagon and two Chicago lawyers conceived the idea of making a claim for the reclaimed land along the Chicago waterfront, including Streeterville. The lawyers eventually lost interest in the scheme, and Pokagon, in desperation, “sold” by quitclaim deed the band’s interest in the Chicago lakefront to another schemer who had previously joined forces with Streeter, William H. Cox.¹⁹¹

Armed with the “deed” from Pokagon, Cox filed a claim on behalf of the tribe with the Indian Bureau of the Department of Interior.¹⁹² The gist of the argument was that the Wall survey of 1821 established the shoreline of Lake Michigan as a boundary rather than a meander line; the Potawatomi had never relinquished their right of occupancy to the land east of this boundary; and, therefore, the Bureau should confirm the Indians’ claim to the land, which the United States would have to acquire by a new treaty if it wished to permit settlement by non-Indians.¹⁹³

The Commissioner of the Indian Bureau rejected the claim in 1900, on the ground that all land east of the Mississippi River that had been occupied by the Indians had been ceded to the United States by the treaties of 1833 and 1846.¹⁹⁴ Later that year, representatives of the Catholic Potawatomi appeared before the House Committee on Indian Affairs, with the request that Congress enact legislation giving them the right to sue in the Court of Claims to “settle the title of lands claimed by them in Lake Michigan.”¹⁹⁵ The committee, following the Secretary of the Interior’s recommendation, found that the Potawatomi had ceded all rights to the lands of Illinois.¹⁹⁶

Simon Pokagon died in 1899, and his son, Charles Pokagon, took up the “Sand-Bar Claim” as his own cause.¹⁹⁷ Charles was, if anything, more melodramatic than his father. In the spring of 1901, he held a press conference announcing a planned “invasion” of the reclaimed land by a chartered steamer filled with Potawatomi braves that would embark from St. Joseph. Once they secured the vacant land in Streeterville, they would

¹⁹⁰ See CLIFTON, SIMON POKAGON, *supra* note 189, at 1–2.

¹⁹¹ *Id.* at 2–6. Cox may have assisted in forging the patent that Streeter used to dupe investors into buying lots in Streeter’s “District.” Brown, *supra* note 60, at 36.

¹⁹² See CLIFTON, SIMON POKAGON, *supra* note 189, at 6.

¹⁹³ See *End of Po-ka-gon Claim*, CHI. TRIB., June 1, 1900, at 5.

¹⁹⁴ See *End of Pottawatomie Claims*, CHI. TRIB., Mar. 9, 1900, at 5.

¹⁹⁵ *Indians’ Claim to Lake Front*, CHI. TRIB., Mar. 27, 1900, at 9.

¹⁹⁶ See *End of Po-ka-gon Claim*, *supra* note 193.

¹⁹⁷ CLIFTON, SIMON POKAGON, *supra* note 189, at 7–8.

fan out north and south to capture all the landfilled areas of the lakefront. The announced invasion generated some amused coverage in the press,¹⁹⁸ but never materialized.¹⁹⁹

Stimulated by Charles's fervor, the Potawatomi reasserted their claim again before the Indian Commissioner in 1902, but he reaffirmed the determination reached in 1900.²⁰⁰ With respect to the argument that the land ceded in the treaties did not include "the lands under the water," the Commissioner held that this was contrary to settled principles of international law:

Under a long line of decisions the title to lands under navigable waters and islands is vested in the sovereign, and as one sovereign withdraws from a territory this title vests in the succeeding sovereign without any special grant. This operates in the United States when States are formed out of territories; the title to the lands under the navigable waters and the control over them vests in the new States without any grant or conveyance from the United States.

Therefore it is absolutely certain that the cession by the tribe under the treaty of 1833 conveys all of the land, and the withdrawal of the United [tribes] from this territory operated to vest in the United States as sovereign all the right and title which the united tribes had to lands under the water or in the waters themselves.²⁰¹

After this decision, the Potawatomi claim fell quiet for a number of years.

VI. THE LAKESHORE DRIVE EXTENSION

The fourth effort to gain title to the newly created lands east of Kinzie's Addition was that of the St. Clair Street owners—those who traced their title to Kinzie's original patent plus natural accretions. This effort was ultimately successful, although the statute that the owners used as a vehicle to secure their claims contained a substantial gap that left a portion of the reclaimed land unaddressed.

Let us begin with this: Who exactly were the St. Clair Street owners? It is difficult to say with complete certainty, although significant information can be gleaned from two state government inquiries, one an investigation in 1893 and the other a survey in 1911.²⁰² From south to north

¹⁹⁸ See *Cash or the Tomahawk: Red Men Prepare to Collect a Bill in Chicago*, CHI TRIB., Apr. 28, 1901, at 1; *Train to Fight Red Men: Citizens Bare Their Arms and Will Sell Lives Dearly*, CHI. TRIB., Apr. 29, 1901, at 3.

¹⁹⁹ See *Indian Invasion a Dream: Chief O'Neill Takes a Weight from Minds of Officials*, CHI. TRIB., May 30, 1901, at 9.

²⁰⁰ See *Indians Have No Title to Sell*, CHI. TRIB., Jan. 21, 1902, at 9.

²⁰¹ *Id.*

²⁰² See REPORT OF THE SUBMERGED AND SHORE LANDS LEGISLATIVE INVESTIGATING COMMITTEE, H.R. 47th Sess., vol. 1, at 33-49 (Ill. 1911) (Chiperfield Commission); *Lincoln Park*

along St. Clair, prominent owners included the Chicago Dock and Canal Company, the Cyrus McCormick estate, Ogden, Sheldon & Co. (the William B. Ogden estate), W.C. Newberry, the Potter Palmer estate, Nathaniel Fairbank, and John V. Farwell. North of Chicago Avenue, the City of Chicago had constructed a pumping station. Farther north of Pearson Street, there were no St. Clair Street owners since this land had been beneath the waters of Lake Michigan when Kinzie's Addition was laid out.

This was a virtual Who's Who of wealthy Chicago families, most of whom had augmented their wealth at least in part through real estate dealings. Collectively and individually, they would have had an acute appreciation of the potential commercial value of the reclaimed land, and they possessed the resources needed to advance their interests in securing the rights to it.

The vehicle that the St. Clair owners used to advance their cause was the Lincoln Park District. The Park District was established as a separate government entity by state legislation in 1869.²⁰³ It was controlled by a board of commissioners appointed by a state court judge and, hence, was independent of the mayor and city council, although for state constitutional reasons the city council had to approve all impositions of taxes to fund the Park District.²⁰⁴ The Park District was given control over all parks originally controlled by the City on the north side. Subsequent legislation adopted in 1889 transferred to the commissioners the State's title to submerged land offshore for 1200 feet, for purposes of filling to enhance the park.²⁰⁵

The main activity of the Lincoln Park District during its early years was to secure land a mile or more north of Streeterville (specifically, between North Avenue and Diversey Avenue) along the lakefront and to fill and landscape this area for what would become Lincoln Park.²⁰⁶ The resulting park soon included a pleasure drive along the shore of the lake, called Lake Shore Drive. The original legislation gave the commissioners authority to extend the drive southward from North Avenue to Oak Street, where Pine Street (now Michigan Avenue) ended, to be paid for by special assessments.²⁰⁷ With squabbles over assessments, construction of this segment of the drive was not completed until 1875.²⁰⁸ A breakwater was

Investigation, CHI. DAILY NEWS, May 13, 1893, at 4 (Bartling Committee); *infra* text accompanying notes 238–40, 282–91.

²⁰³ See 1869 Ill. Laws 368.

²⁰⁴ See I.J. BRYAN, LINCOLN PARK COMM'RS, REPORT OF THE COMMISSIONERS AND A HISTORY OF LINCOLN PARK 22–24 (Chicago 1899) (explaining that only directly elected officials could levy taxes).

²⁰⁵ See Brown, *supra* note 60, at 4.

²⁰⁶ See, e.g., BRYAN, *supra* note 204, at 34.

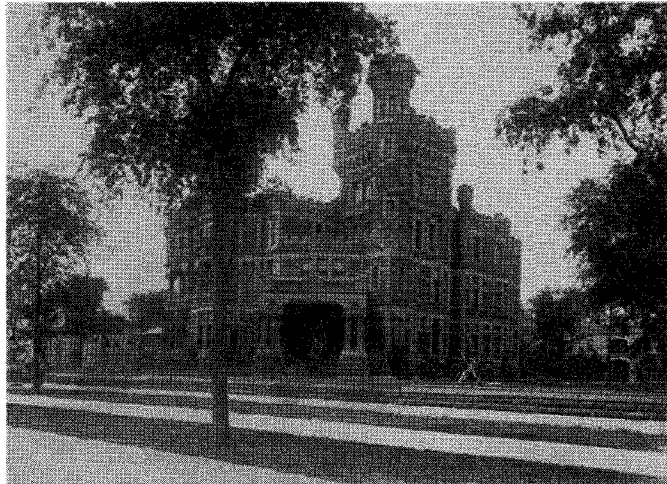
²⁰⁷ See 1869 Ill. Laws 374, § 21.

