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Casey Jarman

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M. Casey Jarman*

INTRODUCTION

Over the past several years, increased demands for coastal resources have created disputes over the respective rights of private landowners and the public in the bayous, tidal streams, and beaches of the Mississippi Gulf Coast. These legal rights are determined by the public trust doctrine, a concept that has evolved in American jurisprudence from Roman and English law.¹ Its philosophic underpinning is that seas and shores, and the resources found within, represent a vast, inexhaustible commons whose wealth can and should be shared by all.

Mississippi's public trust doctrine has its roots in the English common law.² Prior to the signing of the Magna Charta in 1215, the English monarchy claimed sovereign ownership in ocean and coastal lands and waters, and the resources contained therein. Over a period of time, as the King granted many coastal waterways to lords loyal to him, sovereign lands came to be divested in a manner indistinguishable from other private prop-

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¹ See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 473, *passim* (1969)(historic origins of public trust law); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 *passim* (1980)(public trust law history); Note, *The Public Trust in Tidal Areas: A Sometimes Submerged Traditional Doctrine*, 79 YALE L.J. 762, *passim* (1970)(origins of public trust law).

² *State v. Stewart*, 184 Miss. 202, 224, 184 So.2d 44, 47 (1938). Concerning public trust doctrine ". . . Mississippi adopted the common law as it prevails in England." *Id.*

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erty. The Magna Charta, which has been interpreted to have brought to a close such privatization of public lands, established the roots of the modern law of public trust.³ It permitted the monarchy to retain sovereign rights in tidal lands and resources up to the high-water mark, but prohibited exclusive alienation to private parties for private use. Thus, a trust in favor of the public was impressed upon such lands.

Mississippi obtained ownership of its tidelands below mean high tide from the United States government under the equal footing doctrine, a legal principle which provides that states entering the Union after its initial creation came in on an "equal footing" with other states.⁴ Because the original states had reserved their tidelands and navigable waters and held them in trust for the public, Mississippi became owner of its tidelands upon statehood. Prior to statehood, the federal government owned these lands in a similar trust capacity.⁵

³ *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 366 (1842).

The question is not free from doubt, and the authorities referred to in the English books cannot, perhaps, be altogether reconciled. But . . . the question must be regarded as settled in England against the right of the king since the Magna Charta to make such a grant [of submerged lands] . . . But the existence of a doubt as to the right of the king to make such a grant after Magna Charta, would of itself show how fixed has been the policy of that government on this subject for the last six hundred years; and how carefully it has preserved this common right for the benefit of the public.

Id. at 410, 412.

⁴ *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845).

The manner in which the new states were to be admitted into the union, according to the ordinance of 1787 [Northwest Ordinance], as expressed therein, is as follows: ' . . . such state shall be admitted by its delegates into the congress of the United States, on an equal footing with the original states in all respects whatever.'

Id. at 222. This doctrine was extended to ensure that "new" states have the same rights as the original states in the tide waters, and in the lands below the high-water mark, within their respective jurisdictions. *Shively v. Bowlby*, 152 U.S. 1, 26 (1893).

⁵ *Knight v. United States Land Ass'n*, 142 U.S. 161 (1891).

It is the settled rule of law in this court that absolute property in, and dominion and sovereignty over, the soils under the tide waters in the original States were reserved to the several States, and that the new States since admitted have the same rights, sovereignty and jurisdiction in that behalf as the original States possess within their respective borders. Upon the acquisition of the territory from Mexico the United States acquired the title to tide lands equally with the title to upland; but with respect to the former they held it only in trust for the future States that might be erected out of such territory.

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The extent of public rights in tidelands varies from state to state.⁶ And within state public trust case law, courts have had difficulty in establishing the bounds of the trust. Mississippi is no exception. Several property issues have arisen in Mississippi's public trust law. First, what is the geographical boundary between private and public trust land? Second, to what extent can the state alienate trust lands in fee? Third, what private and public uses are protected by the public trust doctrine? And fourth, what public rights are impressed upon owners whose property lies upland from public trust tidelands? This article explores these issues and how they are treated under Mississippi statutory and common law.

