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REAL PROPERTY—STATE HAS TITLE TO FORESHORES OF GEORGIA'S NAVIGABLE WATERS

In *State v. Ashmore*,¹ the Supreme Court of Georgia held that the State has fee simple title to the foreshore of all navigable tidewaters.

On December 6, 1973, the State of Georgia filed suit in the Superior Court of Glynn County disputing the defendants' right to develop for condominiums a beach and dune area on St. Simons Island, Glynn County, Georgia. The State asserted that the property belonged to the State and that the property had been dedicated to public use. The superior court, however, granted the motions of the Ashmores to dismiss the State's complaint for failure to state a claim upon which relief could be granted and for summary judgment against the State, and denied the State's motion for summary judgment.

The property in dispute had been formed by the process of accretion in the years since 1911. The general public had used the foreshore where it has been located from time to time over the years for fishing, bathing and recreation. Prior to this suit, no efforts to prevent public use of the foreshore had been made. In answering the question of who owns the foreshore along the beach at St. Simons Island, the court determined who owns the rest of the beaches in Georgia.²

As early as the Stuart monarchs, the theory of prima facie Crown ownership of tidelands was present in England.³ After the American Revolution, the states of the United States succeeded to the rights of the Crown.⁴ Although a minority of states extended private ownership down to the low water mark, Georgia, along with the majority of states, held that ownership to the foreshore up to the high water mark was in the State.⁵ A majority of courts have held that title of the riparian owner, "who claims merely by grant of the upland extends no further than the high water mark, unless the legislature has made some provision for extending it further."⁶ It was the contention of the Ashmores that the Georgia General Assembly made such a provision in 1902. Georgia Laws 1902, p. 108⁷ (hereinafter referred

1. *State v. Ashmore*, Nos. 30176, 30177 (Ga., Feb. 24, 1976).

2. See *United States v. Lewis*, 355 F. Supp. 1132, 1134, 1140 (S.D.Ga. 1973).

3. See *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); 1 FARNHAM, WATER AND WATER RIGHTS 209-10 (1904); Parsons, *Public and Private Rights in the Foreshore*, 22 COLUM. L. REV. 706, 707-08 (1922).

4. Treaty of Peace Between the United States of America and His Britannic Majesty, 8 Stat. 80 (1783); *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894); *Martin v. Waddell*, 41 U.S. 367, 10 L.Ed. 997 (1842); *Johnson v. State*, 114 Ga. 790, 40 S.E. 807 (1902).

5. *State v. Pennsylvania R.R.*, 228 A.2d 587, 596-600 (Del. 1967); *Johnson v. State*, 114 Ga. 790, 40 S.E. 807 (1902); 1 FARNHAM, *supra* note 3 at 209. See, e.g., *Mobile Transp. Co. v. Mobile*, 187 U.S. 479, 23 S.Ct. 170, 47 L.Ed. 266 (1903).

6. 1 FARNHAM, *supra* note 3 at 209. See *State v. Pennsylvania R.R.*, 228 A.2d 587, at 597 (Del. 1967).

7. The Act provides:

SECTION 1. That from and after the passage of this Act the title to the beds of all

to as the 1902 Act) was passed immediately after *Johnson v. State*⁸ held that criminal action could not be taken against someone who took oysters from a tidewater area adjoining private property, as private ownership of navigable tides did not extend to the low water mark. In light of the *Johnson* holding and the concern over the failing oyster industry, it appears that the 1902 Act was passed in an attempt to revitalize the Georgia oyster industry.⁹ Although poorly drafted, the Statute explicitly grants the "exclusive right to the oysters and clams" but clearly omits any terms of conveyance in reference to navigable tides.¹⁰ Instead, the 1902 Act generally extends "boundaries and rights . . . to [the] low water mark."¹¹ The ambiguity of the 1902 Act has already been examined with the conclusion that "[t]he common law tradition clearly indicates that the 1902 Act should be strictly construed in favor of the public, not against the public. . . ."¹²

tide-waters in this State, where the tide regularly ebbs and flows, and which are not navigable under Section 2 of this Act, shall vest in the present owner of the adjacent land for all purposes, including among others, the exclusive right to oysters, clams and other shell fish therein or thereon. If the water is the dividing line, each owner's boundary shall extend to the main thread or channel of the water. If the main thread, or center, or channel of the water changes gradually, the line follows the same, according to the change. If for any cause it takes a new channel, the original line, if capable of identification, remains the boundary. Gradual accretions of land on either side accrue to the owner.