²⁰⁸ See 1 Lincoln Park Comm'rs, Official Proceedings of Lincoln Park Board: March 16, 1869 to March 23, 1880, at 253; *Announcements*, INTER-OCEAN (Chicago), Nov. 6, 1875, at 3.

constructed outside the drive, but it was inadequate to keep out the lake waters after storms. Consequently, land on both sides of the drive between North Avenue and Oak Street was frequently inundated with standing water.²⁰⁹

In 1885, Potter Palmer startled the Chicago establishment by abandoning Prairie Street on the near south side and building an enormous residence on Lake Shore Drive, several blocks south of North Avenue at what is now Banks Street (Figure 12). Other wealthy families soon followed suit.²¹⁰ The property owners quickly agreed to the necessary supplemental assessments that allowed the commissioners to improve Lake Shore Drive between Oak Street and North Avenue by enhancing the breakwater, rebuilding and paving the drive, and filling in and landscaping the areas in between. Property values on the drive, which enjoyed unobstructed views of the lake, skyrocketed.²¹¹

FIGURE 12: PALMER MANSION²¹²



²⁰⁹ See BRYAN, *supra* note 204, at 76.

²¹⁰ See PAUL GILBERT & CHARLES L. BRYSON, CHICAGO AND ITS MAKERS: A NARRATIVE OF EVENTS FROM THE DAY OF THE FIRST WHITE MAN TO THE INCEPTION OF THE SECOND WORLD'S FAIR 197-98 (1929). Palmer's mansion on Lake Shore Drive was "[b]y far the most famous, probably the largest, and by all odds the most imposing house in [Chicago]." THOMAS E. TALLMADGE, ARCHITECTURE IN OLD CHICAGO 184 (1941).

²¹¹ Cf. BRYAN, *supra* note 204, at 76. After the improvements and construction of Potter Palmer's mansion, "[l]and values in this neighborhood rose from \$160 a front foot in 1882 to \$800 in 1892." 3 BESSIE LOUISE PIERCE, A HISTORY OF CHICAGO: THE RISE OF A MODERN CITY 1871-1893, at 60 (1957).

²¹² Potter Palmer's residence, formerly located north of "Streeterville" at 1350 N. Lake Shore Drive (formerly 100 Lake Shore Drive). On file with the Chicago History Museum ICHI-39490.

Some of the wealthy individuals and families who owned property on Lake Shore Drive, including Palmer, also held interests on St. Clair Street.²¹³ It is fair to surmise that cordial relations developed between the Lake Shore Drive owners and the commissioners of Lincoln Park when the owners were funding the enhancements to Lake Shore Drive north of Oak Street. Such relations presumably made it relatively easy for the St. Clair owners to enlist the aid of the commissioners in helping to secure their interests *south* of Oak Street. The plan that was hatched, according to an early history of Lincoln Park, “was first suggested on April 27, 1886, when H.I. Sheldon, representing Ogden, Sheldon & Co., large owners of property on the lake shore south of Chicago Avenue, proposed to the commissioners the extension of the Lake Shore Drive south of Pearson Street.”²¹⁴ The scheme, as refined, called for the commissioners to construct an extension of Lake Shore Drive that would swing east from Oak Street, sweep around and then turn south outside the existing accreted and landfilled area, and terminate at Ohio Street.²¹⁵ Thus, the plan would add significant new land to the existing reclaimed land (which had been created by accretions and landfills). The extension would be paid for by special assessments imposed on the St. Clair Street owners.²¹⁶ The commissioners, in turn, would transfer to the owners title to the new land between the new drive and the existing shoreline to the west as compensation for their assistance in funding the construction project.²¹⁷

The only plausible rationale for this plan was to secure title to the contested land for the St. Clair owners. The proposed extension of Lake Shore Drive was, to borrow a modern expression, a road to nowhere. The drive would dead end at Indiana Street (modern-day Grand Avenue), where it was blocked by the Michigan Canal and beyond that by the Chicago River. There were no structures of any consequence along the route. There were no existing cross streets. There would be views of the lake to the east, but nothing save mud, garbage, and a few squatter shacks to the west. Anyone out for a Sunday carriage ride would find the existing Lake Shore Drive north of Oak Street, and especially the section of the drive through Lincoln Park, infinitely more pleasant. Photographs of the respective areas about this time confirm this (contrast Figure 13 with Figure 14).

²¹³ See KLATT, *supra* note 108, at 61.

²¹⁴ BRYAN, *supra* note 204, at 90; *see also* 2 Lincoln Park Comm’rs, Official Proceedings of Lincoln Park Board: April 3, 1880 to December 16, 1890, at 213.

²¹⁵ See BRYAN, *supra* note 204, at 90; *Will Extend the Drive*, CHI. TRIB., July 28, 1891, at 1; *see also* 3 Lincoln Park Comm’rs, Official Proceedings of Lincoln Park Board: January 13, 1891 to June 17, 1896, at 14, 91.

²¹⁶ See *Will Extend the Drive*, *supra* note 215; *Live Property Owners: They Plan to Connect the Lincoln and South Park Systems*, CHI. TRIB., Sept. 14, 1889, at 3.

²¹⁷ See *Live Property Owners*, *supra* note 216; 4 Lincoln Park Comm’rs, Official Proceedings of Lincoln Park Board: July 1, 1896 to April 9, 1899, at 56.

FIGURE 13: DESOLATE STREETERVILLE (1909)
(LOOKING NORTHEAST TO THE LAKE)²¹⁸



FIGURE 14: LINCOLN PARK (1905)²¹⁹



²¹⁸ On file with the Chicago History Museum DN-0007184 PGN.

²¹⁹ On file with the Library of Congress LC-D4-18849.

Once the plan was agreed upon, the commissioners sought to implement it under their existing authority but were blocked when the Illinois attorney general sued to stop construction.²²⁰ The commissioners then proposed legislation specifically authorizing the scheme. The bill was conveniently paired with another bill authorizing an extension of Lake Shore Drive north of Lincoln Park.²²¹ The Illinois General Assembly approved it on June 4, 1889.²²² The first section of the Act, speaking in general terms, gave any “board of park commissioners existing under the laws of this State” and having control over any boulevard or driveway bordering “any public waters in this State” the “power . . . to extend such boulevard or driveway . . . over and upon the bed of such public waters,” provided that the extension did not interfere with public navigation.²²³ The second section required the commissioners to obtain “the consent in writing of the owners of at least two-thirds of the frontage of all the lands . . . in front of which it is proposed to extend such boulevard or driveway for the making of such extension.”²²⁴ The riparian rights of all affected owners were to be purchased by the commissioners, and, failing purchase, could be taken by eminent domain. The third section, critical for our purposes, provided as follows:

[T]he submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard or driveway shall be appropriated by the board of park commissioners to the purpose of defraying the cost of such extension and to that end such board of park commissioners are authorized to sell and convey such submerged lands in fee simpl[e] by deeds duly executed on its behalf by its president and under its corporate seal, and every deed executed in pursuance hereof shall vest a good title in the grantee to the premises intended to be conveyed thereby.²²⁵

The fourth section provided that once the extension was completed, the new drive would become part of the Park District and subject to its control.²²⁶

Although the statute called for a sale of the lands between the new drive and the existing shoreline, we are told in a memoir by one of the attorneys for the commissioners that “it was not the intention of the persons instrumental in securing the passage of the act that this course should be adopted.”²²⁷ Instead, “it was plainly the intention to come by negotiation

²²⁰ See M.T. MOLONEY ET AL., BIENNIAL REPORT OF THE ATTORNEY GENERAL TO THE GOVERNOR OF ILLINOIS 121–22 (1895).

²²¹ See 1889 Ill. Laws 214.

²²² See 1889 Ill. Laws 212.

²²³ *Id.* § 1.

²²⁴ *Id.* § 2.

²²⁵ *Id.* § 3.

²²⁶ See *id.* § 4.

²²⁷ Brown, *supra* note 60, at 12.

This close observer went on to acknowledge that “[i]t was foreseen that some opposition would undoubtedly develop to this scheme and that whatever was done, it would probably be charged that the shore owners were getting an undue advantage of the public.”²³⁰ But in order to “forestall the force of adverse criticism as far as possible,” a carefully orchestrated series of consultations was planned.²³¹ First, a “selected committee” of eminent citizens, including Elbert Gary (of judiciary fame, as the song from *The Music Man* goes), was asked to examine the scheme and opine whether it was in the public interest.²³² The committee did so and duly rendered the required judgment. Second, the Army Corps of Engineers was asked to examine the scheme to determine if it presented any interference regarding the rights of navigation.²³³ The chief engineer in Chicago reported to the War Department that he saw no objection, and proponents of the land-grab scheme heralded the Department’s silence as tacit approval in this regard.²³⁴

Contracts for construction were quickly executed in 1891.²³⁵ Deeds granting the right to fill land between the roadway and the existing shoreline were made out to the landowners and placed in escrow with the Northern Trust Company, to be delivered when the owners complied with covenants requiring that they underwrite the cost of the fill and construction of the drive.²³⁶ The work was scheduled to be completed by 1893.²³⁷ Nevertheless, the effort to lull the public into supporting the project did not succeed. Before the fill activity had gone very far, two investigations were launched that brought the work to a stop.

