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Phillips Petroleum Co. v. Mississippi: The Louisiana State Law Institute's Advisory Opinion Relative to Non-Navigable Waterbottoms

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INTRODUCTION

The Louisiana Legislature in 1991 directed the Louisiana State Law Institute to study the law of Louisiana with respect to the ownership of non-navigable waterbottoms in light of the United States Supreme Court opinion in the *Phillips* case. To carry out its mandate the Law Institute established a special committee comprised of representatives from the Mineral Board, the State Land Office, the Attorney General's Office, the Governor's Office, the State's Cabinet, Environmental and Coastal Zone Protection groups, the Louisiana Landowners Association, members of the Bar from throughout the state, and law professors who regularly teach property law.[1]

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After several meetings during 1991 the committee brought its report to the Council of the Law Institute on December 13, 1991 for full discussion. At its January 17, 1992 meeting, the Council heard reports by the Louisiana Landowners Association and by a special sub-committee giving voice to opinions different from the committee report itself. At the conclusion of the discussion on January 17, 1992, the Council voted unanimously to adopt the advisory legal opinion prepared by the committee.

The legislature by Act 998 of the 1992 regular session recognized that the effect of the *Phillips* decision on ownership of "Phillips Lands" in Louisiana is consistent with the opinion and conclusion expressed in the Louisiana State Law Institute Advisory Legal Opinion Relative to Non-Navigable Waterbottoms as transmitted to the legislature on or about January 31, 1992.[2] This is the repository for the advisory legal opinion referred to in Act 998.[3]

January 31, 1992

LOUISIANA STATE LAW INSTITUTE

ADVISORY LEGAL OPINION RELATIVE TO NON-NAVIGABLE WATERBOTTOMS

House Concurrent Resolution No. 145 of the 1991 Regular Session of the Louisiana Legislature directed the Louisiana State Law Institute to study the law of Louisiana with respect to the ownership of inland non-navigable waterbodies in light of the recent United States Supreme Court decision *Phillips Petroleum v. Mississippi*, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988), and legislation introduced in the 1991 Regular Session designed to clarify Louisiana law in this area.

Specifically, the Louisiana State Law Institute was requested to study and report on the law of Louisiana with respect to the following two questions:

1) What was the law of Louisiana prior to the decision in *Phillips Petroleum v. Mississippi*, regarding ownership of non-

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2. "B. Consistent with the Louisiana State Law Institute Advisory Legal Opinion Relative to Non-Navigable Waterbottoms to the Louisiana Legislature on or about January 31, 1992, the legislature hereby finds that as to lands not covered by navigable waters including the sea and its shore, which are subject to being covered by water from the influence of the tide and which have been alienated under laws existing at the time of such alienation, the Phillips decision neither reinvests the state, or a political subdivision thereof, with any ownership of such lands nor does the state, or a political subdivision thereof, acquire any new ownership of such property." Acts 1992, No. 998, §1.

3. All quoted material in the opinion has been published as printed in the original *source* material.

navigable waterbottoms subject to the ebb and flow of the tide? and

2) What changes, if any, in Louisiana law were effected by the decision in *Phillips Petroleum v. Mississippi*?

The Louisiana State Law Institute is directed to report its findings and recommendations on or before February 1, 1992.

In commenting upon jurisprudential developments affecting ownership of the beds of navigable waters, Joseph Dainow once observed that, "It is in the nature of the civil law system to establish classifications and to provide general principles in the basic texts of law, leaving to the courts the function and the duty of determining the application of the principles in relation to the fundamental classifications and in the furtherance of the best interests of society (public policy). From time to time, an extremely important issue strikes this incompletely charted area of the law, creating doubt and disagreement as to the proper solution."[4] Louisiana law with respect to the ownership of waterbottoms reflects vividly this characteristic of our civilian tradition, as evidenced by such decisions as *State v. Erwin*, 173 La. 507, 138 So. 84 (1931), *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936), *Humble Oil & Refining Co. v. State Mineral Board*, 223 La. 47, 64 So. 2d 839 (1953), *California Co. v. Price*, 225 La. 706, 74 So. 2d 1 (1954), and *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974). In the tradition of this jurisprudential history, *Phillips* now commends to the attention of this committee important issues regarding tidelands ownership and the public trust.

BACKGROUND

The lands involved in the *Phillips* decision comprised the beds of non-navigable waters (including eleven short, nameless drainage streams) located several miles inland from the Gulf Coast but nonetheless subject to tidal influence because they were adjacent and tributary to the navigable Jourdan River which flows directly into the Gulf. Notably, this acreage comprised but 42 of the original 140 acres of tidelands challenged in the state court proceeding. The Mississippi Supreme Court had earlier determined that 98 acres were artificially created tidelands (caused by road construction) and were, therefore, not affected by a public trust which the Mississippi Supreme Court construed to apply only to tidelands existing at the time of statehood (1817) and lands added thereto by virtue of natural forces of accretion. See 491 So. 2d at 519-520. The plaintiff landowners claimed title to the disputed acreage under pre-

4. Dainow, "The Work of Louisiana Supreme Court for the 1953-1954 Term—Property," 15 La. L. Rev. 273 (1955).

statehood Spanish land grants and contended that the public trust extended only to lands underlying navigable waters. The State of Mississippi, on the other hand, claimed to have acquired in public trust at the time of statehood the disputed acreage and all other lands lying under waters influenced by the tide, whether navigable or not, under the "equal footing doctrine."

In a 5-3 decision, the majority of the United States Supreme Court determined that the public trust doctrine, derived from English common law, had been recognized in decisions of the Court dating back to the late nineteenth century to vest in the states, by right of sovereignty, ownership of all lands under waters subject to the ebb and flow of the tide. The Court acknowledged that prior cases did not deal specifically with non-navigable tidal streams such as were involved in *Phillips* but suggested that the scope of the prior rulings was nonetheless clear. The majority determined that navigability and the protection of commerce were not the sole interests served by the public trust doctrine, which included such other state interests as protecting the use of such lands for fishing and the reclamation of such lands for urban expansion, among others. The majority specifically rejected plaintiff's suggestion that public trust tidelands embraced only shore lands (i.e., seashore) or lands beneath tidal waters immediately adjacent to the sea, noting that such lands are essentially no different than non-navigable waters influenced by the ebb and flow of the tide which share those "geographical, chemical and environmental qualities that make lands beneath tidal waters unique." According to the majority, although non-navigable waters on the seashore are more directly related to the tides, all tidal waters are connected to the sea, even if by a navigable tidal river. Moreover, the majority concluded that no satisfactory alternative test exists for tidelands classification that provides the benefit of uniformity and certainty that exists with the ebb and flow rule.

Also significant to the result in *Phillips* were findings that (i) a reasonable expectation by plaintiffs in the security of their title based upon a record title interest and the payment of taxes on the disputed lands for over a century was not justified by a consistent recognition in Mississippi of public trust title to lands under tidewaters and a public trust interest in the use of such lands beyond mere navigation and including recreation, fishing and mineral development, and (ii) the recognition of a public trust title to the disputed lands in the State of Mississippi would portend no sweeping changes outside of that state because of a settled recognition that there is no uniform law on the subject. Each State has the authority to define the limits of lands held in public trust and to recognize private rights in such lands as it sees fit according to its own policy views.

In this regard, it is important to note that while the decision is factually limited to lands beneath tidally-influenced non-navigable water-

bodies, the majority decision rests in significant measure upon jurisprudence of the Court which interpreted public trust tidelands to include all lands beneath waters influenced by the ebb and flow of the tide.[5] See, for example, *Mann v. Tacoma Land Co.*, 153 U.S. 273, 14 S. Ct. 820, 38 L. Ed. 714 (1894) involving tide flats or mud flats about three-fourths of a mile from the low water line of a navigable bay which were covered to a uniform depth according to the run of the tides at high water and left entirely bare at low water. Moreover, the majority commented that the scope of public trust tidelands under its decisions had supported state law claims to dominion over lands beneath non-navigable tidal waters such as Connecticut's claim to tidal flats adjoining an arm of the sea and South Carolina's claim to public ownership of salt marshes. See 108 S. Ct. at 794, n. 3.

According to the dissenting justices, the public trust doctrine, from its common law origins, has been founded upon preserving public use of *navigable* waters, fundamentally to protect commerce by preserving the common use of such waters for transportation. Accordingly, navigability, not tidal influence, should be recognized as the universal hallmark of the public trust. The dissenting opinion argues that the public trust parallels the scope of federal admiralty jurisdiction and properly extends only to land underlying navigable bodies of waters and their borders, bays and inlets. It does not extend to discrete and wholly non-navigable waters that are properly viewed as separate from a navigable waterbody. Navigable bodies of water for purposes of the public trust include non-navigable areas at their boundaries (e.g., the ocean shores over which the tide ebbs and flows), but only those waterbottoms that may be considered part of a navigable body of water belong to the public trust. The dissent further argues that this limitation on the scope of the public trust is mirrored by the legislative history of the Submerged Lands Act, 43 U.S.C. §1301 et seq., which reveals that Congress viewed the States' rights in tidal waters as being defined by the boundaries of the navigable ocean, that is, associated with and part of the rights in lands beneath navigable waters.

Finally, the dissent finds that the majority decision is inequitable in its recognition of a belated and opportunistic claim of the State of Mississippi which collected taxes on the property and voiced no adverse claim for over 150 years, and that the decision announces a rule of property which will upset the settled expectations of countless innocent property holders in the coastal States.

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5. Under the stipulated facts, neither the Mississippi Supreme Court nor the United States Supreme Court were required in the *Phillips* litigation to fix the precise outer limits of public trust properties, beyond the broad, general principles announced in their decisions.

ANALYSIS

According to the majority in *Phillips*, it has been long-established that the individual States have the authority to define the limits of lands held in public trust and to recognize private rights in such lands as they see fit. *Shively v. Bowlby*, 152 U.S. 1 at 26, 14 S. Ct. 548 at 557, 38 L.Ed. 331 at 341 (1894); *McGilvra v. Ross*, 215 U.S. 70, 30 S. Ct. 27, 54 L. Ed. 95 (1909). The Court accordingly indicated that its decision does nothing to change ownership rights in States which previously relinquished a public trust claim to such tidelands, acknowledging that many coastal States, as a matter of state law, have granted all or a portion of their tidelands to adjacent upland property owners long ago.

The discussion that follows is a survey of the law of Louisiana prior to *Phillips* regarding ownership of non-navigable waterbottoms subject to the ebb and flow of the tide.

I.

It is appropriate at the outset to note the various sources of title to lands in Louisiana, which prior to cession to the United States in 1803 was alternately under French and Spanish dominion.