SECTION 2. Be it further enacted by the authority aforesaid, That a navigable tide-water, in contemplation of this Act, is any tide-water, the sea, or any inlet thereof, or other bed of water where the tide regularly ebbs and flows, which is in fact used for the purposes of navigation, or is capable of bearing upon its bosom at mean low tide boats loaded with freight in the regular course of trade. The mere rafting of timber thereon, or the passage of small boats thereover, whether for the transportation of persons or freight, shall not be deemed navigation within the meaning of this Act, and does not make tide-water navigable.

SECTION 3. Be it further enacted by the authority aforesaid, That for all purposes, including among others the exclusive right to the oysters and clams (but not to include other fish) therein or thereon being, the boundaries and rights of owners of land adjacent to or covered in whole or in part by navigable tide-waters, as defined in section 2 of this Act, shall extend to low water mark in the bed if the water, provided, however, that nothing in this Act contained shall be so construed as to authorize such an exclusive appropriation of any tidewater, navigable or unnavigable, by any person whomsoever, as to prevent the free use of the same by others for purposes of passage and for the transportation of such freights as may be capable of being carried thereover.

Ga. Laws 1902, p. 108, *codified at* GA. CODE ANN. §85-1307 *et seq.* (Rev. 1970).

8. 114 Ga. 790, 40 S.E. 807 (1902).

9. *Jones v. Oemler*, 110 Ga. 202, 35 S.E. 375 (1900), describes some of the problems of the oyster industry and discusses several of the numerous laws enacted to assist commercial oyster production. *See also* Smith and Sammons, *Public Rights in Georgia's Tidelands*, 9 GA. L. REV. 79, 101, 103 n. 149 (1974).

10. The Statute defines the sea as a navigable tidewater. Ga. Laws 1902, p. 108, *codified at* GA. CODE ANN. §85-1307 (Rev. 1970).

11. Ga. Laws 1902, p. 108, *codified at* GA. CODE ANN. §85-1309 (Rev. 1970).

12. Smith and Sammons, *supra* note 9 at 105.

It has been argued that even if the Georgia 1902 Act had been a clear attempt to convey title of the foreshore to private adjoining owners, such a conveyance would have been unconstitutional.¹³ The Georgia Constitution prohibits legislative donations and gratuities.¹⁴ *Odd Fellows v. City of Thomasville*¹⁵ held that the constitutional prohibition applied to grants of land as well as monetary donations. The only exception to this constitutional prohibition is when an alleged donation or gratuity is one from which great public benefits are expected.¹⁶ In *Illinois Central R.R. v. Illinois*,¹⁷ the United States Supreme Court supported a similar prohibition and exception upon the historical Public Trust Doctrine that a state holds public lands as trustee for its citizens:

A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace.¹⁸

Several states, including New York,¹⁹ New Jersey,²⁰ and Hawaii,²¹ have adopted this two-prong test and allow private ownership of the foreshore to extend down to the low water mark only if it is for a public benefit and an "improvement of the navigation and use of the waters," or "without impairment of the public interest in what remains."

In 1945, the General Assembly attempted to ratify and confirm the 1902 Act by adding a ratification provision in the 1945 Georgia Constitution.²²

13. Brief for Appellants at 16, *State v. Ashmore*, Nos. 30176, 30177 (Ga., Feb. 24, 1976).

14. GA. CONST., art. VII, §16, ¶1 (1877); GA. CONST., art. VII, §1, ¶2, *codified at* GA. CODE ANN. §2-5402 (Rev. 1974), provided in 1902 as follows: "1. The General Assembly shall not by vote, resolution, or order, grant any donation, or gratuity, in favor of any person, corporation, or association."

15. 226 Ga. 4, 8, 172 S.E.2d 612, 615 (1970).