GEOGRAPHIC BOUNDARY OF TIDAL PUBLIC TRUST LANDS

1. *Ebb and Flow Test*

In its earliest public trust decision, *Martin v. O'Brien*,⁷ the Mississippi Supreme Court established the high water mark as the inland geographic boundary of public trust lands.⁸ One of the court's most coherent discussions on the subject is found in *State ex rel. Rice v. Stewart*.⁹ This case involved the ownership of submerged lands in Bayou Bernard, a navigable inlet of the Mississippi Sound.¹⁰ Contending that they owned the bed of the bayou and the minerals contained therein, the adjacent upland

Id. at 183.

⁶ *Shively v. Bowlby*, 152 U.S. 1 (1893).

. . . there is no universal and uniform law upon the subject; but that each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining uplands or not, as it considered for the best interests of the public.

Id. at 26. *See, e.g.* *City of Newport Beach v. Fager*, 102 P.2d 438, 441 (Ca. App. 1940)(legislature may alienate tidelands from public trust if public interest not substantially impaired); *Orbrecht v. National Gypsum Co.*, 105 N.W. 2d 143, 149 (Mich. 1960)(beds of Great Lakes alienable in exceptional circumstances); *State Laws Bd. v. Heuicer*, 548 P.2d 1323, 1325 (Or. App. 1976)(state can not grant away public right to use tidelands for commerce and navigation).

⁷ 34 Miss. 21 (1857).

⁸ *Martin v. O'Brien*, 34 Miss. 21, 36 (1857).

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¹⁰ *State ex rel. Rice v. Stewart*, 184 Miss. at 219, 184 So. at 45.

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owners established a commercial sand and gravel mining operation in the bayou.¹¹ Citing its ownership under the public trust doctrine, the state filed suit to enjoin the mining operations.¹²

In its opinion, the court restated its holding in *Martin* that the state holds lands under navigable tidal waters below mean high tide in trust for the people.¹³ It then further defined the term "navigable" to include all waters subject to the ebb and the flow of the tide, regardless of navigability in fact.

The phrase 'navigable river,' has a technical meaning in the Common Law. A river is navigable in the technical sense, as high up from its mouth as the tide flows Above that it may be a common highway, subject to the use of the public for navigation according to the common law acceptance of the term, but it is not technically a navigable river. The soil under a river which is navigable in the technical sense, does not belong to the riparian owners, but to the public.¹⁴

Noting that no sound policy reason exists for distinguishing ownership of beds beneath freshwater (which extends to the middle of the stream with a navigation easement in favor of the public) and tidal rivers, the court nonetheless restated its acceptance of the English common law public trust doctrine.¹⁵

As recently as 1986, in *Cinque Bambini v. State*,¹⁶ the court affirmed this general rule, but with a curious line of reasoning. The case arose from a dispute over rights to oil and gas on approximately 600 acres of marshland in Hancock County.¹⁷ For almost a century and a half, a succession of owners of the land in question had paid property taxes to the state. Private ownership was not questioned until 1977 when the state granted mineral leases throughout the area.¹⁸ The leases contained assertions of state ownership, under the public trust doctrine, of sub-

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 224, 184 So. at 47.

¹⁴ *Id.* at 225, 184 So. at 47.

¹⁵ *Id.* at 230, 184 So. at 50.

¹⁶ 491 So. 2d 508 (Miss. 1986), *aff'd*, *Phillips Petroleum Co. v. Mississippi*, ____ U.S. ____, 108 S. Ct. 791 (1988).

¹⁷ *Cinque Bambini v. State*, 491 So. 2d at 510.

¹⁸ *Id.* at 511.

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merged lands subject to the ebb and flow of the tide up to mean high-water mark, by virtue of the "ebb and flow" test.¹⁹ The Cinque Bambini Partnership, contended however, that the public trust extends only to submerged tidelands that are "navigable-in-fact."²⁰

In its reaffirmation of state ownership of tidelands up to the mean high tide line, regardless of actual navigability, the court virtually ignored the *Stewart* line of reasoning. Instead, it re-analyzed the issue in light of federal law.²¹ This approach required the court to determine whether extension of the public trust doctrine to inland navigable waters by the United States Supreme Court in *The Genessee Chief*²² in 1851 had resulted in a restriction of the "ebb and flow" test for public trust jurisdiction in tidal lands.²³ Drawing an analogy to navigable freshwaters, the Mississippi court stated that the trust applies to both the navigable and non-navigable portions of a freshwater waterway up to the high-water mark.²⁴ It then equated the "mean high tide" line with the "high-water" mark of a river.²⁵ Because the tidelands granted to Mississippi under the "equal footing" doctrine are those fronting the Gulf of Mexico — un-

¹⁹ *Id.* at 514. Utilizing the "ebb and flow" test, the public trust would be construed to include tidally influenced non-navigable waters. *Id.*

²⁰ *Id.* at 513.