Since 1750 the territory of Louisiana has been the subject of three international transfers: the transfer from France to Spain by the Treaty of Fountainebleau on November 3, 1762, the transfer by Spain back to France by the Treaty of St. Ildefonso on October 1, 1800, succeeded shortly thereafter by the transfer by France to the United States by the Treaty of Paris on April 30, 1803. The Treaty of Paris ceded to the United States all the public and unappropriated lands within the territory. See *Board of Directors v. New Orleans Land Co.*, 138 La. 32, 70 So. 27 (1915); *McDade v. Bossier Levee Board*, 109 La. 625, 33 So. 628 (1902). Moreover, Congress required the people of the Territory of Orleans to relinquish to the United States, under the terms of admission of the State of Louisiana to the Union, all rights or title to the waste or unappropriated lands lying within the territory. See *State v. Capdeville*, 146 La. 94, 83 So. 421 (1919), cert. den. 246 U.S. 581, 40 S. Ct. 346, 64 L. Ed. 727 (1920). This was accomplished by a territorial ordinance adopted in a convention of duly assembled representatives in December, 1811.

Nonetheless, at English common law, the title and dominion in lands flowed by the tidewaters were in the King for the benefit of the nation. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution of the United States. Upon the acquisition of a territory by the United States, the same title and dominion passed to the United States, for the benefit of the whole people, and in trust for the several states to be ultimately created out

of the territory. The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tidewaters, and in the lands under them, within their respective jurisdictions. These principles are the foundation for what has come to be known as the public trust doctrine.

The United States Supreme Court accordingly declared in *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894):

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast, above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted away during the period of territorial government, but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states, and shall vest in the several states, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older states in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals, as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community." See 14 S. Ct. at 566.

Notably, an earlier case before the United States Supreme Court, *New Orleans v. United States*, 35 U.S. 662, 9 L. Ed. 573 (1836), had placed at issue the title of the United States under the Treaty of Paris to a quay in the City of New Orleans (i.e., a vacant space of land between the first row of buildings and the water's edge reserved as a common for the reception of goods and merchandise imported or to be exported). Noting the Civil Code designation of the quay as common property and the designation of the property under the laws and usages of the former French and Spanish sovereigns as lands dedicated to a public use and insusceptible of private ownership so long as such use continued, the Court observed that by the Treaty of Paris, the territory of Louisiana was ceded to the United States in full sovereignty, and in every respect, with all its rights and appurtenances, as it was held by the Republic of France, and as it was received by that Republic from Spain. The Court moreover observed that from the abrogation of the French laws in Louisiana by O'Reilly in 1769, until the country came into the possession

of the United States, the laws of Spain governed the rights in the lands in controversy.[6] Recognizing the common in question, under Spanish law, to be part of the public domain by dedication to public use and thereby inalienable, the Court concluded that the Treaty of Paris conferred no title to the common in the United States. The Court stated:

> "The State of Louisiana was admitted into the Union, on the same footing as the original states. Her rights of sovereignty are the same, and by consequence no jurisdiction of the federal government, either for purposes of police or otherwise, can be exercised over this public ground, which is not common to the United States. It belongs to the local authority to enforce the trust, and prevent what they shall deem a violation of it by the city authorities.
>
> All powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the states and the people." 35 U.S. 662 at 737, 9 L. Ed. 573 at 602.

The Court accordingly concluded that neither the fee of the land in controversy nor the right to regulate its use was vested in the federal government. The decision thus suggests that properties classified as common or public and inalienable by dedication to public use under the regime of laws of the previous sovereigns in force in 1803 did not pass to the United States by the Treaty of Paris (to be transferred by the United States to Louisiana in 1812 subject to the limitations of the common law public trust doctrine) but that the title to and limitations on ownership and use of such property remained subject to the laws governing the Territory of Orleans at the time of the Treaty of Paris as subsequently modified and acted upon by the sovereign state. Principles relied upon by the Court in the *New Orleans* decision are, however, open to question under later pronouncements of the United States Supreme Court in *Shively*, in which the Court declared that by the Constitution, the United States, having rightfully acquired the territories, and being the only government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, federal and state, over all the territories, so long as they remain in a territorial condition and that Congress has the power to make grants of lands below the high-water mark of navigable waters in *any* territory of the United States, whenever it becomes necessary to do so in order to

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6. According to the Court, the retrocession of the country from Spain to France, and the cession of France to the United States followed so soon afterwards as to cause no interruption to the laws of Spain. See generally in this regard, Dart, The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana, 6 Tul. L. Rev. 83 (1931).

perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several states, or to carry out other public purposes appropriate to the objects for which the United States holds the territory. See 14 S. Ct. at 565.

II.

Relying largely upon the pronouncements of *Shively*, the United States Supreme Court in *Phillips* has indicated that Louisiana acquired by right of sovereignty upon its admission to the Union not only the beds of navigable waters but all lands under water that were subject to the ebb and flow of the tide up to the high water mark of 1812.[7] In this regard, the only limitation stipulated in the act for the admission of Louisiana into the Union was that the Mississippi River and the navigable rivers and waters leading into same or into the Gulf of Mexico shall be common highways and forever free to the citizens of the United States without tax, duty, impost or toll. Act of February 20, 1811; 2 Stat. 642.

Preceding Louisiana's admission into the Union, the territorial legislature enacted on March 31, 1808, "A Digest of the Civil Laws Now in Force in the Territory of Orleans, With Alterations and Amendments Adapted to its Present Form of Government." Borrowing from Roman law sources, the 1808 Digest classified property according to its susceptibility or insusceptibility of ownership. Arts. 2, 3 and 6 (1808). The sea and its shores were classified as "common" things not susceptible of ownership, seashore comprising the space of land upon which the waters of the sea are spread in the highest water during the winter season. Arts. 3 and 4 (1808). Navigable rivers and their beds were classified as public things[8] subject to public use and were thereby insusceptible of private ownership, while the banks of navigable rivers

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7. Note that in Louisiana, prestatehood grants by foreign sovereigns may sustain claims of private ownership of public trust lands included in such grants. See Yiannopolous, Five Babes Lost in the Tide—A Saga of Land Titles in Two States: Phillips Petroleum Co. v. Mississippi, 62 Tul. L. Rev. 1357 at 1359 (1988).

8. Note that the classification of river beds as "public" does not necessarily mean the vesting of full title in the State. Under pre-existing French and Spanish law in Louisiana, the beds of navigable rivers were wholly insusceptible of private ownership, whether by the State or by any other person. Louisiana courts have nonetheless relied upon the codal classification and the doctrine of inherent sovereignty as indicating that the beds of navigable rivers are insusceptible of ownership by private persons but belong in full title to the State. See A. Yiannopoulos, Common, Public and Private Things in Louisiana: Civilian Tradition and Modern Practice, 21 La. L. Rev. 697, n. 112, 114 (1961); *Morgan v. Livingston*, 6 Martin (O.S.) 19 (1819); *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936).

belonged to the riparian owners subject to public use. Arts. 6, 8 (1808). These provisions were carried into the Louisiana Civil Codes of 1825 and 1870. Arts. 440-444, 446 (1825); Arts. 449-453, 455 (1870).

Note that the Digest of 1808, like succeeding codes prior to the 1978 revision, declared simply that the beds of navigable rivers, so long as they are covered with water, are public things. State ownership of the beds of other navigable waters such as lakes, bays and sounds has been founded upon statutory legislation enacted since the middle of the last century, the doctrine of inherent sovereignty and a broad interpretation of the Code provision establishing the beds of navigable rivers as public things. In this regard, Professor Yiannopoulos suggests that:

> "The doctrine of 'inherent sovereignty' is a judicial construction of dubious antiquity designed to rationalize state 'ownership' of the bottoms of navigable waters. According to this doctrine, the original states in the Union took sovereignty over all navigable waters within their territories from the British Crown. Subsequent admissions to the Union were on an equal basis. For this reason, Louisiana in 1812 took ownership of all navigable waters within the state. The historical and dogmatic premises of the doctrine have been questioned repeatedly; yet, it seems to be still determinative of the outcome in most cases involving disputed ownership of riparian lands and waterbottoms.
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> Actually, the doctrine of inherent sovereignty confuses sovereignty and ownership ('imperium' and 'dominium') and accords with obscure medievel conceptions rather than ancient Roman law or continental civil law. State sovereignty naturally extends over *all* property situated within its borders—and not only over navigable waters. State property, on the other hand, may be acquired in accordance with the provisions governing acquisition of ownership in general, or in accordance with legislation proclaiming state title over property belonging to no one in particular. It is confusing to talk of deriving 'ownership' from 'sovereignty'.
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> Further, it is difficult to see how Louisiana took an original title to the bottoms of navigable waters by its mere admission to the Union. The only mention of navigable waters, at that time, was the following: 'the river Mississippi and navigable rivers and waters leading into the same or into the Gulf of Mexico, shall be common highways and for ever free, as well to the inhabitants of the said states as to other citizens of the United States, without any tax, duty, impost or toll therefor, imposed by the said state.' Thus, clearly, there was no federal grant of ownership on the beds of navigable rivers, or, for that matter, on the bottoms of any navigable waters. Nor did the admission on an equal basis mean that Louisiana *had* to follow

> the common law rule that the state is owner of the beds of navigable rivers and lakes. Indeed, there are common law states that do not follow this rule. Thus, the doctrine of inherent sovereignty may simply explain state sovereignty ('imperium') over all navigable waters and water bottoms, a self-evident fact. It may also explain state ownership ('dominium') of waters and beds owned by no one at the time the doctrine was first announced. But it cannot explain the vesting of title in the state over navigable waters and beds at the time Louisiana was admitted into the Union.
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> Finally, it is apparently on the basis of Article 453 of the Civil Code that the state claims ownership of the beds of navigable waters other than rivers, although that article mentions only 'navigable rivers.' Analogous application of Article 453 to other bodies of water is, perhaps, the least questionable basis of exclusive state rights since the period preceding statehood. The public interest protected by Article 453 is the free use of navigable waters for transportation and other commercial purposes. And if, as a guaranty of that interest, ownership of the beds of navigable rivers should be vested in the state, for the same reasons, ownership of the bottoms of other navigable waters might be vested in the state." Yiannopoulos, Common, Public and Private Things in Louisiana: Civilian Tradition and Modern Practice, 21 La. Law. Rev., 697 at 713-720 (1961); see also A. Yiannopoulos, 2 La. Civil Law Treatise, Property (3rd Ed.) §65 (1991); Comment, The Public and the Private Domains of the State, 12 Tul. Law Rev. 428 (1938).

Note also that no provision in the 1808 Digest determined ownership of the beds of non-navigable rivers, although the source law suggests that these bottoms were regarded as *res nullius*, i.e., things susceptible of private ownership that belong to no one in particular. Thus, Articles 13 through 17 of the Digest necessarily addressed rights of riparian owners in both navigable and non-navigable streams with respect to alluvion, dereliction and avulsion. These provisions, with later additions addressing islands and sand bars formed in non-navigable streams, corresponded to provisions of the Code Napoleon.