16. *Georgia v. Trustees of Cincinnati S. R.R.*, 248 U.S. 26, 30, 39 S.Ct. 14, 15, 63 L.Ed. 104, 107 (1918). Other cases which have held that grants and legislation in aid of public purposes do not run afoul of the constitutional provision include: *Sigman v. Brunswick Port Auth.*, 214 Ga. 332, 104 S.E.2d 467 (1958); *State Highway Dept. v. Bass*, 197 Ga. 356, 29 S.E.2d 161 (1944); *Aven v. Steiner Cancer Hosp., Inc.*, 189 Ga. 126, 5 S.E.2d 356 (1939).

17. 146 U.S. 387, 135 S.Ct. 110, 36 L.Ed. 1018 (1892).

18. *Id.* at 453, 13 S.Ct. at 118, 36 L.Ed. at 1043.

19. *Town of Smithtown v. Poveromo*, 71 Misc. 2d 524, ____, 336 N.Y.S.2d 764, 774 (1972).

20. *New Jersey Sports & Exposition Auth. v. McCrane*, 61 N.J. 1, ____, 292 A.2d 545, 579 (1972).

21. *County of Hawaii v. Sotomura*, 55 Hawaii 176, ____, 517 P.2d 57, 63 (1973).

22. GA. CONST. art. I, §6, ¶1, *codified at* GA. CODE ANN. §2-601 (Rev. 1945) provides:

However, the Georgia courts have consistently held that "[t]he time with reference to which the constitutionality of an act of the general assembly is to be determined is the date of its passage, and, if it is unconstitutional, then it is forever void."²³ In Support of the 1945 ratification, *Hammond v. Clark*²⁴ and *Calhoun v. Kellogg*²⁵ have been cited for the proposition that a subsequent constitutional amendment, expressly ratifying and confirming a prior act, may retroactively validate that legislation where it may have been of questionable stature.²⁶

In *Ashmore*, the court cited *Hammond* and summarily dismissed the State's argument that the 1902 Act was unconstitutional.²⁷ Instead, the court held that constitutional ratification immunized the 1902 Act from a later successful constitutional attack.

The Georgia Supreme Court's conclusion in *Ashmore*, that the State has fee simple title to the foreshore in all navigable tidewaters, rests upon two findings. First, the court found that the 1945 provision, "the Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark is hereby ratified and confirmed," was inserted to identify *which* Act approved on December 16, 1902, was being ratified. The court held that this language is merely for the purposes of identification and is not to be construed as mandatory or directory. Second, the court reviewed the record of the 1943-44 Constitutional Commission and found that the Commission's intention was not to extend the titles of landowners, adjacent to tidewaters, to the low water mark. The Commission's intention was to protect and bolster the oyster industry in Georgia by giving cultivators in the oyster industry property rights in the oyster beds that they had planted.²⁸ The court reasoned that this conclusion comports with the general principle that a public grant is construed strictly against the grantee and nothing is taken by implication.²⁹

The court, in finding that the State had title in all navigable tidewaters, was careful to delineate between navigable and non-navigable tidewaters. Although it declined to define non-navigable tidewaters, it did caution

Tidewater titles confirmed. The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting on tidal water to low water mark is hereby ratified and confirmed.

23. *Jones v. McCaskill*, 112 Ga. 453, 456, 37 S.E. 724, 725 (1900). See also *Jamison v. City of Atlanta*, 225 Ga. 51, 165 S.E.2d 647 (1969); *Sentell, Unconstitutionality in Georgia: Problems of Nothing*, 8 GA. L. REV. 101 (1973).

24. 136 Ga. 313, 71 S.E. 479 (1911).

25. 41 Ga. 232 (1870).

26. Brief for the Appellees at 17, *State v. Ashmore*, Nos. 30176, 30177 (Ga., Feb. 24, 1976).

27. Nos. 30176, 30177 at 5 (Ga., Feb. 24, 1976).

28. *Id.* at 7-13, quoting from Proceedings of 1943-44 Constitutional Commission.