²¹ The court merely mentioned the *Stewart* holding in support of its own conclusion under the federal law analysis. *Id.* at 516. The court deemed the issue to be a federal question, as the federal government had title to the lands prior to statehood, and as the allocation of land to tide state, to private citizens, and to the public trust was governed by the "equal footing" doctrine. *Id.* at 513.

²² 53 U.S. (12 How.) 443 (1851). *The Genessee Chief* case was precipitated by a collision between two vessels on Lake Ontario. The appellant contended that the federal court system did not have jurisdiction over the case, as admiralty and maritime jurisdiction "is limited to cases occurring upon waters within the ebb and flow of the tide." *Id.* at 447. The court examined the reasons for the initial grant of admiralty jurisdiction to the federal government, and determined that the same reasons extend to navigable streams and lakes. *Id.* at 453-54. Accordingly, the court held that admiralty jurisdiction encompassed navigable inland waters as well as those influenced by the tide. *Id.* Subsequent to this expansion of admiralty jurisdiction, the Supreme Court expanded the boundaries of the public trust to include navigable inland waters. *Cinque Bambini*, 491 So. 2d at 514.

²³ *Cinque Bambini*, 491 So. 2d at 513.

²⁴ *Id.* at 514.

²⁵ *Id.* at 514-15.

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questionably a navigable body of water — the court reasoned that the trust therefore extends from the state's border on the Gulf to the mean high tide line.²⁶ Despite the strained reasoning of the opinion, the resultant holding is consistent with past decisions of the court.

2. Ambulatory Boundaries

Because coastal tidelands are a dynamic, constantly changing ecosystem, their geographic boundaries are "ambulatory," or mobile. Wetlands are created and destroyed regularly by both natural and man-made forces, described in legal terminology as accretion²⁷, reliction²⁸, and avulsion²⁹. To what extent do the legal boundaries of trust land follow these changes? The Mississippi Supreme Court has taken the position that accretions that develop adjacent to the shore become the property of the upland owner.³⁰ The court justifies this holding on the theory that it protects an owner's littoral right of access to the water.³¹ Title to noncontiguous fast lands that emerge from tidal waters, however, is held by the state in trust for the public in the same manner as submerged tidelands.³² Accreted lands adjacent to an island belong to the owner of the island, even when such

²⁶ *Id.* at 515-16. The court found further support for its conclusion in the fact that "tide" terminology has continued in use since *The Genessee Chief*, thus indicating that the "navigable waters" test is an extension rather than replacement of the "ebb and flow" rule. *Id.* at 515.

²⁷ "Accretion" refers to the "addition of portions of soil, by gradual deposition through the operation of natural causes, to that already in possession of owner." BLACK'S LAW DICTIONARY 36 (4th ed. 1957).

²⁸ "Reliction" is an "increase of the land by the permanent withdrawal or retrocession of the sea or a river." BLACK'S LAW DICTIONARY 1455 (4th ed. 1957).

²⁹ "Avulsion" is the "removal of a considerable quantity of soil from the land of one man, and its deposit upon or annexation to the land of another, suddenly and by the perceptible action of water." BLACK'S LAW DICTIONARY 173 (4th ed. 1957).

³⁰ *H.K. Porter Co. v. Jackson County*, 324 So. 2d 746, 750 (Miss. 1975); *International Paper Co. v. Mississippi State Highway Dep't*, 271 So. 2d 395, 398 (Miss. 1972); *Harrison County v. Guice*, 244 Miss. 95, 106, 140 So. 2d 838, 841-42 (1962).