Though outside the public domain, the beds of non-navigable streams were not recognized as belonging to the riparian owner under French jurisprudence until an Act of 8 April 1898 established riparian ownership of such riverbeds. By contrast, Louisiana courts have historically recognized riparian ownership of the beds of non-navigable streams. See, generally, A. Yiannopoulos, 2 La. Civ. Law. Treatise, Property (3rd ed.) §§63, 78 (1991); 2 Aubry & Rau, Droit Civil Francais, §§168-178 (7th ed. Esmein 1961).

Keep in mind also that running water is distinguished under our Civil Code from the bed that contains it. Running water was originally classified in the 1808 Digest as a "common" thing insusceptible of ownership and remains insusceptible of private ownership by classification in our present Code as a public thing subject to public use. Art. 3 (1808); Art. 450 as revised in 1978. Thus, the bed of a non-navigable river is a private thing, while the water within it is a public thing subject to public use. By contrast, the bed of a navigable river or stream is a public thing, as is the water within it. See A. Yiannopoulos, 2 La. Civil Law Treatise, Property (3rd ed.) §57 (1991). Regarding the extent of public rights to the use of running waters, see C.C. Art. 452; R.S. 9:1101; *Chaney v. State Mineral Board*, 444 So. 2d 105 (La. 1983); *Brown v. Rougon*, 552 So. 2d 1052 (La. App. 1st Cir. 1989), writ denied. Note also C.C. Art. 658.

Accordingly, under the laws in place upon Louisiana's admission to the Union in 1812, the only limitation upon private ownership of waterbottoms extended to the beds of navigable waters, the sea and its shores. It is important to note in this regard, that while the limits of the public trust title in the bottoms of navigable waters that inured to Louisiana by right of inherent sovereignty extended to the high water line of 1812, state law recognized private ownership of the banks of navigable rivers and streams subject to a right of public use. Article 8[9] of the 1808 Digest thus declared that the use of the shores of navigable rivers or creeks is public but that the property of the river shores belongs to those who possess the adjoining lands. See Arts. 446, 448 (1825); Arts. 455, 457 (1870); Art. 456, as revised in 1978; *Morgan v. Livingston*, 6 Mart. (O.S.) 19 (1819); *State v. Richardson*, 140 La. 329, 72 So. 984 (1946); *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *Smith v. Dixie Oil Co.*, 156 La. 691, 101 So. 24 (1924). The bank of a stream is recognized by our jurisprudence and codal law to be the area between the ordinary low and ordinary high stages of water (except where there is a levee in proximity to the water); and, according to well-settled jurisprudence, the servitude of public use extended by the Code is limited to purposes that are incidental to the navigable character of the stream and its enjoyment as an avenue of commerce. See *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); Comment (b) to C.C. Art. 456 as revised in 1978.

In this regard, the subservience of the federal public trust title to state law property concepts is demonstrated in *State v. Richardson*, supra, in which a state claim to sovereign title in the beds of navigable waters to the ordinary high water mark was rejected in view of conflicting state law principles which recognized private ownership of the banks of

9. "Articles" in original.

navigable streams and in which the Louisiana Supreme Court also observed:

> "The property of the bed is, however, in the public, and inalienable, only so long as the bed remains covered by water; and, when the water leaves the bed, as such uncovered, its ownership is regulated by provisions of the state law to the effect that, if the river finds another bed, the owners of the soil thus occupied take the old bed; if the bed be only partially uncovered, and an island be formed in a navigable stream, it belongs to the state, or, in a stream not navigable, to the owners of the lands upon either side.
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> . . . Our conclusions may then be stated as follows.
> The state of Louisiana, in virtue of her sovereignty, became the owner of all lands underlying the navigable waters within her territory, below mean high-water mark, with power to determine the rights of riparian proprietors with respect thereto, subject only to the limitations imposed by, and under, the Constitution of the United States; and, in the exercise of that power, she has enacted laws which have been read into the titles of all lands bordering upon such waters and which declare, in effect, that the property of the beds of navigable streams is in the public, so long as they are covered with water; that the banks are "that which contains" the river, in its ordinary state of high water, and belong to the adjacent proprietor, subject to a servitude of use in favor of the public; that the accretions which are formed, successively and imperceptibly, to any soil constituting the shore of any river or stream, are called alluvion, and belong to the owner of such soil, who is bound to leave public that portion of the bank required by law.
> Construing those various provisions of the law together, and with reference to the doctrine, here propounded on behalf of the state, that all lands between the banks of a river, below mean high-water mark, constitute its bed, it is evident that the law and the doctrine cannot stand together, and equally evident that, in the enactment of the law, the state has not intended that they should stand together, but has established an exception to the doctrine, and such is the well founded and settled jurisprudence of this court, from which it appears that batture and alluvion, lying between the banks of navigable rivers, below the ordinary stages of high water, have been, for a century and more, occupied, leased, mortgaged, sold, and litigated over, as property the title to which was vested in individuals and private corporations; that, in no case, has this court ever held, or intimated, that an alluvion which was shown to appear above

> the surface of the water, at its ordinary stage, with a reasonable appearance of permanence and identification with the soil of the shore, was part of the bed of the river, or for that, or any, reason was not susceptible of private ownership . . . ." 72 So. 984, at 990-991.

By Act 247 of 1855, the Louisiana Legislature authorized the sale of swamp and overflowed lands donated by Congress to the State under the Swamp Land Grant Acts of 1849 and 1850,[10] as well as shallow non-navigable lakes which had become the property of the State and were susceptible of being reclaimed. The Louisiana Supreme Court in *McDade v. Bossier Levee Board*,[11] 109 La. 625, 33 So. 628 (1902) recognized that the latter category of land was within the purview of the swamp land grants as "overflowed lands." Proceeds from the sale of lands under Act 247 were deposited in a special fund to be applied to the cost of levee construction and drainage. Act 124 of 1862 assimilated dried out navigable lakes to swamp land (thereby opening such waterbottoms to sale) through its stipulation that all lakes which by natural causes become dry land over which surveys of the State may be extended shall be regarded as swamp lands of the same character as those donated to the State under the Swamp Land Grant Acts of 1849 and 1850. Act No. 38 of 1870 (extra session) re-enacted the 1855 statute and authorized private entry and sale at the rate of 25¢ per acre of those public lands donated by Congress which are *subject to regular tidal overflow* and which have been approved to the State of Louisiana by the general government as swamp and overflowed lands. See also Act 104 of 1871 and Act 75 of 1880 which similarly authorized the entry and sale of public lands donated to Louisiana by Congress, including those designated as sea marsh or prairie, subject to tidal overflow, so as to render them unfit for settlement and cultivation.

As with previous statutes, Act 75 of 1880 provided a different sales price for separate categories of lands. Ordinary swamp lands, subject to overflow, generally located some distance inland from lands adjacent

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10. Act March 2, 1849, c. 87, 9 Stat. 352 and Act Sept. 28, 1850, c. 84, 9 Stat. 519; see 43 U.S.C.A. §981 et seq. The purpose of the federal swamp land grants was to aid the State of Louisiana in constructing the necessary levees and drains to reclaim the swamp and overflowed lands within the state. See, for example, 43 U.S.C.A. §§982, 983. While sales of swamp and overflowed lands were initially conducted by the Register of the State Land Office, commencing in 1886 various levee districts were created by the State and land grants made to each as an instrumentality to accomplish the sale of state lands and application of the proceeds to the completion of a levee system. See, for example, Act 74 of 1892 and 160 of 1900; Act 18 of 1894 and 205 of 1910; *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 50 So. 405 (1912); Madden, *Federal and State Lands in Louisiana* (1973) at p. 291-296.

11. "Levee District" in original.

to the shore line, were subject to entry and sale at 75¢ per acre, while sea marsh or prairie, subject to tidal overflow, so as to render them unfit for settlement and cultivation, was subject to entry and sale at 12-1/2¢[12] per acre. See Sections 10 and 11 of Act 75 of 1880; Madden, *Federal and State Lands in Louisiana*, (1973) at page 294. Note in this regard that Congress did not use the term "tidal" in either of the Swamp Land Grant Acts of 1849 and 1850, indicating that it did not matter how lands became overflowed or for what reason or by what source, so long as they were overflowed or at least subject to periodic overflow, requiring levees or embankments to keep out the water and to make them suitable for cultivation. The term "overflowed lands" within the Swamp Land Acts has also been judicially recognized as including within the grant submerged lands which as a permanent condition are overflowed. See *McDade*, supra.[13] Such lands existed in 1849 and 1850 not only in the deltaic formations along the shores of the Gulf, but also along lakes, rivers and bayous miles inland from the Gulf and even within low and depressed areas extending into North Louisiana. See generally Madden, supra, pages 259-297.

In this regard, courts have interpreted Act 75 of 1880, in authorizing the sale of sea marsh, subject to tidal overflow, as including only lands donated to Louisiana under the swamp land grants and not "lands within the tidewaters of the sea" which inured to the State by right of sovereignty upon its admission to the Union. See *State v. Capdeville*, 146 La. 94, 83 So. 421 (1919), cert. den. 246 U.S. 581, 40 S. Ct. 346, 64 L. Ed. 727 (1920); *State v. Sweet Lake Land and Oil Co.*, 164 La. 240, 113 So. 833 (1927).[14]

On the basis of these statutes, patents [were] issued by the State which frequently involved large areas containing both non-navigable and navigable waters. Until 1886, the only limitation on the ability of the State to alienate navigable or non-navigable waterbottoms could be found in the provisions of the Civil Code which declared navigable waterbottoms and the sea and its shores to be insusceptible of private ownership. The first direct legislative prohibition of alienation of state owned wa-

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12. "Twelve and one halve" in original.

13. The Federal Bureau of Land Management recognizes tidelands to comprise coastal areas situated above mean low tide and below mean high tide, particularly as they are alternately covered and uncovered by the ebb and flow of the daily tides. Coastal marshes that are not covered by the daily tide are regarded as swamp and overflow lands within the meaning of the swampland grants and are subject to survey. See Yiannopoulos, 62 Tul. L. Rev. 1357 at 1361, n. 24.

14. The *Sweet Lake* decision suggests nonetheless that a transfer under the swamp land grants will preempt any challenge to the actual character of the waterbottoms as lands within the tidewaters of the sea and that "tidewaters of the sea" are constrained by jurisprudential limits recognized in *Morgan*, *Burns*, and *Salinovich*.

terbottoms is found in Act 106 of 1886, the first of the so-called "Oyster Statutes." Section 1 of the Act provided:

> ". . . all the beds of the rivers, bayous, creeks, lakes, coves, inlets and sea marshes bordering on the Gulf of Mexico, and all that part of the Gulf of Mexico within the jurisdiction of this State, and not heretofore sold or conveyed by special grants or by sale by this State, or by the United States to any private party or parties, shall continue and remain the property of the State of Louisiana, and may be used as a common by all the people of the State for the purposes of fishing and of taking and catching oysters and other shell fish, subject to the reservations and restrictions hereinafter imposed, and no grant or sale, or conveyance shall hereafter be made by the Register of the State Land office to any estate, or interest of the State in any natural oyster bed or shoal, whether the said bed or shoal shall ebb bare or not."[15]

Independent of the codal scheme which recognized a "public" or "common" right or interest with respect to navigable rivers, the sea and its shores, this Act, designed to protect, regulate and develop the oyster industry in the State, is perhaps the first legislative enactment to recognize a public interest in coastal waterbottoms not directly associated with the navigability of the waterbody. Yet this legislation, like other statutes enacted by the Louisiana legislature since the middle of the past century, did not regard the public interest in such waterbodies as protected by an original inalienable public trust title in the State as its effect was expressly limited to the recognition of a State title in waterbottoms not previously conveyed into private ownership.