The first investigation was undertaken by a special committee of the Illinois Senate, known as the Bartling Committee after its chairman. The committee issued a report that excoriated the project, describing it as a “theft from the navigable waters of Lake Michigan” that “leads nowhere and is valuable only to the abutting and contiguous property owners as an exit from the made land.”²³⁸ The committee surmised that “the property owners by undue influence of some sort used the Lincoln Park Commissioners” to advance their own interests; it estimated the value of the newly made land transferred to the owners to be from “8 to 12 Millions.”²³⁹ The report concluded by recommending that “the Attorney

²³⁰ *Id.*

²³¹ *Id.*

²³² *See id.* at 13; *The Lake-Shore Drive Assured*, CHI. TRIB., Jan. 24, 1892, at 29.

²³³ *See Brown, supra* note 60, at 13.

²³⁴ *See id.*; *Mr. Moloney Smells a Land Grab*, CHI. TRIB., Feb. 21, 1894, at 3.

²³⁵ *See Brown, supra* note 60, at 14.

²³⁶ *See id.* at 15; 4 Lincoln Park Comm’rs, *supra* note 217, at 56.

²³⁷ *See Kirk*, 162 Ill. at 142, 45 N.E. at 831.

²³⁸ REPORT OF SPECIAL SENATE COMMITTEE, 38th Gen. Assemb., at 7–8 (Ill. 1893) (Henry C. Bartling, chair) [hereinafter Bartling Committee Report] (on file with authors).

²³⁹ *Id.* at 8.

General of the State of Illinois take all necessary steps to obtain possession of the lands created in the waters of Lake Michigan and do all in his power to prevent greedy owners of riparian rights from encroaching upon the waters of the Lake."²⁴⁰

The Illinois attorney general, Maurice Moloney, promptly launched his own investigation and concurred that an excessive amount of submerged land would be taken from the public, primarily for private gain.²⁴¹ He announced on May 22, 1894, that he was filing suit on behalf of the State against the commissioners and the St. Clair Street owners.²⁴² The suit demanded that the statute be declared unconstitutional, all construction contracts declared void and cancelled, all filling of submerged lands removed, and the submerged lands restored to the condition they had been in before any encroachments took place.²⁴³ The Chicago Title & Trust Co., acting on behalf of the owners, filed suit against the commissioners demanding that the contracts be specifically performed.²⁴⁴ The commissioners filed a cross bill asking that their title to the land be quieted and their right to levy special assessments on the owners to complete and maintain the drive be declared.²⁴⁵

Moloney's case against the Lake Shore Drive extension was powerfully reinforced by the then-recent decision of the U.S. Supreme Court in the *Illinois Central* case.²⁴⁶ In 1869, the Illinois legislature had granted the submerged land south of the Chicago River, for the distance of one mile into the lake, to the Illinois Central for the purpose of the railroad's constructing a new outer harbor. In 1873, the legislature had repealed the grant. The U.S. Supreme Court, speaking through Justice Stephen Field in 1892, upheld the repeal over the railroad's claim that it impaired vested rights. The Court confirmed that the State of Illinois owned the submerged land but said that it did not hold such lands subject to barter and sale, as did the United States with respect to its public lands. Instead, the submerged lands were held in trust for the benefit of the public. "The trust with which they are held," the Court said, "is governmental and cannot be alienated, except in those instances . . . of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters

²⁴⁰ *Id.* at 9.

²⁴¹ See MOLONEY ET AL., *supra* note 220, at 122-23; *He Vetoes the Drive: Atty.-Gen. Moloney to Fight the South Lake Shore Project*, CHI. TRIB., Apr. 12, 1894, at 3; *Mr. Moloney Smells a Land Grab*, *supra* note 234.

²⁴² See Brown, *supra* note 60, at 16-17; *Lake Shore Case in Court*, CHI. REC., May 23, 1894, at 3.

²⁴³ See Brown, *supra* note 60, at 17-18.

²⁴⁴ See *id.* at 17; *Make a Forced Move: Lake Shore Property-Owners Act on Moloney's Threats*, CHI. TRIB., May 10, 1894, at 7.

²⁴⁵ See Brown, *supra* note 60, at 17.

²⁴⁶ *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892).

remaining.”²⁴⁷ Moloney thus had a powerful argument that the legislature, in conveying some ninety-three acres of submerged land to the adjacent shore owners to compensate them for building the new drive, had violated this public trust.

The matter came before Judge Windes, of the circuit court, who dismissed the attorney general’s action for want of equity. Windes acknowledged that title to lands under the waters of Lake Michigan was held by Illinois “in trust for the people for all purposes of which it may be used beneficially.”²⁴⁸ He nevertheless concluded that the legislature had plenary authority “to convey the fee of lands covered by waters of the lake to private individuals for the accomplishment of purposes beneficial to the people of the State.”²⁴⁹

In 1896, the Illinois Supreme Court affirmed.²⁵⁰ Reflecting popular hostility toward the scheme, the court voiced its displeasure with the legislation. If the matter were a “question of policy” to be determined by the court, it said, “we would have no hesitation in condemning the action of the legislature in passing the act as unwise and detrimental to the best interest of the people of the State.”²⁵¹ But the court wrote that the propriety or impropriety of the legislation was a matter for the legislature to determine, not for the courts:

The legislature represents not only the State, which holds the title which at common law was vested in the crown, but the legislature also represents the public, for whose benefit the title is held, and in that capacity it possesses the sovereign power of parliament over the waters of the lake and the submerged lands covered by the waters.²⁵²

The court found no compelling evidence that the extensive landfill would interfere with navigation or with fishing. And because the new drive would remain under the control of park commissioners for park purposes, the legislature had made no attempt “to relinquish its governmental powers or place them beyond the power of future legislation.”²⁵³

²⁴⁷ *Id.* at 455–56.

²⁴⁸ *May Push the Drive: Judge Windes Dismisses Moloney’s North Shore Suit*, CHI. TRIB., Jan. 31, 1895, at 9.

²⁴⁹ *Id.* In a matter that would not be appealed further, the judge also upheld the Lincoln Park Commissioners’ plan to devote the land between Chicago Avenue and Pearson Street in front of the City’s water-pumping station for a public park, even though the City had not given its consent. The State was not required to compensate the City for this use of the land because “[p]ublic property belonging to a city not appropriated, used, or needed for any purpose may be devoted by the Legislature to some other public purpose within the city.” *Id.*

²⁵⁰ *See People ex rel. Moloney v. Kirk*, 162 Ill. 138, 45 N.E. 830 (1896).

²⁵¹ *Id.* at 148, 45 N.E. at 834.

²⁵² *Id.* at 151, 45 N.E. at 835.

²⁵³ *Id.*

The *Kirk* court also upheld the critical provision of the Act that allowed the submerged lands between the drive and the shore to be filled and transferred to private parties to fund the construction of the drive. Although the Act spoke of a sale of these lands, there could be no objection to conveying them to the adjacent shore owners, the court concluded, so long as the commissioners received full value for the submerged land in the form of improvements financed by the landowners. The court failed to address the obvious objection that the government *did* relinquish control with respect to the submerged lands between the drive and the shore, as they would fall into private hands. But the court concluded with a sentence that no doubt caught the eyes of the lawyers at Chicago Title & Trust Co.: “The right of a shore owner on Lake Michigan to fill up portions of the lake and thus extend his lands does not arise in this case and that question will not be considered.”²⁵⁴

VII. THE SLOW BIRTH OF STREETERVILLE

The St. Clair Street owners had won. Or had they? One of the puzzles of the history of Streeterville is that development of the area failed to take off after the Illinois Supreme Court blessed the Lake Shore Drive extension in 1896, including the transfer of ninety-three acres of new landfill to the St. Clair Street owners. The drive was eventually completed, even if not until sometime after 1902.²⁵⁵ A railroad poster depicting the lakefront, published in that year, shows the area as devoid of any buildings whatever.

FIGURE 16: BIRD’S-EYE VIEW OF CHICAGO LAKEFRONT (1902)²⁵⁶



²⁵⁴ *Id.* at 157, 45 N.E. at 837.

²⁵⁵ The segment of the drive that swung east into the lake from Oak Street was the last to be completed. The commissioners had agreed to fund this segment themselves, and it proved to be more expensive than contemplated. The contractor also made an error that resulted in the reclamation of more land in this area than the plan contemplated, which generated more fodder for the legislative and judicial investigations. See KLATT, *supra* note 108, at 62.

²⁵⁶ On file with the Library of Congress g4104c pm020210, available at <http://hdl.loc.gov/loc.gmd/g4104c.pm020210>. Streeterville is the area north of the river and along the lake.

To be sure, once the drive was completed, new buildings eventually followed. But the pace of development was exceedingly slow, especially given the prime location of the land. In 1912, a ten-story cooperative apartment building went up on Oak Street, on landfill created by the commissioners, where the new drive turned south.²⁵⁷ In 1916, a new factory was constructed at the foot of Ohio Street.²⁵⁸ The Drake Hotel graced the corner of Michigan Avenue and Oak Street starting in 1920, although this was at least partially on land included in original section 3.²⁵⁹ Several other apartment buildings along Oak Street east of Michigan Avenue, again on landfill created to build the drive, followed. In 1923, the east side of the American Furniture Mart, now 680 North Lake Shore Drive, went up, again on new landfill (the west side with the tower was completed in 1926).²⁶⁰ Strikingly, however, an aerial photograph of the area taken in 1925—nearly three decades after the *Kirk* decision—reveals that there were still relatively few buildings of any substance in the area. (See Figure 17.) An armory had been constructed on the land east of the City's water tower pumping station.²⁶¹ But the land where Northwestern University would locate its downtown campus remained vacant, until the groundbreaking for Ward Hall, Wieboldt Hall, and Levy Mayer Hall occurred in 1926.²⁶²

FIGURE 17: CHICAGO AERIAL PHOTO (1925)²⁶³



²⁵⁷ See FRANK A. RANDALL, *HISTORY OF THE DEVELOPMENT OF BUILDING CONSTRUCTION IN CHICAGO* 244 (1949).