29. *Id.* at 18. See *McLeod v. Savannah, A.&G. R.R.*, 25 Ga. 445, 457 (1858); *McLeod v. Burroughs*, 9 Ga. 213, 221 (1851).

that its holding applied solely to navigable tidewaters.³⁰

A result in *Ashmore* other than the holding that the State had title in all navigable tidewaters would have marked a break from the long tradition of protecting the public interest in the foreshore. However, the majority opinion is extremely disappointing in that it averts the real issue of whether the 1902 Act was constitutional by summarily citing *Hammond* for the proposition that "the 1910 General Assembly proposed a constitutional amendment, later ratified by the voters, that ratified, validated, and confirmed the series of statutes that had been declared unconstitutional by this court."³¹

Exclusively on the holding of *Hammond*, the court held that

the constitutional ratification in 1945 of the 1902 Act, which had been in effect since its enactment and had not been held to be unconstitutional, was effective. In short, the 1945 constitutional ratification immunized the 1902 Act from a later successful constitutional attack.³²

In dismissing the constitutional question, the court ignored its own recent holding in *Seago v. Richmond County*.³³ There, the court adopted a rule, as stated in *Corpus Juris Secundum*, that

[t]he matter printed on the ballot must be sufficient to identify the amendment referred to and to show its character and purpose, and the question as framed on the ballot must *not* be *misleading* or *inconsistent* with other provisions of the resolution.³⁴

In *Seago*, the court held that an amendment to the Constitution of 1945 was void because neither the resolution nor

the words printed on the ballots correctly state the real purpose of the proposed amendment and they are . . . therefore misleading; this being true, the conclusion is inevitable that the voters were not . . . intelligently informed concerning the nature, character, scope or purpose of the proposed amendment.³⁵

Similarly, in *Ashmore* the court reviewed the 1945 constitutional provision: "The Act of the General Assembly approved December 16, 1902, which extends the title of ownership of lands abutting tidal on water to low water mark is hereby ratified and confirmed."³⁶ In holding that the provision, "The Act of the General Assembly approved December 16,

30. Nos. 30176, 30177 at 5.

31. *Id.*

32. *Id.*

33. 218 Ga. 151, 126 S.E.2d 657 (1962).

34. *Id.* at 155, 126 S.E.2d at 661, quoting from 16 C.J.S. *Constitutional Law* §9(3) at 56-57 (emphasis added).

35. 218 Ga. at 156, 126 S.E.2d at 660.

36. GA. CONST. art. I, §6, ¶1, codified at GA. CODE ANN. §2-601 (Rev. 1973).

1902, which extends title . . ." is not self executing and is neither mandatory nor directory but rather, is merely an identifying phrase which "contradicts the caption of the very 1902 Act it is ratifying," the court inexcusably ignores its own holding in *Seago*. Not only does the court in *Ashmore* conclude that the 1945 provision "contradicts the caption of the very 1902 Act it is ratifying," it also noted that "this identifying phrase contradicts the body of the 1902 Act it is ratifying."³⁷ The veracity of the court's perception is indisputable. However, the court should have concluded that the voters were not intelligently informed concerning the nature, character, and scope of the proposed constitutional provision and that, therefore, the 1902 Act was not ratified and confirmed by the 1945 Constitution. Admittedly, this conclusion would have reopened the question of who has rights to the oysterbeds; however, in light of *Seago*, such a conclusion is inescapable under the rationale of *Ashmore*.

In addition to the absence of ratification and confirmation, it is questionable whether the 1902 Act could withstand judicial scrutiny under the rationale of *Illinois Central R.R. v. Illinois*,³⁸ for the 1902 Act did not encourage an "improvement of the navigation and use of the water," nor was it a disposal "without impairment of the public interest in what remains."³⁹ Had the Georgia Supreme Court taken the initiative it could have protected the public interest in the future by adopting the rationale of *Illinois Central R.R.* As it has frequently been noted, self-interested and powerful minorities often have an undue influence on the public resource decisions of legislative and administrative bodies and cause these bodies to ignore broad based public interests.⁴⁰ Instead of being given a strong sense of security that only for the public benefit would the Georgia beaches be granted to exclusively private use, the people of Georgia are left with a fleeting sense of relief that this time the legislators did not intend to give away the beaches.

In distinguishing between navigable and non-navigable tidewaters, the court apparently leaves open several questions. First, the issue now left to be decided is whether marshlands are "navigable" or "non-navigable" tidewaters. The 1902 Act defines navigable tidewaters as

any tidewater, the sea, or any inlet thereof, or other bed of water where the tide regularly ebbs and flows, which is in fact used for the purposes of navigation, or is capable of bearing upon its bosom, at mean low tide, boats loaded with freight in the regular course of trade. The mere rafting of timber thereon, or the passage of small boats thereover, whether for the transportation of persons or freight, shall not be deemed navigation within

37. Nos. 30176, 30177 at 6.

38. 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed. 1018 (1892).