In *Morgan v. Negodich*,[16] 40 La. Ann. 246, 3 So. 636 (1888), the Louisiana Supreme Court considered an action under Act 106 of 1886 by an 1878 patentee of 800 acres of tidal overflow lands traversed by Bayou Cook in lower Plaquemines Parish. Plaintiff claimed the exclusive

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15. Note that the express prohibition against grant, sale or conveyance by the State in the early oyster statutes extended only to *natural* oyster beds or shoals and was later expanded in Act 153 of 1902 to include the beds of all affected waterbottoms. Marginal annotations to the original Act suggest a design to encourage the planting of oyster beds in existing state-owned waterbottoms from the stock of natural oyster reefs. Apparently, many of the oyster beds in coastal waters west of the Mississippi River were thus planted with oysters from natural reefs located in areas east of the Mississippi River. In this regard, the successful propagation of oysters requires, among other things, a mixture of both fresh and salt water to achieve the proper salinity; thus not all water bodies are suitable for oyster cultivation. For an interesting account of the oyster industry and its early development in Louisiana, see Waldo, *The Louisiana Oyster Story* (Louisiana Conservationist 1953) and Vujnovich, *Yugoslavs in Louisiana.*

16. "Negodish" in original.

right to use of Bayou Cook for the planting of oysters and other shell fish under Section 2 of Act 106 as against the claims of fisherman to use of the bed of Bayou Cook and its shores as a common. Section 2 of Act 106 declared that the owner of lands traversed by any river, bay, lake, bayou, cove, inlet or pass comprised within the limits of his lawful survey shall have the exclusive right to use the beds of such waters to plant oysters or other shellfish. Noting that the evidence did not clearly show the extent to which the ebb and flow of the tides of the gulf affected the lands on the shores of Bayou Cook, or whether or not the oyster beds therein were at any time bared by the ebb tide, the Court nonetheless found that the salt water in Bayou Cook did not result from overflow occasioned by the high tides flooding its banks but entered first an adjoining bay, combining in Bayou Cook with fresh water derived from the Mississippi River, which then floods the banks of Bayou Cook and passes into the adjoining marsh to be returned to the Gulf at low tides. The Court[17] concluded that under the criterion of the Code Bayou Cook and its banks were not an arm of the sea or seashore (i.e., common property) and that the land in question was therefore susceptible of private ownership, noting that "[t]he Legislature has, by very strong implication, recognized the right of property therein as vested in private individuals."

Subsequent reenactments of Act 106 of 1886 brought significant and sometimes confusing modifications, reflective perhaps of the uncertainty and difficulty in delimiting public versus private rights in non-navigable, tidal waterbottoms. For example, Act 110 of 1892 eliminated "sea marshes" from coverage under the Act and removed the former qualification of the Act to waterbottoms not heretofore sold or conveyed by the State or the United States to private parties. Act 153 of 1902 expanded the list of affected waters to include "lagoons, bays and sounds," expanded affected waterbottoms to include those either bordering on "or connecting with" the Gulf,[18] and expanded the common

17. "Cook" in original.

18. Previous statutes indicated that affected waterbottoms comprised only those bordering on the Gulf of Mexico (e.g., waterbottoms which might generally be regarded as arms of the sea or which otherwise provided a direct outlet to the Gulf), and it is questionable whether a significant expansion beyond the coverage of the former acts was intended in view of the stipulation in the title to Act 52 of an intent to declare "the ownership of the State in and to the bottom or beds of the bodies or streams of water along the Coast of the Gulf of Mexico." There is limited jurisprudence on the matter, although *Realty Operators v. State Mineral Board*, 202 La. 398, 12 So. 2d 198 (1943) recognized that a fresh water lake in Terrebonne Parish not connected with any arm of the sea did not fall within the prohibitions of Acts 106 of 1886, 153 of 1902 and 52 of 1904. See also *Stevens v. State Mineral Board*, 221 So. 2d 645 (La. App. 4th Cir. 1969), reversed on procedural grounds 254 La. 452, 223 So. 2d 866 (1970) relative to Black Bay and Breton Sound, and *Winkler v. State*, 239 So. 2d 484 (La. App. 4th Cir. 1970) relative to Quarantine Bay in Plaquemines Parish.

uses of the waterbottoms to include the bedding and raising of oysters and other shell fish. For an interpretation of the 1902 statute, see *Sinclair Oil & Gas Company v. Delacroix Corp.*, 285 So. 2d 845 (La. App. 4th Cir. 1973), in which the Court held that two major limitations in the Act restricted the geographical area to which it applied: (1) the water bottom must border on or connect with the Gulf of Mexico and (2) the purpose of the Act (to establish, protect and regulate the oyster fishing industry) was such that it intends to encompass only those waterbottoms which may reasonably be considered as suitable for oyster cultivation.

Curiously, commencing with Act 121 of 1896 through the modern statutes, the oyster acts declared that the rights of riparian owners along the various waterbottoms affected thereby shall extend to the ordinary low water mark. Act 52 of 1904 made a particular declaration that no one shall own in fee simple the bottoms of navigable waters, which was modified in subsequent acts to include the bottoms of any of the waterbodies covered by the act. Section 10 of Act 178 of 1906 limited the authority of the Oyster Commission to lease affected waterbottoms to those not claimed under some title by any person (excluding bottoms not previously alienated by the State or those which were then in litigation). Any attempted lease was deemed invalid until there was an adjudication between the State and private claimant as to the validity of the title to the waterbottom. This limitation was modified in Act 189 of 1910 and subsequent acts to declare that adverse private claims to affected waterbottoms shall not be valid or effective until adjudicated between the State and claimant and to recognize a right of action in the claimant for the determination of such claims.[19] See generally La. Acts 1886, No. 106; La. Acts 1870, No. 18; La. Acts 1892, No. 110; La. Acts 1896, No. 121; La. Acts 1902, No. 153; La. Acts 1904, No. 52, as amended by La. Acts 1906, No. 178; La. Acts 1908, Nos. 167 and 291; La. Acts 1910, No. 189; La. Acts 1914, No. 54, as amended by La. Acts 1924, No. 139; La. Acts 1932, No. 67; see now La. R.S. 41:14 and R.S. 56:3.

In *Chauvin v. Louisiana Oyster Commission*, 121 La. 10, 46 So. 38 (1908), the owners of a parcel of land which included part of the bed of a saltwater bay ranging from 1 to 5 feet in depth and connecting through bayous with the Gulf of Mexico (and thus subject to the regular

19. These provisions were noted by the Louisiana Supreme Court in *California Co. v. Price*, 225 La. 706, 74 So. 2d 1 at 6-7 (1954) and construed as a legislative recognition that there might be title claims outstanding to affected waterbottoms under attempted sales or grants by the State requiring a judicial determination of the claims, as to which the court noted that claims predicated on an authorized patent covering affected waterbottoms might be decreed valid under the prescriptive limitations for assailing patents under Act 62 of 1912.

ebb and flow of the tide) sought to enjoin the Louisiana Oyster Commission from leasing the submerged areas for fisheries or other purposes. The land in question was selected by and granted to the State as swamp and overflowed land under the swamp land grants of 1849 and 1850 and sold by the State to plaintiff's ancestor in title in 1876. The Oyster Commission argued that the bottom of the bay comprised lands which belonged to Louisiana by virtue of her sovereignty, that the state had[20] given no authority to her officers for the alienation of such waterbottoms and that the title claimed by plaintiffs was an absolute nullity. The trial court determined that the bay was not a navigable highway leading to the Gulf of Mexico and that even if it was, the State had the right to sell the submerged portion subject only to the right of navigation in the public. The trial court also ruled that the State was estopped to challenge the character of the lands conveyed as being other than swamp or overflowed land.

On original hearing, the Louisiana Supreme Court noted that for more than half a century the United States and the State of Louisiana acquiesced in the character of the land as swamp and overflowed land susceptible to patent but that the Oyster Commission now assails the patents as absolute nullities "on the novel ground that a portion of the tract conveyed consisted of a tidal water bottom." 121 La. 10, 46 So. 38, at p. 39 (1908). The Court also noted that Act No. 178 of 1906 specifically excepted from the jurisdiction of the Oyster Commission water bottoms claimed under some title by any person, firm, or corporation until there shall have been an adjudication by a court of competent jurisdiction between the State and the claimant as to the validity of the title to the property, revealing a legislative intent that the sovereign first proceed to court and assail by direct action adverse titles to the waterbottoms suitable for oyster production and cultivation. The Supreme Court ultimately affirmed the judgment of the lower court, finding in part that acceptance by the State of lands certified to it by the Secretary of the Interior as "swamp and overflowed" was conclusive upon the State as to the title to and character of lands so certified and subsequently sold by the State as such.

On rehearing, the Court reviewed the legislative history and affirmed its prior decree, holding that the Oyster Commission was not empowered to stand in judgment for the State regarding the validity of plaintiffs' title or to speak for the State to deny its authority to part with title or attack its patents on the basis that the common right of fishing or bedding oysters within the ebb and flow of the tide is inalienable.

In *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 125 La. 740, 51 So. 706 (1910), the limitations upon private property

20. "had been" in original.

rights in lands within potential reach of the oyster statutes were framed around the traditional limitations affecting navigable waters, the sea and its shores under the Civil Code. The plaintiff claimed title to submerged and swamp and overflowed lands forming part of the peninsula of St. Bernard Parish which projects into the Gulf of Mexico (including the waterbottoms of Creole Pass and Grand Pass) under an 1894 deed deraigned from patents issued previously by the State of Louisiana. Plaintiff sought to enjoin an alleged slander of title and trespass by the Oyster Commission and its licensees on portions of the property, including Grand Pass, for oyster fishing and to enjoin threats of arrest and prosecution by the Oyster Commission under color of Act 52 of 1904 and Act 178 of 1906. Appeal was taken from a trial court judgment sustaining an exception of no cause of action.

The Oyster Commission contended that the submerged lands claimed by plaintiff were a part of the public domain which it was charged to administer. In this regard, the Louisiana Supreme Court commented upon the historic origins of sovereign title to navigable and tide waters. The Court observed that according to the common law of England, there is no navigable water save that which is within the ebb and flow of the tide, while in this country, where rivers are navigable far above the limits of the tide waters a different test was required which regards all streams as navigable in the legal sense which are navigable in fact.