²⁵⁸ See KLATT, *supra* note 108, at 119. This was the Pelouze Building, 218–30 E. Ohio Street. See RANDALL, *supra* note 257, at 252.

²⁵⁹ See RANDALL, *supra* note 257, at 255.

²⁶⁰ See *id.* at 260.

²⁶¹ See *id.* at 262; see also Frank R. Schwengel, *The New Armory of the 122nd Field Artillery in Chicago*, 16 *FIELD ARTILLERY J.* 1, 1 (1926) (providing history, photographs, and details of the armory).

²⁶² See RANDALL, *supra* note 257, at 270.

²⁶³ Photograph courtesy of the Newberry Library, Chicago, Midwest MS Sloan No. 3090.

One reason why construction proceeded so slowly is that agitation and litigation over ownership rights to the reclaimed land did not end with the decision in *Kirk* in 1896. Streeter lay low for several years after his release from prison in 1904. But by 1909 he was back on the vacant land, living in an abandoned omnibus and selling lots to the unsuspecting.²⁶⁴ In 1912, a sympathetic Chicago alderman arranged for Streeter to occupy the back end of a small brick structure on Chestnut Street, where he and Ma Streeter sold soda pop, liquor, and copies of his biography.²⁶⁵

Streeter was bloodied in a massive attack by the Chicago police in 1915, which was provoked, according to a recent account, because Streeter had insulted Mayor William Hale Thompson.²⁶⁶ Although Streeter got the worst of the encounter, he was charged with assault. Defending himself once again, he was acquitted by the jury.²⁶⁷ Chicago Title & Trust Co. finally obtained an order to demolish the Streeters' makeshift store in 1918, whereupon the couple retired to a boathouse in Indiana Harbor.²⁶⁸

Streeter died in 1921. His funeral was attended by Mayor Thompson, who led a forty-car motorcade to Graceland Cemetery, final resting place of the Chicago elite.²⁶⁹ The president of Chicago Title & Trust Co., who no doubt had mixed feelings about the event, wrote a short eulogy printed in the *Chicago Tribune*:

The Cap'n's ideas of law were somewhat at variance with that of the preponderant legal opinion but he was a gallant and able protagonist nevertheless. We shall miss him more than might be imagined. He kept two lawyers and one vice president busy for twenty-one years . . . may he rest in peace and find his lost "deestric" in some fairer land where the courts cease from troubling and title companies are at rest.²⁷⁰

Streeter may have found lasting peace, but the title company did not. Ma Streeter continued the quest for vindication, filing a lawsuit in Cook County Circuit Court in 1924 seeking \$100 million in damages from the St. Clair property owners, the Lincoln Park Commissioners, and Chicago Title & Trust Co.²⁷¹ The suit was dismissed without prejudice and later dropped. Ma was back with a similar claim in federal court in 1925, but lost when the judge ruled she had not been properly married to Streeter—he had

²⁶⁴ See KLATT, *supra* note 108, at 107–08.

²⁶⁵ See *id.* at 111–12.

²⁶⁶ See *id.* at 115–16.

²⁶⁷ See *id.* at 116–17; 'Cap' Streeter Turns Lawyer in Own Behalf: Avoids Fireworks and Makes a Plea for "Justice" When His Attorney Is Ruled Out, CHI. TRIB., Nov. 22, 1916, at 17.

²⁶⁸ See KLATT, *supra* note 108, at 117–19.

²⁶⁹ See *id.* at 120–21.

²⁷⁰ *Id.* at 122 (alteration in original).

²⁷¹ See "Ma" Streeter Sues for Cool \$100,000,000, CHI. TRIB., May 27, 1924, at 13; 'Ma' Streeter Fights for Chicago Lands: Takes Up Battle of Shooting 'Cap'n' and Sues 1,500 Persons for \$1,000,000, N.Y. TIMES, May 27, 1924, at 23.

failed to terminate at least one previous marriage—and so she did not inherit any of his “right.”²⁷²

Meanwhile the Potawatomi claim, after lying dormant for several years, sprang back to life in 1909. The occasion was a proposal for state legislation that would permit the Illinois Steel Company to engage in extensive landfilling to enlarge its plant site on Lake Michigan near the Calumet River, some ten miles to the south of Streeterville.²⁷³ William H. Cox and William E. Johnson submitted a protest on behalf of the Potawatomi to the Illinois legislature, claiming that the tribe still owned the submerged land.²⁷⁴ The argument fell on deaf ears, and the transfer of land to the steel company was approved on June 15, 1909.²⁷⁵ Later that year, plans for constructing a massive new public pier into the lake at Grand Avenue were unveiled. The Indians’ claim was again raised as a potential complicating factor.²⁷⁶ An investigative body, the Chipewfield Commission, determined that the Chicago lakefront was securely under the State’s dominion.²⁷⁷ In 1914, after four years of planning, the construction of Municipal Pier, soon to be renamed Navy Pier, was underway.²⁷⁸

In a final effort to vindicate the Potawatomi claim, the tribal band’s business committee persuaded two Chicago lawyers to test the claim in litigation. The end came swiftly. The U.S. District Court for the Northern District of Illinois dismissed a complaint filed by the Potawatomi, finding that “the Indians cannot claim land which they abandoned eighty years ago.”²⁷⁹ In 1917, the Supreme Court affirmed in a terse decision.²⁸⁰ Justice James C. McReynolds saw no need to construe the treaties or determine the original rights of the Potawatomi to the submerged lands:

If in any view [the Potawatomi] ever held possession of the property here in question we know historically that this was abandoned long ago and that for

²⁷² *Judge Rules Against “Ma” Streeter’s Claims*, CHI. TRIB., Apr. 21, 1925, at 1; “*Ma*” Streeter Denied Title to the “Deestrick,” CHI. EVENING POST, Apr. 21, 1925, at 9.

²⁷³ See COMM. ON PARKS & BOULEVARDS, AMENDMENTS TO SENATE—NO. 284, S. 46-284 (Ill. 1909).

²⁷⁴ Cox and Johnson submitted the protest on behalf of the Pokagon Tribal Government of the Potawatomi Indians of Michigan and Indiana. See PROTEST AGAINST SENATE BILL NO. 284, AS BEING INTRODUCED IN THE ILLINOIS SENATE, S. 46-284, at 1-4 (Ill. 1909).

²⁷⁵ See S.B. 284, 46th Gen. Assemb. (Ill. 1909) (approving sale to the Illinois Steel Co.); Sale to Illinois Steel Company, 1909 Ill. Laws 434.

²⁷⁶ See *Ignores Indians’ Claim to Shore: Secretary Dickinson Says Pier Permit Does Not Involve Title to Land*, CHI. TRIB., May 27, 1909, at 9.

²⁷⁷ See REPORT OF THE SUBMERGED AND SHORE LANDS LEGISLATIVE INVESTIGATING COMMITTEE, H.R. 47th Sess., vol. 1, at 17 (Ill. 1911); see also *infra* text accompanying notes 282-91.

²⁷⁸ See DOUGLAS BUKOWSKI, NAVY PIER: A CHICAGO LANDMARK 20 (1996).

²⁷⁹ *Indians’ Suit for Strip on Lake Front Rejected*, CHI. TRIB., Mar. 19, 1914, at 14.

²⁸⁰ See *Williams v. City of Chicago*, 242 U.S. 434 (1917).

more than a half century it has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.²⁸¹

After decades of agitation in multiple forums, the claim advanced on behalf of the Potawatomi was rejected on a simple theory of abandonment.

In short, the period from 1909 to 1924 witnessed continued contestation, including litigation, over ownership of the vacant lands between St. Clair Street and the new Lake Shore Drive extension. Although in hindsight none of the protests or lawsuits posed a particularly serious threat to the interests of the St. Clair Street owners, this may not have been so clear at the time. Moreover, it is striking that, once again, the claims of the rival contestants were not resolved on the merits, with an affirmation that the St. Clair Street owners had title to the land. Instead, the claims of the rivals were disposed of on collateral grounds—such as Ma Streeter's invalid marriage and the Potawatomi's abandonment of any rights to the land.

The uncertainty created by the never-ending contestation of private claimants was magnified by the emergence of new assertions of public rights in the reclaimed land. Legally speaking, the most notable call for public ownership and control came from a committee appointed by the state legislature to ascertain the extent of the State's rights in submerged and shore lands, and to determine how far those rights had been "usurped by private individuals, corporations, and companies."²⁸² Called the Submerged and Shore Lands Legislative Investigating Committee, and known informally as the Chiperfield Commission, the committee produced a three-volume report in 1911 that called for a vigorous assertion of public rights in order to end "piratical encroachments for private gain."²⁸³ In the best tradition of the Progressive Era, the commission argued that government ownership of submerged and reclaimed shore lands should be vigorously maintained, a new "Rivers and Lakes Commission" created to monitor public rights in submerged lands, and the attorney general charged to roll back existing private encroachments.²⁸⁴ The objective was not to preserve submerged lands in their natural state, as would become the animating focus of the public trust doctrine later in the century.²⁸⁵ Rather, it was to reserve land for public purposes such as a new outer harbor for

²⁸¹ *Id.* at 437.