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accretions meet the mainland.³³

In 1962, the court was first presented the opportunity to determine whether lands that were once subject to the public trust could inure to the upland owner when artificially filled. In *Harrison County v. Guice*³⁴, the county filled shallow bottoms below mean high tide, as well as upland on Guice's property, in order to protect Highway 90 and the seawall that separated it from the Mississippi Sound.³⁵ The court found this to be an artificial accretion erected by "strangers to the upland title."³⁶ Such accretions, decided the court, become the property of the upland owner, even though the accretions were created at public expense and the submerged land that was filled to make the beach previously belonged to the state.³⁷ The court reached this conclusion by analogy to the principle that owners whose property adjoins tidelands cannot extend their lands by artificially reclaiming state-owned bottoms.³⁸ The court stated that protection of the littoral owner's right of access to the water is the reason for such a rule.³⁹

A federal court opinion arising from the same controversy as *Guice* came to the opposite conclusion. In *United States v. Harrison County*,⁴⁰ The Fifth Circuit rejected the *Guice* holding, reasoning instead that Section 95 of the Mississippi Constitution of 1890 supersedes the common law doctrine of accretion.⁴¹ Section 95 provides that "lands belonging to, or under the control of the state, shall never be donated directly or indirectly to private corporations or individuals."⁴² Because of this provision, the court ruled, private upland owners cannot take ownership of for-

³³ *H.K. Porter Co. v. Jackson County*, 324 So. 2d 746, 751 (Miss. 1975).

³⁴ 244 Miss. 95, 140 So. 2d 838 (1962).

³⁵ *Id.* at 839. Work was financed with a combination of federal and county funds to remedy an erosion problem associated with the original construction of the seawall. *Id.* The county secured an easement from Ms. Guice, but only 50' wide. *Id.* Ms. Guice owned approximately 175-250 feet south of Highway 90 at the time of granting of easement and emplacement of the sloping beach. *Id.*

³⁶ *Id.* at 842.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 399 F.2d 485 (5th Cir. 1968).

⁴¹ *Id.* at 491.

⁴² Miss. CONST. art. IV, § 95.

accretions meet the mainland.³³ , I

In 1962, the court was first presented the opportunity to determine whether lands that were once subject to the public trust could inure to the upland owner when artificially filled. In *Harrison County v. Guice*³⁴, the county filled shallow bottoms below mean high tide, as well as upland on Guice's property, in order to protect Highway 90 and the seawall that separated it from the Mississippi Sound.³⁵ The court found this to be artificial accretion erected by "strangers to the upland. Such accretions, decided the court, become the property of the upland owner, even though the accretions were created at public expense and the submerged land that was filled to make the beach previously belonged to the state." The court reached this conclusion by analogy to the principle that owners whose property adjoins tidelands cannot extend their lands by artificially reclaiming state-owned bottoms.³⁶ The court stated that protection of the littoral owner's right of access to the water is the reason for such a rule.³⁷

A federal court opinion arising from the same controversy as *Guice* came to the opposite conclusion. In *United States v. Harrison County*³⁸ The Fifth Circuit rejected the *Guice* holding, reasoning instead that Section 95 of the Mississippi Constitution of 1890 supersedes the common law doctrine of accretion.³⁹ Section 95 provides that "lands belonging to, or under the control of the state, shall never be donated directly or indirectly to private corporations or individuals."⁴⁰ Because of this provision, the court ruled, private upland owners cannot take ownership of for

³⁴ *H.K. Porter Co. v. Jackson County*, 324 So. 2d 746, 751 (Miss. 1975).

³⁵ 244 Miss. 95, 140 So. 2d 838 (1962).

³⁶ *Id.* at 839. Work was financed with a combination of federal and county funds to remedy an erosion problem associated with the original construction of the seawall. *Id.* The county secured an easement from Ms. Guice, but only 50' wide. *Id.* Ms. Guice owned approximately 175-250 feet south of Highway 90 at the time of granting of easement and emplacement of the sloping beach. *Id.*

³⁷ *Id.* at 842.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

399 F.2d 485 (5th Cir. 1968).

Id. at 491.