Recognizing the codal prohibition against private ownership of the bed of a navigable river and a fortiori of the bed of the sea or of an arm of the sea, the Court concluded that the exception of no cause of action was properly granted as to that portion of plaintiff's lands bordering on and partially surrounded by the tidewaters of the Gulf of Mexico up to the high water mark and as to lands lying beneath navigable passes or channels which intersect or separate the tracts of dry land included in plaintiff's grant but that a cause of action was or may be shown with respect to the dry land and such "non-navigable streams, pools, ponds and wet places, so insignificant in dimensions and so within the border of the dry land covered by plaintiff's grants that plaintiff would be entitled to hold them, as included therein" (citing *Burns v. Crescent Gun and Rod Club*, 116 La. 1038, 41 So. 249 (1906), which notably had recognized, inter alia, that it is because navigable rivers afford a way of communicating that the legislature has placed them in the public domain and that the civil law is very plain regarding the reach of the "shore" of the sea—the shore is limited to that space of land on the borders of the sea which is at times covered by the rising, and at other times left dry by the falling, tide and includes only the lands along the sea or the ocean and does not extend back from the one or the other).

By Act 258 of 1910, effective August 12, 1910 (now La. R.S. 9:1101), the State of Louisiana asserted ownership of the waters and beds of all bayous, lagoons, lakes and bays within the borders of the State not

then under the direct ownership of any person, firm or corporation. The Act separately declared State ownership of the beds of navigable streams, provided "this Act is not intended to interfere with the acquisition in good faith of any waters or the beds thereof transferred by the State or its agencies prior to the passage of this Act." The reference to navigable "streams" in the second part of the Act was restated to navigable "waters" in the reenactment of the statute by Act No. 443 of 1954. Notably, unlike the oyster statutes, Act 258 of 1910 did not expressly prohibit the transfer of affected waterbottoms by the state to private persons.[21]

Act 258 was interpreted by the Louisiana Supreme Court in *State v. Board of Commissioners of the Caddo Levee District*, 188 La. 1, 175 So. 678 (1937), to evidence a legislative intent to retake title (to the extent lawfully necessary) to the beds of both non-navigable and navigable waters where they not been conveyed to the several levee boards of the State and where the rights of third parties had not intervened, to the extent that such waterbottoms were embraced within the statutory land grants previously made by the State to the levee districts. According to the Court:

> "Act No. 258 of 1910 by its terms clearly manifests the legislative intention to establish a uniform and mandatory rule or system as to the ownership of the waters and beds of the bayous, lagoons, lakes, rivers and bays within the State, where they were not under the direct ownership of any private person, firm, or corporation, and where they had not been previously transferred by the State. Excluding the lands subject to private ownership and the lands previously transferred by the State, there were left only those the ownership of which was of necessity in the State, as to which no declaration by the Legislature was necessary, and those granted, but not actually transferred, to the several levee boards, as to which a legislative declaration was necessary to put back the title in the State." 188 La. 1, 175 So. 678, at 681.

In his dissent, Chief Justice O'Niell commented:

> "At the time when Act No. 258 of 1910 was enacted the beds of the nonnavigable bodies of water in Louisiana had no value, if separated in ownership from the lands of which they formed

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21. As noted by one commentator, "It does not appear that Act 258 of 1910 was intended to unalterably vest title to the beds of these waters in the state, and to set up an absolute prohibition against their future alienation by the state to a private owner," but, subject to the curative effects of Act 62 of 1912, to preclude their future alienation by mere inclusion within or implication from the general terms of a conveyance. See Comment, Ownership of the Beds of Navigable Lakes, 21 Tul. L. Rev. 454, 469-470 (1947). But see *Winkler v. State*, 239 So. 2d 484 (La. App. 4th Cir. 1970).

> a part. It is, therefore, impossible to imagine what motive the Legislature could have had at that time for desiring to sever the title for the beds of her nonnavigable bodies of water from the title for the lands of which these nonnavigable water bottoms formed a part. . . . If the Legislature had intended by the act of 1910 to separate the ownership of the beds of her nonnavigable bodies of water from the ownership of the lands embracing them, the state engineers would have been busy all these twenty-seven years, surveying and separating, from the adjacent lands, these shapeless stripes and spots of water-covered land which the State is said to have withdrawn from the grants to the levee boards. The effect of this decision will be to destroy the titles of all who have bought from the levee boards lands for which the levee boards obtained their instruments of conveyance after the act of 1910 was enacted, as far as the beds of nonnavigable bodies of water forming parts of such lands are concerned." 188 La. 1, 175 So. 678, at 687-688.

The legislative intent suggested by the *Caddo* Court was clarified with respect to the beds and bottoms of navigable waters only by the legislative amendment of Act 258 by Act 443 of 1954.[22] As with Act 106 of 1886, the recognition in Act 258 of 1910 that its effect did not extend to waterbottoms under direct private ownership on the effective date of the statute is arguably an implicit recognition of the State's right to convey non-navigable waterbottoms, inconsistent with the notion of an inalienable public trust title in such lands beyond existing state law limitations affecting beds of navigable waters, the sea and its shores. Absent such public trust limitations, these statutes could not be constitutionally applied to divest private ownership rights in such lands which had already vested on the effective date of the statute. See, e.g., *California Co. v. Price*, 225 La. 706, 74 So. 2d 1, at 7 (1954).[23]

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22. The amendment provided in pertinent part:
"All transfers and conveyances or purported transfers and conveyances made by the state of Louisiana to any levee district of the state of any navigable waters and the beds and bottoms thereof are hereby rescinded, revoked and canceled."

23. Louisiana constitutions since 1812 have prohibited the legislature from passing any ex post facto law or any law impairing the obligations of contracts and, commencing in 1868, prohibited divestiture of vested rights except for purposes of public utility and for adequate compensation paid. See Art. VI, Sec. 20, 1812 Constitution; Art. 110 of the 1868 Constitution; Art. IV, Sec. 15 of the 1921 Constitution and Art. I, Sec. 23 of the 1974 Constitution which omitted the provision regarding divesting vested rights, a matter already proscribed by the due process clause of the U.S. Constitution. See Amend. XIV, Sec. 1, U.S. Const. As to prospective sales, note *Stevens v. State Mineral Board*, 221 So. 2d 645 (La. App. 4th Cir. 1969), reversed on procedural grounds 254 La. 452,

In order to promote security of land titles, the Louisiana Legislature passed Act No. 62 of 1912, now La. R.S. 9:5661, a repose statute that made state patents unassailable upon lapse of six years from the passage of the Act. The litigation spawned by this statute is indicative of the uncertainty which has historically attended the recognition of public policy limitations affecting private ownership of the beds of navigable and non-navigable waters in Louisiana. See, for example, Comment, Ownership of Beds of Navigable Waters, 30 Tul. L. Rev. 115 (1955).

Jurisprudence prior to 1912 indicated clearly that common and public things, dedicated to public use and benefit, could not be privately owned. See, for example, *Milne v. Girodeau*,[24] 12 La. 324 (1838) and *Zeller v. Southern Yacht Club*, 34 La. Ann. 837 (1882) relative to lands below the high water mark and within the bed of Lake Pontchartrain, an arm of the sea; *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249 (1906), *Louisiana Navigation Company v. Oyster Commission of Louisiana*, 125 La. 740, 51 So. 706 (1910) and other authorities previously cited relative to the beds of navigable streams and the limits of water-bottoms comprising the sea and its shores.

In *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405 (1912), the Louisiana Supreme Court considered a claim of private ownership to the lands beneath the waters of intercommunicating sounds, bayous, creeks, channels, lakes, bays, coves and inlets bordering upon the Gulf of Mexico and within the ebb and flow of the tide. An 1898 conveyance from the Board of Commissioners of the Lake Borgne Basin Levee District was alleged to include such lands, together with other swamp and overflowed lands granted by the State to the Levee District. Recognizing that the State had acquired ownership of these tide water bottoms (which contained a depth of water ranging from 2-1/2 to 12 feet) by right of sovereignty upon its admission to the Union, the Court commented:

> "The jurisprudence of the country is now settled to the effect that, upon the acquisition of territory by the United States, whether by cession from one of the states, by treaty with a foreign country, or by discovery and settlement, the title to, and control of, all the tide lands became vested in the govern-

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223 So. 2d 542 (1970), and *Winkler v. State*, 239 So. 2d 484 (La. App. 4th Cir. 1970), in which the Fourth Circuit Court of Appeal considered the effect of Act 198 and Act 258 of 1910 on conveyances by the State of navigable waterbottoms covered by the Acts subsequent to their passage, and determined such transfers to be nullities. *Winkler* held that patents issued to a private owner pursuant to a 1910 Sheriff's Sale by the Grand Prairie Levee District in contravention of the prohibitions of Acts 189 and 258 of 1910 were absolute nullities which vested no title to the property and which were not rendered valid by the provisions of Act 62 of 1912.

24. "Girodeaux" in original.

> ment, 'for the benefit of the whole people, and in trust for the several states, to be ultimately created out of the territory'; that, though the United States, whilst holding territory, as such, may grant, for appropriate purposes, titles or rights in the soil below high-water mark, they have never done so, by any general laws, but, 'unless in some case of international duty or public exigency, have acted upon the policy, as most in accordance with the interest of the people and with the object for which the territories were acquired, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the states, respectively, when organized and admitted into the Union'; that the states admitted into the Union since the adoption of the Constitution became at once entitled to the soil under their navigable waters, the same as the original states, and that nothing therein remained to the United States save the public lands, which do not include lands below high-water mark; that the general legislation of Congress in respect to public lands does not extend to tide lands, but is confined in its application to lands which are subject to sale or other disposal, under general laws; that 'the soil beneath the great lakes and navigable waters, above as well as below the flow of the tide, properly belongs to the states, by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its surveys and grants beyond the limits of high water'; that the titles and rights of riparian or littoral proprietors in the soil below high-water mark are governed by the laws of the several states, subject to the rights granted to the United States by the Constitution." [citations omitted] 130 La. 604, 58 So. 405, at 407.

Citing the codal and legislative provisions in place prior to the conveyance from the Levee District, including Act 106 of 1886, and noting that the levee board at the time of the conveyance had no authority to alienate the waterbottoms at issue and that the plats and acreage estimates utilized for the sale delineated the waterbottoms and merely estimated acreage within the areas conveyed, the Court determined that the conveyance embraced only public lands which the State held for sale and did not purport to be a conveyance of navigable and tide waters and waterbottoms, which the State was holding in trust for all of her citizens. The Court continued:

> "It may be, and probably is, true that there is no legal impediment in the way of the state's alienating such property in favor of particular individuals or corporations, save in so far as such alienations might conflict with the power vested in Congress to regulate interstate and foreign commerce; but, as

> we have already seen, her declared policy has always been not to do so, and any statute or contract from which such effect were claimed would, necessarily, be strictly construed against the grantee." 130 La. 604, 58 So. 405, at 410.