²⁸² REPORT OF THE SUBMERGED AND SHORE LANDS LEGISLATIVE INVESTIGATING COMMITTEE, H.R. 47th Sess., vol. 1. at 18 (Ill. 1911).

²⁸³ *Id.* at 12.

²⁸⁴ *Id.* at 6-7.

²⁸⁵ See generally James L. Huffman, *A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy*, 19 ENVTL. L. 527 (1989) (describing possible bases for the public trust doctrine and, incidentally, its development).

Chicago and to facilitate the development of “waste lands” adjacent to the shore.²⁸⁶

Buried in the Commission’s report was an analysis, prepared by an attorney for the City of Chicago, of the Michigan Canal project sponsored by the Chicago Dock and Canal Company.²⁸⁷ The analysis sharply questioned the legality of artificial landfilling that had occurred to the north of the canal site and concluded that “[t]he title of the Chicago Dock and Canal Company, at least to the north half of this land, is not free from cloud. The cloud on the company’s title is the claim which might be made by the State of Illinois.”²⁸⁸

Turning to the Lake Shore Drive extension, the commission condemned the project as having no evident purpose other than “that it was consummated to acquire title in behalf of special interests.”²⁸⁹ It demanded that the attorney general commence new litigation to determine “whether or not property worth millions of dollars [had been] given to private property owners to further augment and swell their holdings.”²⁹⁰ The commission thought it self-evident that such a giveaway of valuable submerged land by the park commission would be “wholly odious to the theory that the people are the true owners of the submerged lands of the State of Illinois, and that such lands are irrevocably dedicated for public purposes.”²⁹¹ These sentiments were undoubtedly noted by the St. Clair Street owners and their legal advisors, and could only instill further caution in them about proceeding with any development in the area.

More-specific plans were also afoot to use the reclaimed land for public purposes. The influential Plan of Chicago, published in 1909 by the Commercial Club, featured two gigantic piers jutting into the lake, one on each side of the downtown lakefront.²⁹² (See Figure 18.) Daniel Burnham and Edward Bennett located the northern pier at Chicago Avenue—that is, squarely in the middle of Streeterville. Other sketches in the plan showed multiple docks jutting off the north pier to accommodate freight steamers.²⁹³ At least implicitly, Burnham’s plan contemplated that the area around the Lake Shore Drive extension would develop as a giant maritime port.

²⁸⁶ See REPORT OF THE SUBMERGED AND SHORE LANDS LEGISLATIVE INVESTIGATING COMMITTEE, H.R. 47th Sess., vol. 1, at 9.

²⁸⁷ *Id.* vol. 2, at 198–206.

²⁸⁸ *Id.* at 203.

²⁸⁹ *Id.* at 207.

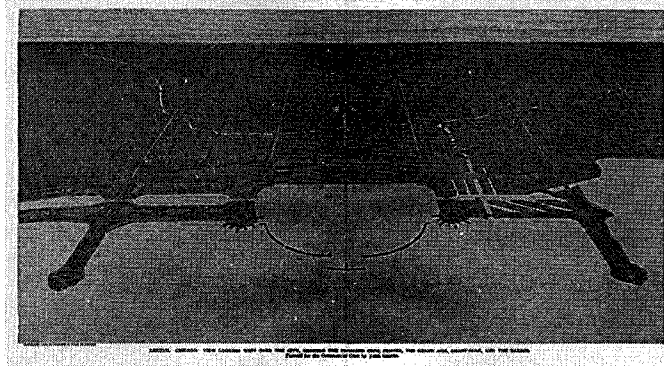
²⁹⁰ *Id.* at 211.

²⁹¹ *Id.*

²⁹² See DANIEL H. BURNHAM & EDWARD H. BENNETT, PLAN OF CHICAGO fig.CXXXVII (Da Capo Press 1970) (1909).

²⁹³ See *id.* at 64 fig.LXXI.

FIGURE 18: PLAN OF CHICAGO (1909)
 (LOOKING WEST FROM THE LAKE)²⁹⁴



This was scarcely the only plan to convert the area into a port. The Pugh Terminal Company proposed a plan in 1908 to build three piers north of the Chicago River.²⁹⁵ The Chicago Sanitary Board released a plan in 1910 for six piers to be built between the Chicago River and Pearson Street, each with a warehouse designed to accommodate four million tons of freight annually.²⁹⁶ The next year, Mayor Carter Harrison proposed a plan calling for twenty-five miles of docks and recreation piers in the area.²⁹⁷ Eventually, the City Council approved a plan in 1912 to build two piers, a 3000-foot-long one for passengers and packages and a somewhat shorter one for heavy freight.²⁹⁸ This evolved into the plan for Municipal Pier No. 2 (now Navy Pier), construction of which started in 1914 at the foot of Grand Avenue.²⁹⁹ The second pier never came to fruition.

The *Kirk* decision, far from suppressing dreams about grand public plans for the lakefront in this area, could be read as encouraging them. The opinion reaffirmed the overriding importance of navigation on the lake and stated that the 1889 legislation did not relinquish the legislature's governmental powers over the lake "or place them beyond the power of future legislation."³⁰⁰ In effect, the strong public rights associated with submerged lands meant that a public claim on the future development of the lakefront in this area as a harbor facility remained a distinct possibility. This, too, magnified the uncertainty associated with the land, and

²⁹⁴ On file with the Chicago History Museum ICHI-64844.

²⁹⁵ See *Docks in the Lake; \$8,000,000 Project*, CHI. TRIB., Oct. 23, 1908, at 1; *Bids for Chance to Build 3 Piers: Pugh Terminal Co. Submits Definite Plans for Work North of River Mouth*, CHI. TRIB., July 7, 1909, at 3.

²⁹⁶ See *Move in Unity for Chicago Harbor*, CHI. TRIB., Nov. 18, 1910, at 1.

²⁹⁷ See *Mayor's Harbor Plan for 25 Miles of Docks and Recreation Piers*, CHI. TRIB., July 29, 1911, at 4.

²⁹⁸ See *O.K. Harbor Plan; Up to U.S.*, CHI. TRIB., Feb. 10, 1912, at 2.

²⁹⁹ See BUKOWSKI, *supra* note 278, at 20.

³⁰⁰ *People ex rel. Moloney v. Kirk*, 162 Ill. 138, 151, 45 N.E. 830, 835 (1896).

undoubtedly caused those who might otherwise have initiated private commercial development to hesitate until the ultimate use of the area had been settled.

VIII. OVERCOMING A FLAWED TITLE

The deeper question is why these rival private and public claims persisted when the *Kirk* decision, notwithstanding its qualifying language, seemed to deal a decisive victory for the St. Clair Street owners. The ultimate reason, we believe, is that the title claims of the St. Clair Street owners were seriously flawed—and they were flawed in a way that the 1889 legislation and the *Kirk* decision did not cure.

Oversimplifying slightly, one can picture the question of title to the Streeterville land as involving three layers (or increments) of new solid land formed on submerged land east of Kinzie's Addition. The first layer (shown in the darkest gray in Figure 19 below) consisted of ordinary accretion formed by the action of the counterclockwise current in Lake Michigan. Once it was determined that the St. Clair Street owners had riparian title east of St. Clair Street,³⁰¹ this land rightly belonged to them under settled rules of title by accretion. The second layer (shown in Figure 19 with a dotted line marked "1886" down the middle of the layer) consisted of artificial fill added outside the original area of accretion, whether by the construction of the pier that incorporated the Michigan Canal, or by the depositing of refuse in the lake after the fire of 1871, or by the use of the area as a general dump for city and contractors' refuse, or by the efforts of Streeter and his followers. The construction of the pier and slip was arguably justified by the wharfing-out privilege. But the other forms of fill were not authorized, and thus the riparian owners could not claim them as either accretions or avulsions. Once it became clear that the State owned the submerged land,³⁰² this layer of fill presumably belonged to the State. The third layer (east from the 1892 shoreline to the lake) consisted of the ninety-three acres of new land added by the Lincoln Park Commissioners in constructing and obtaining financial support for the Lake Shore Drive extension. This layer had been granted by the State to the Lincoln Park Commissioners, who had in turn granted much of it to the riparian owners, in a transaction upheld by the Illinois Supreme Court in the *Kirk* case.³⁰³ To be sure, there was the nettlesome sentence in the court's opinion saying that the right of the riparian owners to "fill up portions of the lake" was not being adjudicated in the case.³⁰⁴ Did this refer to artificial

³⁰¹ See *supra* notes 92–95 and accompanying text (discussing *Banks v. Ogden*, 69 U.S. (2 Wall.) 57 (1864)).

³⁰² See *supra* notes 41–42 and accompanying text (discussing *Kirk*, 162 Ill. 138, 45 N.E. 830, and Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892)).