Cousw. art. IV, 95.

merly submerged lands.⁴³ This reasoning allowed specific performance of a contract entered into in 1951 by the federal government and Harrison County, in which the government awarded 1.3 million dollars to the state of Mississippi for the construction of 17 miles of beach in Harrison County. In exchange for such public funds, the county agreed that the beaches would be made available to the public. The court granted public access to such beaches for sunbathing, recreation, and other uses appropriate to a sand beach, so long as such use did not unreasonably interfere with the littoral rights of the upland owners.⁴⁴

These conflicting decisions leave the status of ownership of the man-made beaches on Mississippi's coast and the viability of the common law doctrine of accretions in doubt. Section 95 of the Mississippi Constitution of 1890 is not mentioned in the *Guice* opinion, so it is unclear whether that issue was raised and considered. Dicta in the Mississippi Supreme Court's latest public trust case suggest acceptance of the *Guice* holding.⁴⁵ As development pressures on Mississippi's coast increase, conflicts between public and private rights on the beach are bound to arise. Therefore, it is likely that the court will be called upon to resolve the two opinions.

If the court were to accept the *Guice* holding in a subsequent case, it would create a no-win situation for the governing body charged with overseeing man-made beaches, upland owners, and the public. The court could reconcile *Guice* with the *Harrison County* decision, however, by applying the common law doctrine of implied dedication. The dedication doctrine makes it possible for a landowner either to transfer full ownership of his land to the public or to grant an easement to the public for certain uses.⁴⁶ To be legally enforceable, two elements

⁴³ *Harrison County*, 399 F.2d at 491.

⁴⁴ *Id.*

⁴⁵ *Cinque Bambini*, 491 So. 2d at 519. The court referred to the *Guice* opinion as support for the proposition that the deposit of alluvial soil upon the "margin of water" inures to the benefit of the owner of the shoreland. *Id.* This reference was made as part of a summary of the contours of Mississippi Law governing the title of coastal lands, and did not address the inconsistency presented by the *Harrison County* decision.

⁴⁶ "Dedication is the term applied to a transfer of the ownership of land or of a privilege to use it to the public for a public purpose." 6A POWELL, LAW OF REAL PROPERTY § 926 (1986).

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must be present: an intent on the part of a property owner to dedicate and a valid acceptance by the public.⁴⁷

An owner's intent to dedicate may be expressly given or implied from his failure to object to continued use of his property by the public.⁴⁸ It is crucial, though, that a non-expressed intention be clearly and unequivocally manifested. Also, acceptance may be either express or implied through formal action or use by the public.⁴⁹

To date, application of the doctrine of implied dedication in Mississippi has been limited to roads and parks.⁵⁰ The test established by the court requires "long use for a specific public purpose, the discontinuance of which constitutes a violation of good faith to the public and to those who have acquired property with a view to the use contemplated by the dedication."⁵¹ It seems clear that such a test can be met in relation to Mississippi's beaches. Members of the public have been using the beaches openly and without interference.⁵² Because use need not be constant, it would be irrelevant that public use diminishes during the winter months. In many instances, counties are expending funds to maintain them. In addition, local governments routinely grant privilege licenses to beach vendors without ob-

⁴⁷ *Id.* at § 926 (2).

⁴⁸ "An implied dedication may arise by operation of law from the acts and conduct of a landowner." *Id.*

⁴⁹ *Id.*

⁵⁰ See, e.g., *City of Louisville v. Hull*, 292 So. 2d 177, 179 (Miss. 1974)(recognized implied dedication doctrine applicable to property owned by a municipality); *Armstrong v. Itawamba County*, 16 So. 2d 752, 757 (Miss. 1944)(recognized implied dedication of road which had been used by public and maintained with public funds for about twenty years); *Harrison County v. Seal*, 66 Miss. 129, 129, 5 So. 622, 622 (1889)(acceptance of dedication of road does not have to be express but can be inferred from public use); *Kinnare v. Gregory*, 55 Miss. 612, 620-21 (1878)(early recognition of implied dedication where court enjoined obstruction of highway by private party).

⁵¹ *City of Louisville v. Hull*, 292 So. 2d 177, 179 (Miss. 1974).

⁵² This writer knows of only two exceptions. First, formerly blacks were excluded from beaches which instigated the *Guice* and *Harrison County* decisions. More recently, a controversy has developed over public use of the beaches of Deer Island. Deer Island is a 500-600 acre island located in the Mississippi Sound, offshore from the coastal city of Biloxi. A private developer has attempted to restrict public access to all but a small portion of the island that is owned by the city of Biloxi. Prior to the developer's acquisition of the property, the public freely used the island for recreational purposes. As a result, an uneasy tension now prevails over public use of the island.

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