The public policy limitation of Louisiana law which precluded private ownership of the beds of navigable waters was later consecrated in the state constitution which, as amended in 1921, prohibited alienation of the fee of the bed of any navigable body of water except for purposes of reclamation. See Section 2, Article IV of the 1921 Constitution.

The extent[25] of the public trust limitations affecting private ownership of the beds of navigable waters under Louisiana law was tested in *State v. Erwin*, 173 La. 507, 138 So. 84 (1931), in which Louisiana Supreme Court determined that the State of Louisiana acquired by virtue of its sovereignty ownership of the bed of Calcasieu Lake, a fresh-water inland navigable lake, up to the high water mark of 1812, but did not acquire title to navigable bottoms later formed by the action of the waters in washing away and submerging privately owned lands abutting the lake. *Erwin* was subsequently overruled in *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936), which affirmed the State's title to lands which had become part of the bed of a navigable lake through erosion and in which the Court declared:

> "It is the rule of property and of title in this State, and also a rule of public policy that the State, as a sovereignty, holds title to the beds of navigable bodies of water." 186 La. 784, 173 So. 315, at 322.

Shortly thereafter, Act No. 55 of 1938, now La. R.S. 49:1-3, was enacted to declare the sovereignty of Louisiana along its sea coast and to fix its present sea coast boundary and ownership. The preamble to Act 55 began:

> "Whereas dominion, with its consequent use, ownership and jurisdiction, over its marginal waters by a State has found support because it is the duty of a State to protect its citizens whose livelihood depends on fishing, or taking from said marginal waters the natural products they are capable of yielding; also, has found support in that sufficient security must exist for the lives and property of the citizens of the State; . . ."

The Act declared Louisiana's full sovereignty over and full and complete ownership of the waters of the Gulf of Mexico and of the arms of the Gulf and the beds and shores of the Gulf and its arms, including all lands that are covered by the waters of the Gulf and its arms either

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25. "extend" in original.

at low tide or high tide, within Louisiana boundaries as established therein. Thus by legislative fiat, the bed and shores of the sea, classified by the Civil Code as a common thing belonging to no one, were made public things belonging to the State of Louisiana.

At this point, the public policy limitations of Louisiana law affecting private ownership of waterbottoms appeared to be consonant with the limitations of the constitution and codal scheme affecting the beds of navigable waters, the sea, arms of the sea, and their shores. Two later court decisions, however, relying upon Act 62 of 1912, cast doubt upon the concept of an inalienable public trust limitation affecting State ownership of the beds of navigable waters. In *Humble Oil and Refining Co. v. State Mineral Board*, 223 La. 47, 64 So. 2d 839 (1953), and *California Co. v. Price*, 225 La. 706, 74 So. 2d 1 (1954), the Louisiana Supreme Court recognized that beds of navigable bodies of water are susceptible of private ownership where, under Act 62 of 1912, the State failed to annul within the prescribed delay a patent which conveyed a tract of land containing navigable waters. See also *State v. Cenac*, 132 So. 2d 897 (La. App. 1st Cir. 1961). Justice Hawthorne argued in a vigorous dissent in *Price* that, by enacting Act 62 of 1912, the Legislature intended to ratify only those patents which conveyed lands susceptible of private ownership and not patents which conveyed the beds of navigable bodies of water. Chief Justice Fournet, in his *Price* dissent, noted that the majority ruling did violence to the fundamental principles of *Miami* that title to the bottoms of navigable beds of water, and particularly those that form a part or an arm of the sea, are insusceptible of private ownership, and was contrary to a "public policy that is established by codal articles that have been interpreted and reaffirmed in an unbroken line of jurisprudence for more than a century." See 74 So. 2d 1, at 15.

Act 727 of 1954, now La. R.S. 9:1107-1109, was a direct legislative effort to overrule the *Humble* and *Price* cases. The Act declares that it has been the public policy of the State of Louisiana at all times since its admission into the Union that all navigable waters and the beds of same within its boundaries are common or public things and insusceptible of private ownership and that no act of the legislature has been enacted in contravention of that policy. The Act also states that the purpose of Act 62 of 1912 was to ratify and confirm only those patents which conveyed or purported to convey public lands susceptible of private ownership, the alienation or transfer of which was authorized by law. The Act declares null and void any patent or transfer which purports to include navigable waters and the beds thereof. Notably, the final section of the Act stipulates that no statute enacted by the legislature shall be construed to validate by prescription or peremption any patent or transfer issued by the State or any levee district thereof so far as it purports to include navigable *or tide waters* or the beds of same. The

significance of the particular reference to "tide waters" in the final section is unclear, as it would then be broader than the title to the Act which purports to deal only with navigable waters and the beds thereof; although consistent with the prior legislative and jurisprudential history which assimilated state law protection of the tide waters of the sea with state law interests in the protection of navigable waters *and* the reference to the beds of navigable waters as *common* or public things in §1107, the term would logically comprehend the bed and shores of the sea and its arms.

In partial reliance upon the legislative intent manifested by the provisions of Act 727 of 1954, the Louisiana Supreme Court overruled *Price* in *Gulf Oil Corporation v. State Mineral Board*, 317 So. 2d 576 (La. 1974) and recognized that State patents are ineffective insofar as they purport to convey navigable waterbottoms. In commenting upon Act 727 of 1954, the Court indicated:

> "The people of this state have been on notice since that time [the passage of Act 727] that the rule of property in this state is not the one announced in *Price* or in the *Humble* case; rather, it is that rule pronounced, and never varied from, by the legislature forbidding private acquisitions of navigable water bottoms." 317 So. 2d 576, at 591.

Significantly, the many constitutions of Louisiana adopted from the time of statehood did not speak to the matter of a limitation upon the alienation of state lands by the Legislature until 1921.[26] As previously indicated, Article IV, Section 2 of the 1921 Constitution prohibited the Legislature from alienating, or authorizing the alienation of, the fee of the bed of any navigable stream, lake or other body of water, except for purposes of reclamation. This prohibition was continued in Article IX, Section 3 of the 1974 Constitution, which expanded on the exception to recognize that the State may transfer the bed of a navigable water body to a riparian landowner reclaiming land lost through erosion.[27] See, generally, Hargrave, "Statutory" and "Hortatory" Provisions of the Louisiana Constitution of 1974, 43 La. L. Rev. 647 at 660-662 (1983). The narrow focus of these constitutional provisions, particularly in light of the prior history of law and jurisprudence in Louisiana at

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26. Louisiana had eight constitutions prior to 1921: 1812, 1845, 1852, 1864, 1868, 1879, 1898 and 1913. Commencing with the Constitution of 1879, the Legislature was prohibited from *donating* property of the State to any private or public person, association or corporation. See Art. 56 of La. Const. 1879; Art. 58 of La. Consts. 1898 and 1913; Section 12, Art. IV of La. Const. 1921; Section 14 of Art. 7 of La. Const. 1974.

27. Constitutional provisions must be strictly construed and cannot be modified or amended by implication. *King v. Bd. of Comm. for Atchafalaya Basin Levee District*, 148 So. 2d 138 (La. App. 3d Cir. 1962), cert. denied.

the time of their adoption and the legislative policy statements which followed (as evidenced in R.S. 9:1107-1109 and R.S. 41:1701), is a compelling indication that Louisiana does not extend inalienable public domain status to all tidelands which it acquired by right of sovereignty in accordance with the majority decision in *Phillips*, but recognizes a much narrower public trust limitation on private ownership of water-bottoms which focuses upon navigability (like the public trust limits recognized by the dissenting justices in *Phillips*) and is grounded upon the historical treatment of navigable waters, the sea and its shores under our Civil Code. In this regard, by contrast to the beds of navigable waters, including the sea and its shores, Louisiana courts have consistently recognized ownership rights of riparian owners in the beds of non-navigable bayous and streams. See *Doiron v. O'Bryan*, 218 La. 1069, 51 So. 2d 628 (1951); *Begnaud v. Grubb & Hawkins*, 209 La. 826, 25 So. 2d 606 (1946); *Bodcaw Lumber Co. v. Kendall*, 161 La. 337, 108 So. 664 (1926); *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *Amite Gravel & Sand Co. v. Roseland Gravel Co.*, 148 La. 704, 87 So. 718 (1921); *Palmer Co. v. Wilkinson*, 141 La. 874, 75 So. 806 (1917); *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249 (1906). See also *Morgan v. Nagodish*, 40 La. Ann. 246, 3 So. 636 (1888), *State v. Sweet Lake Land & Oil Co.*, 164 La. 240, 113 So. 833 (1927), *O'Brien v. State Mineral Board*, 209 La. 266, 24 So. 2d 470 (1946) and *R.D. Fornea Co., Inc. v. Fornea*, 324 So. 2d 619 (La. App. 1st Cir. 1976), writ refused 326 So. 2d 374 (La. 1976), relative to non-navigable lakes and sea marsh beyond the limits of "seashore". See also A. Yiannopoulos, 2 La. Civ. Law Treatise, Property (3rd ed.) §§63, 78 (1991).

Two important measures were adopted in the 1978 Legislative Session. Act 645 of 1978, now La. R.S. 41:1701, et seq., established Louisiana's position on public trust lands. Section 1701 provided:

> "§1701. Declaration of Policy; Public Trust.
>
> The beds and bottoms of all navigable waters and the banks or shores of bays, arms of the sea, the Gulf of Mexico, and navigable lakes, belong to the State of Louisiana and the policy of this state is hereby declared to be that these lands and waterbottoms, hereinafter referred to as 'public lands,' shall be protected, administered and conserved to best insure full public navigation, fishery, recreation, and other interests. Unregulated encroachments upon these properties may result in injury and interference with the public use and enjoyment and make create hazards to the health, safety, and welfare of the citizens of this state. To provide for these orderly protection and management of the stateowned properties and serve the best interests of all citizens, the lands and waterbottoms, except those excluded and

> exempted herein below, or as otherwise provided by law shall be under the management of the Department of Natural Resources, hereinafter referred to as 'the department' which shall be responsible for the control, permitting, and leasing of encroachments upon public lands, in accordance with this Chapter and the laws of Louisiana and the United States."

Pursuant to the authority of Article IX, Section 3 of the Louisiana Constitution of 1974, Section 1702 of the statute recognized an exception to the prohibition against alienation of lands protected by the public trust which permits owners of land contiguous to or abutting navigable waterbottoms to reclaim lands lost through erosion by the action of the navigable waterbody occurring on and after July 1, 1921.