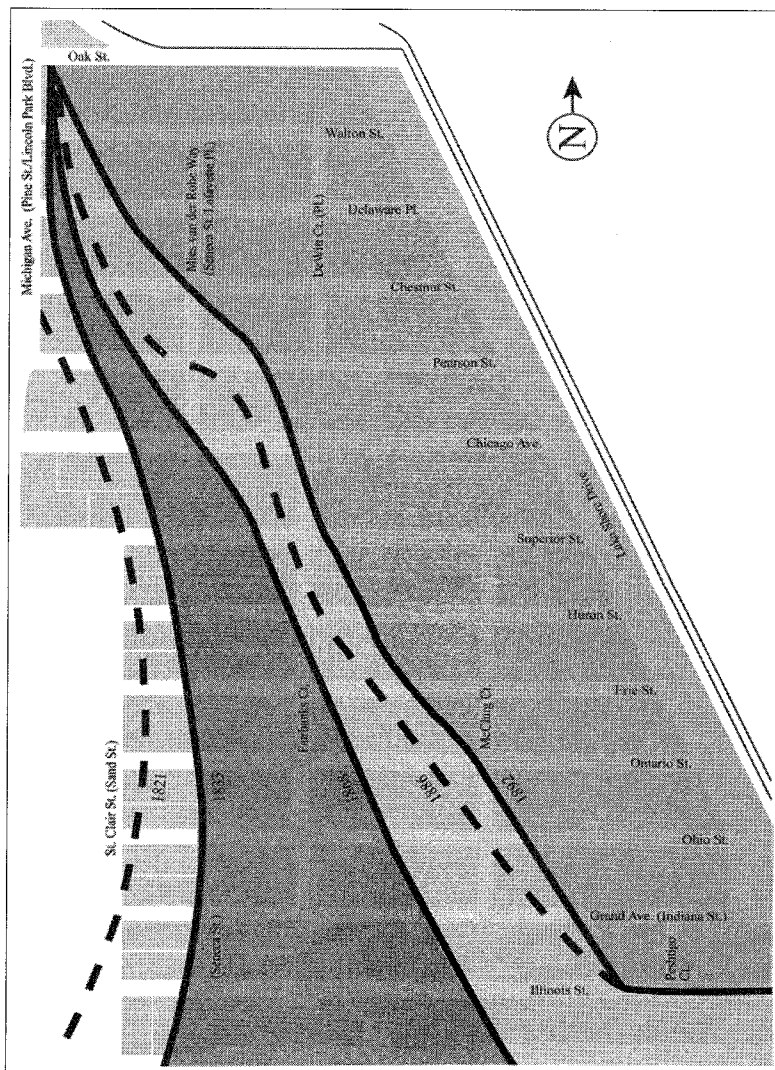
³⁰³ See *supra* text accompanying notes 213–54.

³⁰⁴ *Kirk*, 162 Ill. at 157, 45 N.E. at 837.

filling that occurred before the Lake Shore Drive extension—that is, to filling in layer two? Or did it refer to the filling authorized in layer three—in other words, was the court upholding the construction of the drive only? So the third layer, like the first, most likely belonged to the St. Clair Street owners, although the matter was hardly free from doubt.

Figure 19 gives a sense of these layers.

FIGURE 19: “THREE LAYERS”



We can be sure that more than one lawyer for the Chicago Title & Trust Co. puzzled over the state of title created by this three-layered cake. What did it mean if title to the outer layers was probably good but to the middle layer likely bad? Would the soundness of the outer layers rescue the middle? Or did the lack of good title to the middle infect and invalidate the outer? In retrospect, the St. Clair Street owners had failed in not securing language in the 1889 legislation ratifying *all* existing fills between the original shoreline of 1821 and the new Lake Shore Drive extension. In 1889, it might have been possible to insert dexterous language in the statute that would have cleared everything up. But by 1893, the public outcry over the Lake Shore Drive “steal” meant that a legislative fix was out of the question.³⁰⁵

Once it became clear that the 1889 legislation and *Kirk* did not fully remove the cloud on the title of the St. Clair owners, the straightforward solution would have been to file an action to quiet title and ask the courts to declare who owned Streeterville.³⁰⁶ Surely this was considered. But the judgment was evidently reached that it was too risky. As previously noted, after Fairbank suffered a setback during a forcible entry and detainer action against Streeter in 1891—when Streeter pointed out to the court that Fairbank did not have title to land created by artificial filling—the St. Clair Street owners consistently avoided any legal challenge that would require a judicial determination of their rights.³⁰⁷

If the St. Clair owners were unwilling to risk a quiet title action, how were they to secure the fruits of their legal maneuvering to gain effective rights to the land? The only answer was to establish visible occupation of the land through significant development. If individuals or entities could be persuaded to build substantial structures on the land, especially structures occupied by institutions engaged in respectable activities, this would soon establish a collective sense that the St. Clair owners had acquired “vested rights” in the filled land. After a time, if someone tried to challenge the occupants’ title based on the unextinguished claims of the State, the

³⁰⁵ See *supra* text accompanying notes 230–54.

³⁰⁶ Quiet title actions had been recognized in Illinois. See, e.g., *Hardin v. Jones*, 86 Ill. 313, 315–16 (1877) (stating that an action to quiet title may be brought by a party who is in possession of the land in controversy or claims to be the owner of land that is unimproved and unoccupied).

³⁰⁷ An action for partition, which was in effect a quiet title action, was filed in *Barney v. Board of Commissioners*, 203 Ill. 397, 67 N.E. 801 (1903). The action concerned parkland at Oak Street and Michigan Avenue—in front of where the Drake Hotel stands today—and was brought by speculators who had acquired a reversion in this land at an execution sale. The litigation was a long-shot attempt to have the title of the Lincoln Park Commissioners declared void, converting the reversion into a fee simple. See *id.* at 398–99, 67 N.E. at 801. Needless to say, the effort failed. The action did not touch the area that was truly vulnerable to legal challenge, which was the “middle layer” of landfill, south of Oak Street, composed of artificial fill not sanctioned by the State.

St. Clair Street owners could claim estoppel, laches, or abandonment—and hope this would prevail with the courts.³⁰⁸

The problem with this strategy is that it presented a kind of prisoner's dilemma, as each St. Clair owner would rationally prefer that someone else be the first mover to risk constructing a substantial structure on the land. The full story of how the St. Clair Street owners overcame this prisoner's dilemma will probably never be known. Nevertheless, the manner in which Northwestern University came to acquire a significant portion of the land in the 1920s provides a window into how Streeterville eventually came to be regarded as solid land of secure title, no different from other land in commercially developed sections of Chicago.

Starting around 1913, the Northwestern professional schools located in the City of Chicago—law, medicine, dentistry, and commerce—all began looking for new quarters.³⁰⁹ Each of the schools preferred to stay in Chicago rather than move to Evanston, where the main university campus was located.³¹⁰ The leader of the professional schools at the time was John Henry Wigmore, dean of the law school from 1901 to 1929.³¹¹ In 1916, Wigmore surveyed the deans of the various professional schools and reported to the university about their needs in terms of new space. As to location, he reported that the deans had agreed upon three criteria: south of Chicago Avenue, east of LaSalle Street, and west of Pine Street (Michigan Avenue).³¹² Thus, as of 1916, Wigmore and his colleagues preferred the North Side but were not thinking about locating in Streeterville. The principal difficulty (as always) was to find the money to pay for a substantial piece of real estate and the construction of new buildings in this preferred area.

About the same time, Nathan William MacChesney, an influential Chicago attorney and a powerful trustee of Northwestern, proposed that the Northwestern professional schools build a new campus on the largely vacant land in Streeterville.³¹³ In particular, MacChesney suggested that

³⁰⁸ Something like this strategy would work for the Illinois Central Railroad when it sought to develop the air rights above its landfill south of the river. The Illinois Supreme Court eventually held in *Hickey v. Illinois Central Railroad*, 35 Ill. 2d 427, 220 N.E.2d 415 (1966), that although the State's title to the air rights had never been extinguished, the State was estopped from challenging private development of the air rights by its long inaction in defending its title. *See id.* at 449–50, 220 N.E.2d at 427. By the time the litigation arose, the air rights were occupied by, among other structures, the Prudential Insurance Company building, then the tallest building in Chicago. *See id.* at 445, 220 N.E.2d at 424.

³⁰⁹ *Cf.* WILLIAM R. ROALFE, JOHN HENRY WIGMORE 155 (1977); Letter from John H. Wigmore to Col. Nathan W. MacChesney 1 (June 20, 1916).

³¹⁰ *See, e.g.*, Letter from John H. Wigmore to William A. Dyche (Feb. 5, 1919); Letter from John H. Wigmore to William A. Dyche (Feb. 15, 1919).

³¹¹ *See* ROALFE, *supra* note 309, at 45–75, 179–84.

³¹² *See* Letter from John H. Wigmore to Col. Nathan W. MacChesney 3 (June 20, 1916).