39. *Id.* at 453, 13 S.Ct. at 118, 36 L.Ed. at 1043.

40. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 560 (1969).

the meaning of this and the preceding section, and shall not make tidewater navigable.⁴¹

It is unclear whether the word "which," in introducing the qualification that in order to be navigable the body of water must be "used for the purposes of navigation, or is capable of bearing upon its bosom, at mean low tide, boats loaded with freight in the regular course of trade," applies solely to the phrase "other bed of water where the tide regularly ebbs and flows" or is all-inclusive in that it also applies to any "tidewater, the sea, or any inlet thereof." The distinction is crucial in that if "which" is all-inclusive and applies to "inlets" as well as "other bed[s] of water," then in a future suit the marshland water would probably be held to be "non-navigable" as it is not "in fact used for the purposes of navigation or is capable of bearing upon its bosom, at mean low tide, boats loaded with freight in the regular course of trade." On the other hand, if the word "which" applies solely to the phrase "other bed of water," then the water off the marshland would probably be considered navigable as an inlet of the sea. Therefore, under the rationale of *Ashmore*, title to the foreshore would be in the State.⁴²

Another question which the court itself raises and declines to answer is that even if the waters of the marshlands are considered non-navigable, does the "title," which is vested in the abutting landowners, apply to oyster bed, bottoms, or land? Section 1 of the 1902 Act provides that "[t]he title to the beds of all tidewaters, where the tide regularly ebbs and flows, and which are not navigable under the next succeeding section, shall vest in the present owner of the adjacent land for all purposes"⁴³ As the court points out, it is unclear whether the phrase "title to the beds" relates to the oyster beds, bottoms, or land.⁴⁴ Again, the distinction is crucial in that if the only title which is vested in abutting landowners is the title to the oyster beds, then title to the foreshore is impliedly left in the State. In contrast, if the phrase "title to the beds" applies to the land, then under the rationale of *Ashmore*, title in the marshlands between the low and high water mark is vested in adjacent landowners.

In the event the phrase "title to the beds" applies to the land, thereby vesting title between the low and high water mark in adjacent landowners, Justice Gunter's well-reasoned dissent will become increasingly persuasive. He notes that section 3 of the 1902 Act provides that

nothing in this Act contained shall be so construed as to authorize such an exclusive appropriation of any tidewater, navigable or unnavigable, by any person whomsoever, as to prevent the free use of the same by others

41. GA. CODE ANN. §85-1308 (Rev. 1970).

42. See *State v. Ashmore*, Nos. 30176, 30177 at 6 (Ga., Feb. 24, 1976).

43. GA. CODE ANN. §85-1307 (Rev. 1970).

44. *Id.*

for purposes of passage and for the transportation of such freights as may be capable of being carried thereover.⁴⁵

It is Justice Gunter's view that in light of section 3 any extension of boundaries from the high-water mark to the low-water mark by the General Assembly was specifically subject to an easement in favor of the general public.⁴⁶ In addition he does not agree "with the narrow, limited interpretation of 'fishing, passage, and transportation' urged upon the court in this case by the appellees."⁴⁷ Therefore, on the basis of his dissent, even if at some future time it is held that private ownership extends to the low water mark in the marshlands, easement rights may still remain in the public.

Although a landmark case, the *Ashmore* decision is disappointing in two respects. First, the court's distinction between navigable and non-navigable tidewaters leaves the question of who owns the Georgia marshlands open to future judicial determination. Second, and more important, the court's failure to adopt the rationale of *Illinois Central R. R.* and thereby limit the legislature's power to gratuitously convey portions of the foreshore to those situations where it benefits the public and is an "improvement of the navigation and use of the waters," or "without impairment of the public interest in what remains," leaves no guidelines that would aid in determining the validity of any future grants of foreshore.

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45. Ga. Laws, 1902, p. 108, *codified at* GA. CODE ANN. §85-1309 (Rev. 1970).

46. Nos. 30176, 30177 at 2 (Gunter, J., dissenting).

47. *Id.*