Significantly, in defining lands affected by the public trust, Section 1701 makes no mention of non-navigable waterbodies, even if affected by the ebb and flow of the Gulf tide. An equally important measure was the legislative revision of Title I of Book II of the Louisiana Civil Code of 1870, accomplished by Act No. 728 of 1978. The revision classified the waters and bottoms of natural navigable water bodies, the territorial sea and the seashore as public things that belong to the state. C.C. Art. 450. According to the official comments, "natural navigable water bodies" refers to inland waters the bottoms of which belong to the State either by virtue of its inherent sovereignty or by virtue of other modes of acquisition, including expropriation. Consistent with prior jurisprudence, the beds of non-navigable rivers or streams are specifically recognized to be private things. See C.C. Art. 506, and the comments thereunder. Again, no express limitation was recognized with respect to non-navigable waters affected by the ebb and flow of the Gulf tide. Accordingly, any limitation upon private ownership of such waterbottoms must be found within the context of the codal classification for the territorial sea and seashore.

In this regard, the Code's historic Roman law origins for "common" rights in and along the relatively tideless Mediterranean Sea provided little guidance for application of the codal provisions governing the sea and its shores to the peculiar conditions of the Louisiana coast, with its innumerable bayous, bays and inlets abutting and interspersed throughout its coastal marsh. Louisiana jurisprudence has accordingly fashioned the codal provisions to the particular characteristics of the State.

As explained by Professor Yiannopoulos:

> "The courts of Louisiana have regarded as 'sea' bodies of water known as 'arms of the sea'. What is an arm of the sea has been decided in a number of cases. In general, a body of water will be regarded as an arm of the sea if it is located in the immediate vicinity of the open coast and is overflowed by the

> tides directly. Thus, in the leading case of *Morgan v. Negodich*, the Louisiana Supreme Court held that a bayou which joined a bay on the open coast with a bay further inland was not an arm of the sea. Although its waters were a mixture of salt water from the Gulf and fresh water from the Mississippi, the bayou was not located in the immediate vicinity of the coast and was not overflowed by the tides directly; salt water first entered an arm of the Gulf and thence flowed into the bayou. The same test was applied in the case of *Buras v. Salinovich*. It was held in that case that a body of water subject to tidal overflow is not merely for this reason an arm of the sea; the term applies only to tidal waters in lakes, bays, and sounds along the open coast. Special rules, however, apply to Lake Ponchartrain. Though not in the vicinity of the open coast, and not affected by the tides, Lake Ponchartrain has been consistently regarded as an arm of the sea." See 21 La. Law Rev. 697, at 703.

Seashore is defined in the 1978 revision as the space of land over which the waters of the sea spread in the highest tide during the winter season. C.C. Art. 451. Official comment (b) recognizes that according to Louisiana decisions, seashore is the space of land in the open coast that is *directly* overflown by the tides, citing *Buras v. Salinovich*, 154 La. 495, 97 So. 748 (1923), *Morgan v. Negodich*,[28] 40 La. Ann. 246, 3 So. 636 (1888), and *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249 (1906). Thus, not all lands subject to tidal overflow are seashore. As specifically recognized by the Court in *Salinovich*, with reference to a tract containing over 5,000 acres of marsh land fronting on the east bank of the Mississippi River about 85 miles below New Orleans and claimed to be subject to regular overflow by the gulf tides as to all but the ridges of land along the river and banks of the several bayous within the land:

> "The fact that it is subject to tidal overflow does not characterize the land as 'seashore,' under the provisions of the Code. The statute providing for disposing of such lands, either by the state or by the federal government, describe them as being subject to tidal overflow. It has never heretofore been supposed that the definition in Article 451 of the Civil Code was intended to include . . . any and all land that is subject to tidal overflow, however remote from the 'seashore', as it is generally understood. The waters of the Gulf of Mexico, or the bays or coves behind plaintiff's land, do not 'spread' upon it, during the ordinary high tides, or in the highwater seasons. The tide waters

28. "Nagodish" in original.

> back up into the coves behind the land, and cause the bayous in the land to rise and spread over most of the area. These expressions in the Code 'the sea and its shores' and 'seashore,' have reference to the gulf coast, and to the lakes, bays and sounds along the coast. The nearest body of water that could reasonably be characterized as a part of the sea, or as having a seashore, in this case, is a small bay nearly a mile away from plaintiff's land." *Salinovich*, 154 La. 495, 97 So. 748, at 750.

In *Burns*, the Court recognized and protected the private ownership of the defendant in the beds of several non-navigable streams adjacent to Lake Pontchartrain, an arm of the sea, and affected by the ebb and flow of the tide from the lake, including Bayou Castiglione, whose waters directly communicated with the waters of the lake. The Court further rejected the claim that the latter bayou formed part of the shore of the lake, noting that the shore comprises only that space of land along the borders of the sea covered and bared by the tide.

See, generally, Comment, Seashore in Louisiana, 8 Tul. L. Rev. 272 (1934); A. Yiannopoulos, 2 La. Civil Law Treatise, Property (3rd ed.) §§69-73 (1991); see also *Davis Oil Co. v. Citrus Land Co.*, 563 So. 2d 401 (La. App. 1st Cir. 1990), affirmed in part, reversed in part and remanded, 576 So. 2d 495 (La. 1991).

Finally, in 1985 the Louisiana legislature passed Act 876 which dealt principally with the powers and duties of the Wildlife & Fisheries Commission and included provisions relating to ownership and title to wildlife and waterbottoms. Section 2 of the Act, now La. R.S. 41:14, provided:

> "No grant, sale or conveyance of the lands forming the bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the state shall be made by the secretary of the Department of Natural Resources or by any other official or by any subordinate political subdivision, except pursuant to R.S. 41:1701 through 1714. Any rights accorded by law to the owners or occupants of lands on the shores of any waters described herein shall not extend beyond the ordinary low water mark. No one shall own in fee simple any bottoms of lands covering the bottoms of waters described in this Section."

Section 3 of the Act, which appears at La. R.S. 56:3, provided:

> "A. The ownership and title to all wild birds, and wild quadrupeds, fish, other aquatic life, the beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico within the territory or jurisdiction of the state, including all oysters and other shellfish and parts thereof grown thereon, either naturally

> or cultivated, and all oysters in the shells after they are caught or taken therefrom, are and remain the property of the state, and shall be under the exclusive control of the Wildlife and Fisheries Commission except as provided in R.S. 56:4.
>
> B. Wild birds, quadrupeds, fish, other aquatic life, and the beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets bordering on or connecting with the Gulf of Mexico, within the territorial jurisdiction of the state, including all oysters and other shellfish and parts thereof grown thereon, either naturally or cultivated, and all oysters in the shells after they are caught or taken therefrom, shall not be taken, sold, or had in possession except as otherwise permitted in this Title; and the title of the state to all such wild birds, quadrupeds, fish, and other aquatic life, even though taken in accordance with the provisions of this Title, and the beds and bottoms of rivers, streams, bayous, lagoons, lakes, bays, sounds, and inlets always remains in the state for the purpose of regulating and controlling the use and disposition thereof."

The foregoing provisions borrow from language which originally appeared in the earlier oyster statutes which, as previously indicated, recognized no original public trust limitation precluding private ownership of the affected waterbottoms but merely proscribed alienation of affected waterbottoms for the future. It is arguable, therefore, that Act No. 876 of 1985 does nothing more than recognize state ownership in lands which were affected by the statutory limitations created under the previous oyster statutes. To the extent that it may be argued that these acts created prospectively a public trust interest in affected waterbottoms, the limits of the trust would be measured by the terms and limitations peculiar to each enactment during the period of its operation and in any event would not extend beyond the specific bodies of water within the geographical limitations imposed by the relevant statute to the extent such waterbottoms, consistent with the purposes of the statute, were suitable for oyster cultivation.

III.

The Codal classification of "public things subject to public use" provides the functional equivalent in our civil law to the common law public trust doctrine. See Yiannopoulos, Five Babes Lost in the Tide—A Saga of Land Titles in Two States: Phillips Petroleum Co. v. Mississippi, 62 Tul. L. Rev. 1357 (1988). At the time of its admission to the Union, Louisiana regarded the beds and bottoms of the territorial sea, seashore and navigable waters as insusceptible of private ownership, limitations which remain imbedded in our modern codal law. Indeed,

the history of Louisiana law and jurisprudence in this area reveals that navigability has been the hallmark of public trust limitations affecting Louisiana waterbottoms, including tide water bottoms embraced within the limits of the territorial sea, arms of the sea and their shores, in much the same fashion as the dissenting justices in *Phillips* viewed the common law public trust doctrine. See *Burns v. Crescent Gun & Rod Club*, 116 La. 1038, 41 So. 249 (1906); *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 125 La. 740, 51 So. 706 (1910); *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405 (1912); *State v. Richardson*, 140 La. 329, 72 So. 984 (1916), citing *McGilvra v. Ross*, 215 U.S. 70, 30 S. Ct. 27, 54 L. Ed. 95 (1909); *State v. Capdeville*, 146 La. 94, 83 So. 421 (1919); *Miami Corp. v. State*, 186 La. 784, 173 So. 315 (1936); *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974); Article IV, Section 2 of the 1921 Constitution; La. R.S. 9:1107; Article 9, Section 3 of the 1974 Constitution; R.S. 41:1701; Madden, supra, at p. 5, 314-335. By contrast, the bottoms of inland non-navigable waterbodies (i.e., non-navigable waterbottoms other than sea or seashore), even if influenced by the tide, have been recognized to be private things susceptible of private ownership under state law. See A. Yiannopoulos, 2 La. Civil Law Treatise, Property (3rd ed.) §61 (1991).

In terms of public use or utility, there is no sound distinction to be drawn between "sea marsh or prairie, subject to tidal overflow," which were authorized for sale by the State by Act No. 75 of 1880, and the *bottoms* of inland non-navigable waters which are subject to the ebb and flow of the tide, except perhaps to the extent such bottoms could be deemed suitable for oyster cultivation. It cannot be said, however, that the Oyster Statutes purported to recognize an original inalienable public trust title in the waterbottoms affected thereby subject to the right of all persons to use in common, as the original legislation expressly excluded non-navigable waterbottoms and sea marsh bordering on the Gulf which had been previously conveyed into private ownership.[29] See *Chauvin v. Louisiana Oyster Commission*, 121 La. 10 at 19, 46 So. 38 (1908); *Louisiana Navigation Co. v. Oyster Commission of Louisiana*, 125 La. 740, 51 So. 706 (1910).

Moreover, as particularly evidenced by Louisiana's long-standing recognition of private ownership of the banks of navigable streams and as revealed by Act 247 of 1855 and Act No. 124 of 1862, the acquisition of title by right of sovereignty does not of itself preclude divestiture of

29. Under the Codal limitations in place at the time, only navigable waters, the sea and its shores were incapable of private ownership and therefore unaffected by the statutory exclusion of lands previously conveyed by the State.

such title by the State into private ownership.[30] Note in this regard, *Ellerbe v. Grace*, 162 La. 846, 111 So. 185 (1927). See also C.C. Art. 504, *Dickson v. Sandefur*, 259 La. 473, 250 So. 2d 708 (1971) relative to ownership of the former bed of a navigable river which has altered its course by avulsion; *Wemple v. Eastham*, 150 La. 247, 90 So. 637 (1922); *Smith v. Dixie Oil Co.*, 156 La. 691, 101 So. 24 (1924) and *Chaney v. State Mineral Board*, 444 So. 2d 105 (La. 1983) relative to ownership of a bed of a non-navigable stream that was navigable in 1812.