³¹³ *See* Nathan W. MacChesney, Report of Committee on Increasing Endowment (Oct. 26, 1915), in NORTHWESTERN UNIVERSITY BOARD OF TRUSTEES AND EXECUTIVE COMMITTEE MINUTES: JULY 1,

Northwestern purchase the Farwell property located between Superior Street and Chicago Avenue and the Fairbank property located between Huron and Superior streets. When university officials expressed interest in this idea, Wigmore quickly threw his support behind the plan, silently dropping the condition that the land had to be west of Michigan Avenue.³¹⁴

In 1917, MacChesney and William Dyche, Northwestern's business manager, negotiated options to purchase the Farwell and Fairbank properties.³¹⁵ When World War I intervened, the options expired.³¹⁶ After the war was over, Wigmore succeeded in getting the options renewed.³¹⁷ The board of trustees approved the acquisitions in the fall of 1919.³¹⁸ Northwestern finally acquired the Farwell property in 1920 for \$999,049.³¹⁹ The university purchased the Fairbank property at the same time for \$421,211.³²⁰

In 1927, Northwestern purchased an additional contiguous five acres from the Newberry Library, thereby enlarging the Chicago campus from

1915 TO JUNE 30, 1916, at 161–64; Letter from Nathan W. MacChesney to North Central Association (May 19, 1920).

³¹⁴ See Nathan W. MacChesney, *Reminiscences of Forty Years' Association with Dean Wigmore* 28–32 (n.d.).

³¹⁵ See Nathan William MacChesney, *The Genesis and History of Northwestern University Downtown Campus*, NW. U. ALUMNI NEWS, May 1923, at 3, 5; Kevin Leonard, *The Origins of Northwestern University's Chicago Campus—1915–1926*, at 3, 10 (June 1, 1976) (unpublished paper, Northwestern University); *The Romance of the City Campus of Northwestern University* (document available in folder marked Chicago Campus 1923–1925, 1929, 1933–1938, 1941, 1943, 1945–1947 in MacChesney Box 2 at Northwestern University Archives).

³¹⁶ See ROALFE, *supra* note 309, at 155–56; HAROLD F. WILLIAMSON & PAYSON S. WILD, *NORTHWESTERN UNIVERSITY: A HISTORY 1850–1975*, at 120, 139 (1976); *see also* Leonard, *supra* note 315, at 11 (concluding that the options likely expired because of America's participation in the war, notwithstanding MacChesney's claim decades later that he personally carried the options from 1917 to 1919); MacChesney, *supra* note 315 (claiming that the options could not be exercised because of the war and that MacChesney and Dyche kept the options alive).

³¹⁷ See Letter from Wigmore to Dyche (Feb. 5, 1919), *supra* note 310; Letter from Wigmore to Dyche (Feb. 15, 1919), *supra* note 310; Leonard, *supra* note 315, at 12–13.

³¹⁸ See Leonard, *supra* note 315, at 16; *see also* NW. UNIV., *REPORT OF THE COMMITTEE ON FINANCIAL CAMPAIGN (1919)*; *N.U. to Expend \$4,450,000 on Campus in City*, CHI. TRIB., Oct. 10, 1919, at 1; *Northwestern Drive for Building Fund On*, CHI. DAILY NEWS, Oct. 10, 1919, at 3.

³¹⁹ See Deed from Arthur L. Farwell & Katherine I. Farwell to Northwestern University (July 13, 1920) [hereinafter *Farwell Deed*]; *NORTHWESTERN UNIVERSITY BOARD OF TRUSTEES MINUTES 1920–21*, at 6–7 (meeting of July 13, 1920).

³²⁰ See *NORTHWESTERN UNIVERSITY BOARD OF TRUSTEES MINUTES 1920–21*, at 14–17 (meeting of Oct. 26, 1920); *see also N.W.U. Chicago Campus Bought for \$1,500,000: Option Exercised on Eve of Expiration*, CHI. TRIB., June 16, 1920, at 5 (reporting that Northwestern would “buy the Fairbanks-Farwell nine acre tract at Chicago avenue and Lake Shore drive” for a purchase price of “about \$1,500,000”). The university would add to this area in 1927. *See N.U. Will Add to Its Campus on North Side*, CHI. TRIB., Dec. 7, 1927, at 1 (noting purchase price of \$2,000,000).

nine to fourteen acres.³²¹ The Newberry property, located immediately south of the original purchase, on the north side of Huron Street between Lake Shore Drive and Fairbanks Court, cost Northwestern approximately \$2,185,000.³²²

The deeds of conveyance in both 1920 and 1927 hint at the uncertain state of title to this land. The grantors of the Farwell property, Arthur and Katherine Farwell, were the son and daughter-in-law of John V. Farwell. Their deed of conveyance to the university was a special warranty deed—that is, a deed in which the grantors warranted that they had done nothing to impair title during their ownership (in this instance, since they had inherited the land from John Farwell), but did not guarantee against defects in title existing before they acquired the property.³²³ As for the Fairbank property, whose title Northwestern took via a “trustees’ deed,” Northwestern was aware of “certain objections to the title to a small portion of the property” and regarded it as “unwise” to obtain that portion “at the present time.”³²⁴ Moreover, citing “litigation pertaining to the titles in this neighborhood,” the board of trustees decided to seek title insurance for the Farwell and Fairbank properties.³²⁵ And the 1927 deed of conveyance (covering the Newberry property) was a quitclaim deed, which provided no warranty of title at all.³²⁶ Typically, special warranty deeds and quitclaim deeds signal potential flaws in the title, and land conveyed by these deeds generally commands a lower price.³²⁷

There is an interesting clue as to how at least some of the money to pay for the 1920 purchases was raised. MacChesney served on the board of directors of an organization called the North Central Association, consisting mostly of real estate investors and businesses having interests in the area north of the Chicago River. For example, the association’s board included, in addition to MacChesney, representatives of the Palmer estate, the Ogden estate, the McCormick estate, the Farwell family, and the Fairbank family.³²⁸ Correspondence between the organization and

³²¹ See *N.U. Will Add to Its Campus on North Side*, *supra* note 320; *Northwestern in Chicago*, CHI. TRIB., Dec. 8, 1927, at 10; see also Deed from Newberry Library to Northwestern University (July 1, 1927) [hereinafter Deed from Newberry Library].

³²² See Deed from Newberry Library, *supra* note 321 (reflecting purchase price of \$2,184,833); WILLIAMSON & WILD, *supra* note 316, at 155. By 1929, Northwestern completed Passavant Hospital on the Newberry property but had to stop all further construction plans for approximately thirty years, primarily because of the emergence of both the Great Depression and World War II. See *id.*

³²³ See Farwell Deed, *supra* note 319.

³²⁴ NORTHWESTERN UNIVERSITY BOARD OF TRUSTEES MINUTES 1920–21, at 14–17 (meeting of Oct. 26, 1920).

³²⁵ *Id.* at 23–24 (meeting of Sept. 29, 1920).

³²⁶ See Deed from Newberry Library, *supra* note 321.

³²⁷ Cf. *Waterman Hall v. Waterman*, 220 Ill. 569, 574, 77 N.E. 142, 144 (1906).

³²⁸ See Memorandum from Bertram M. Winston, N. Cent. Ass’n, to Nathan W. MacChesney et al. 2 (Apr. 30, 1920) (listing MacChesney and the others on the letterhead).

MacChesney reveals that the North Central Association was actively engaged in soliciting its members to contribute financially to Northwestern to provide the funds for the purchase of the Streeterville property. A “bulletin” issued to “members” and “friends” stated bluntly that the proposed project “is of particularly great commercial value to the surrounding neighborhood.”³²⁹ Specifically, “[i]t will encourage to the South of Chicago Avenue, a high type of business development which will be of tremendous value to the surrounding real estate; it will also protect the wonderful residential section to the North from business encroachment.”³³⁰

MacChesney was, to put the best face on it, working to advance the interests of both sides of the deal. His friends and clients among the St. Clair Street owners wanted a “prestige” development to enhance the reputation of Streeterville and legitimize it as a location for future development. Meanwhile, Northwestern needed a site for a new campus and was short of cash to pay for it. There is no evidence from the archival record that MacChesney specifically informed the Northwestern Board of Trustees that land values in Streeterville were depressed because the title was clouded.³³¹ Nor is there any evidence he informed the board that constructing its campus in this area might help to resolve the title issue, at least as a matter of public perception, and hence enhance the value of the remaining holdings of the St. Clair Street owners with whom MacChesney was associated. Nor is it clear that the trustees had any explicit understanding that the owners would donate part of the funds that the university required to acquire the land, although it is plausible that there was at least a tacit agreement to this effect.

Once the Farwell land was acquired in 1920, Wigmore and others made further efforts to raise the money for construction. Levy Mayer’s widow and Judge Gary provided support for a new law school, the cornerstone of which was laid in 1926.³³² Montgomery Ward’s widow and daughter made major gifts that made possible the construction of the medical school building, also dedicated in that year.³³³

After Northwestern’s Gothic-revival campus went up, development of Streeterville began to take off. Northwestern’s commitment to the area was

³²⁹ *To the Members of the North Central Association and Its Friends*, N. CENT. BULL. (N. Cent. Ass’n, Chicago, Ill.), May 5, 1920 [hereinafter N. Cent. Ass’n]; see also *Northwestern Drive for Building Fund On*, *supra* note 318 (reporting that “[r]eal estate operators and those who have been studying the district . . . see a tremendous advance in property values as the result of the university’s project”).

³³⁰ N. Cent. Ass’n, *supra* note 329.

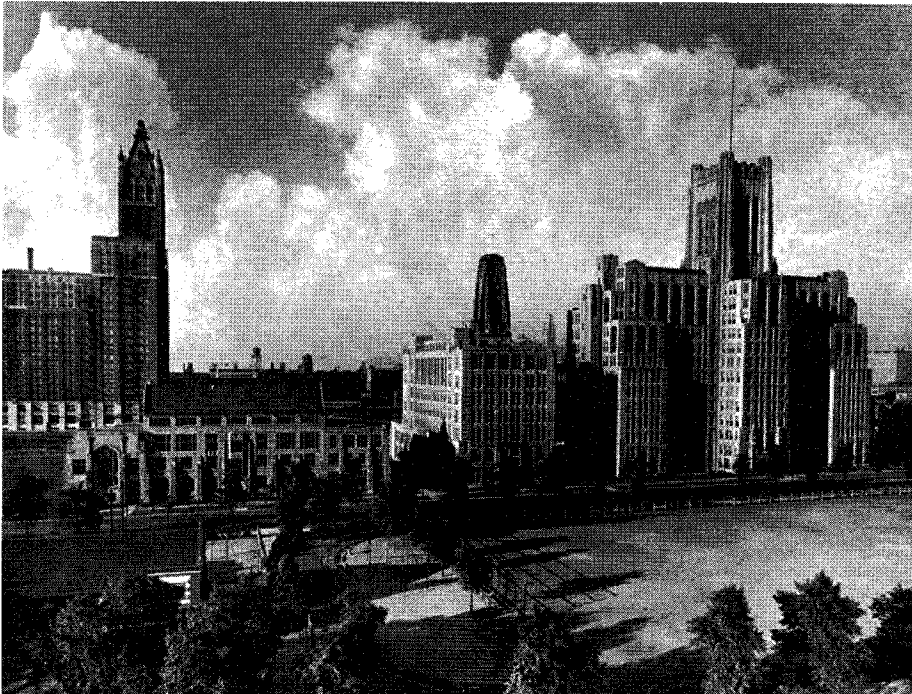
³³¹ In his initial report to the board about locating the professional school campus north of the Chicago River, MacChesney had merely noted that once the Michigan Avenue bridge was completed, land values in the area would likely rise. See MacChesney, *supra* note 315, at 164.

³³² See ROALFE, *supra* note 309, at 157–58, 174–75.

³³³ See Kearney & Merrill, *supra* note 4, at 1465 n.267.

not the only cause. The opening of the Michigan Avenue bridge and the widening (and renaming) of Michigan Avenue in 1920 made the area more accessible.³³⁴ And the construction of the posh Drake Hotel the same year lent considerable cachet to the neighborhood.³³⁵ Still, the central area of Streeterville remained largely vacant of buildings until Northwestern made its move. After 1926, commercial construction activity proceeded at a more rapid pace. Figure 21, reflecting our research, traces the progress of new building in Streeterville from 1910 to 1925 to 1938. Further development would be disrupted by the Great Depression and World War II—but never again by doubts about the validity of the legal title to the land.

FIGURE 20: NORTHWESTERN UNIVERSITY CHICAGO CAMPUS (1939)³³⁶

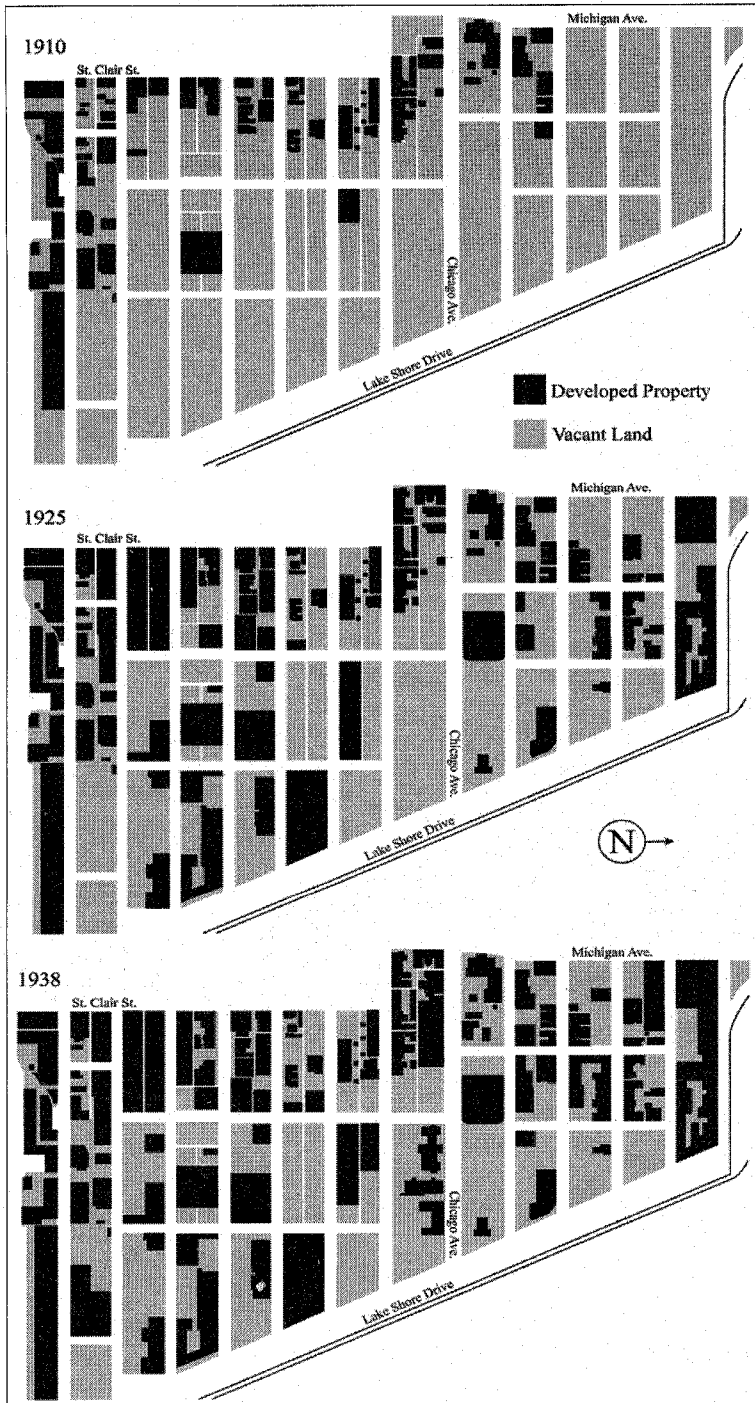


³³⁴ See ELIZABETH McNULTY, CHICAGO: THEN AND NOW 58 (2007).

³³⁵ See *The Drake*, CHI. TRIB., Nov. 30, 1920, at 8; *New Year's Parties Will Mark Formal Opening of Drake*, CHI. TRIB., Dec. 8, 1920, at 25.

³³⁶ On file with the Northwestern University Archives. This view looks south toward the buildings on Chicago Avenue, including Levy Mayer Hall, and beyond Chicago Avenue to include (in the easternmost portion) a view of the Furniture Mart. Cf. *supra* note 260 and accompanying text.

FIGURE 21: STREETERVILLE BUILDINGS—1910, 1925, 1938



CONCLUSION

Whether by luck or design, Streeterville was eventually transformed from submerged land into a neighborhood of Chicago regarded as conventional (if especially valuable) real estate. The period of transformation, which started in the 1830s and was fully completed only a century later, was marked by extraordinary competition over who would garner the prize of new solid land. The contestants came from all walks of life, from squatters armed with guns to con artists to Indian tribes to Chicago's wealthiest families and their sophisticated advisors.

The competition was made possible in significant part by legal uncertainty over the status of new land formed where water once stood. The governing rules were sufficiently unclear, and were sufficiently susceptible of manipulation, that few citizens had any idea who was in control of this resource. As a result, nothing seemed to eliminate the collective intuition that it was up for grabs. Neither physical invasion, nor armed guards, nor fences, nor street construction, nor legislation, nor court decisions seemed to end the competition. The only solution was for one of the contesting groups to seize control of the asset, engage in substantial development, and hang on. Solid land, at least when it has been occupied in a visible way, is a resource susceptible of stable control and use. Vacant land reclaimed from water, it would seem, is not.

It is also noteworthy that Streeterville, which consists predominantly of artificial landfill protected by the public trust doctrine, is today mostly private property. The exceptions are the small park east of the Chicago pumping station, which the Lincoln Park Commissioners, seeing no private owner to claim the reclaimed land, decided should become a city park, and the beaches outside Lake Shore Drive at Oak Street and Ohio Street. The main reason for the dearth of public land is the weakness of the public trust doctrine. The trustee of the vast trove of submerged land under Lake Michigan was the Illinois legislature, and the Illinois Supreme Court, in the *Kirk* case, was happy to defer to the trustee about the proper disposition of this resource, given the vagueness of the trust. Grant Park to the south, which also consists of landfill protected by the public trust doctrine, was saved for public use by the public dedication doctrine, not the public trust doctrine.³³⁷ But given the repudiation of the Public Land Office survey in 1896, Streeterville has no official survey or plat. Thus, there is no formal designation of public space to which the public dedication doctrine might attach. It would take many decades before state institutions would become strong enough to protect public rights along the lakeshore, without the aid of private rights aligned with the cause of preservation. By the time the

³³⁷ See Kearney & Merrill, *supra* note 4, at 1418–22 (summarizing the role of each doctrine in the context of Grant Park).

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State of Illinois was sufficiently robust to play this role, Streeterville was securely held as private land.