IV.

This brings us to a consideration of what changes, if any, in Louisiana law were effected by the decision in *Phillips*.

According to *Phillips*, the beds of inland non-navigable rivers or streams that are influenced by the tide belong to the State of Louisiana under the equal footing doctrine. The question whether the State has kept these beds within the public trust or made them susceptible to private ownership was recognized in *Phillips* to be a matter of state law. According to Louisiana law at the time of its admission to the Union, only the sea, the seashore and navigable water beds or bottoms were insusceptible of private ownership. These classes of waterbottoms remain today the only waterbottoms which by their nature are incapable of private ownership as public things subject to public use. Non-navigable waterbottoms, even if subject to the ebb and flow of the tide, have been consistently recognized to be private things susceptible of private ownership, except to the extent that special statutes, such as the Oyster Statutes, have prohibited their alienation by the State. The reach of the Oyster Statutes, however, extended only to bodies of water situated along the coast which were suitable for oyster cultivation, and these statutes have been typically cited in jurisprudence and commentaries as evidencing the long-standing public policy of the State against alienation of the beds of navigable waters (including the sea and its shores), beyond which the waterbottoms affected by these statutes have not been included within the public policy protections evidenced by Louisiana's organic law or legislative policy statements at R.S. 9:1107 or R.S. 41:1701. See, for example, Madden, supra, at p. 332; *Gulf Oil Corporation v. State Mineral Board*, 317 So. 2d 576 at 583 (La. 1974); note also the comment

30. In fact, the Legislature specifically granted tidal overflow lands acquired by right of inherent sovereignty to the Buras Levee Board for sale to facilitate the construction and maintenance of levees and drains. See Acts 18 of 1894 and 205 of 1910; *State v. N.A. Baker & Son*, 146 La. 413, 83 So. 693 (1920); *Board of Commissioners v. Mt. Forest Fur Farms*, 178 La. 696, 152 So. 497 (1933).

of the Fourth Circuit Court of Appeal in *Winkler v. State*, 239 So. 2d 484 at 486, relative to Act 189 of 1910.

Accordingly, the true impact of *Phillips* in Louisiana will be the extent to which "sea" and "seashore" as recognized under our Civil Code is determined to be equivalent to the public trust status of tidelands under the equal footing doctrine. Such an extension, however, would require the overruling of prior jurisprudence and impose a new expansive interpretation of "sea" and "seashore" not heretofore countenanced by Louisiana law.

In this regard, it is clear that Louisiana law from the period preceding statehood did not extend the limits of its public policy protection of lands affected by the waters of the sea to the full limits of the public trust tidelands which the *Phillips* majority declared were received by Louisiana at the time of statehood.

Louisiana's historic classification of the sea and its shores as common things insusceptible of ownership, its codal definition of seashore as "the space of land over which the waters of the sea spread in the highest tide of the winter season," and its recognition of rights respecting public use of seashores are derived almost verbatim from the Institutes of Justinian. In Roman law, the beds of navigable rivers, like the soil beneath the sea, were *res publicae* which, affected by right of public use, were insusceptible of ownership. The limits of the sea were established with reference to the almost tideless Mediterranean, whose high waters occurred in the winter season (in marked contrast to the situation along the Louisiana Gulf coast). The consecration of the Roman law in the Digest of 1808 and subsequent codal revisions with respect to rights in lands affected by the waters of the sea is clearly reflected by the failure of the redactors to adopt either the definition of seashore in Las Siete Partidas as "that space of ground covered by the waters of the sea, in their highest annual swells, whether in winter or summer," or French law principles regarding seashore as the land normally covered by the highest tides of the year. While, according to one commentator, Spanish law has expanded the Partidas definition to include the space of land affected by the tides, or by the largest waves during storms, in such places where the ebb and flow of the sea is not felt, Louisiana law has held fast to its Roman law origins in recognizing the limits of the seashore under its codal definition. Louisiana jurisprudence has consistently interpreted seashore as limited to lands in the *open coast* which are *directly overflown* by the tides of the sea, the only exception found in the classification of Lake Pontchartrain as an arm of the sea.[31]

31. It has been suggested that the treatment of Lake Pontchartrain as an exception to the "open coast" rule has been influenced by its geological origins as part of the Gulf of Mexico created when a delta finger of the Mississippi River united with the mainland,

See *Morgan*, *Burns*, *Salinovich*, *Sweet Lake*, *Erwin*, and *Davis Oil Company*, supra; Comment, Seashore in Louisiana, 8 Tul. L. Rev. 272 (1934); Comment, Alluvion and Dereliction in Lakes, 7 Tul. L. Rev. 438 at 441-442 (1932-1933). Expansion of the limits of "seashore" has been resisted by the courts as necessitating a rewriting of the Civil Code provision, a province which belongs to the legislature. See *A. K. Roy, Inc. v. Board of Commissioners for the Pontchartrain Levee District*, 238 La. 926, 117 So. 2d 60 (1960).

It has been correctly suggested nonetheless that judicial decisions construing the scope of "sea" and "seashore" are not law but mere interpretations of the law without binding effect as precedents. See A. Yiannopoulos, Five Babes Lost in the Tide—A Saga of Land Titles in Two States: Phillips Petroleum Co. v. Mississippi, 62 Tul. Law Rev. 1357 (1988). In this regard, Louisiana recognizes but two sources of law: legislation and custom, the paramount source of law being legislation. See La. C.C. Arts. 1-4. It has also been said:

> "The civilian does not regard the judicial interpretations of a statute as becoming part of the statute, so that the statute *as interpreted* is the law. He regards the statute alone as being the law, and prior decisions do not 'insulate' him . . . from going directly to the statute for its meaning. In ideal theory, the civilian judge decides cases primarily 'not by reference to other decisions, but by reference to legislative texts and within the limits of such judicial discretion as the legislative texts grant.'" Tate, Techniques of Judicial Interpretation in Louisiana, 22 La. L. Rev. 727 at 744 (1962).

These principles were relied upon by the Louisiana Supreme Court in its *Gulf Oil* decision in rejecting the notion of hardship upon those property owners within the State who had theretofore relied upon the pronouncements of its *Price* decision, the Court commenting that "when it is necessary to overrule a short line of clearly erroneous jurisprudence in order to reinstate the long-standing law and public policy of this State, that course is clearly the one that must be followed." See 317 So. 2d 576 at 591. In its *Miami Corp.* decision, the Court also stated:

> ". . . In Louisiana, this court has never hesitated to overrule a line of decisions where they establish a rule of property when greater harm would result from perpetuating the error rather than from correcting." See 173 So. at 320.

It is submitted, however, that the legislative and jurisprudential history in this State does not reflect a public policy position recognizing public

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enclosing a portion of the Gulf in what is today Lake Pontchartrain. See Comment, Seashore in Louisiana, 8 Tul. L. Rev. 272 (1934).

trust limitations upon, or precluding private ownership rights in, waterbottoms affected by the ebb and flow of the tide acquired by Louisiana by right of sovereignty under the *Phillips* decision beyond those policy limitations clearly expressed in our code, constitution and jurisprudence respecting navigable waters (including the sea and its shores). Modification of that body of law and jurisprudence to divest private ownership in recognition of a public trust limitation upon alienation of all *Phillips* tidewater bottoms within Louisiana would indeed be contrary to other policies of this State which favor not only stability in the law and constancy of jurisprudence, but which also favors stability in real estate titles. See *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 (La. 1974), and *O'Brien v. State Mineral Board*, 209 La. 266, 24 So. 2d 470 (1946). From a historical and practical perspective, note also the observations of Chief Justice O'Niell in his dissenting opinion in the *Miami Corp.* decision (186 La. 784, 173 So. 315 at 341-343), including the following citation from 15 C.J. § 342:

> "Stability is especially requisite in the law in regard to titles to real property. Titles may be dependent largely or wholly upon previous decisions, and landed interests would be jeopardized by sudden or frequent changes in the interpretation or construction of legal principles. By reason of this the courts are always reluctant to overrule or reverse a decision when title to real property will be involved. Therefore, when a court of last resort has announced principles affecting the acquisition of title to real property, and the principles thus announced have become established and have been frequently recognized and conformed to, and property rights have been acquired thereunder, it has generally been held that the decisions should not be overturned save by the interposition of the legislative power, even though the principles announced therein might otherwise be questioned." 186 La. 784, 173 So. 315 at 342.

In this sense, it may be fairly stated that in Louisiana, unlike Mississippi, the codal, legislative, jurisprudential and constitutional history of the law in this area reveals fundamental assumptions about the public trust which underlie existing property titles, a modification of which would upset reasonable and settled expectations of property owners within the State. This proposition is evident in the few judicial decisions extant in Louisiana in which the *Phillips* doctrine has been considered. In *Delacroix Corporation v. Jones-O'Brien, Incorporated and Martin Exploration Co.*, No. 21-193 "B" of the 25th Judicial District Court, Parish of Plaquemines, the District Court commented:

> "Since the court concludes that Lake Quatro Caballo was not subject to the ebb and flow of the tide in 1812 it is not necessary to discuss *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469,

> 108 Sup. Ct. 791, 98 L. Ed. 877 (1988). That decision held that [in the] State of Mississippi ownership of sovereignty waterbottoms acquired on admission to the Union extended to the limits of the effect of the tide, through marsh and into the barest depths of waters. The Court comments that the *Phillips Petroleum Co.* decision is the ultimate justification for the wisdom of the 1912 Legislature in their adoption of Act 62 of that session. But for that legislation every private domain owner of an opening in the marsh, large owners and small, would need to stand ready to litigate on the level of the instant case, and produce like expert testimony on a complicated historical subject, or forfeit their ownership to state claims which had been allowed to lie dormant for nearly a century."

In *Dardar v. Lafourche Realty Company, Inc.*, No. 85-1015 of the United States District Court for the Eastern District of Louisiana, decided May 16, 1991, the findings of the Court distinguished "tidal" lands acquired by Louisiana by right of inherent sovereignty in 1812 (i.e., lands underlain by waters influenced by the Gulf tides) from "seashore" (i.e., lands in the *open* coast *directly* overflown by the tides). The disputed property consisted largely of non-navigable, low trembling prairie interspersed with shallow, non-navigable bays and bayous at and prior to 1902, when the State issued land patents covering the area at issue. The Court made separate findings that the lands were not subject to influence by the Gulf tides, were not seashore and did not include the bottoms of naturally navigable waterbodies. Significantly, the Court rejected Louisiana's "tidal" and "navigational" title claims upon concluding that since none of the contested property constituted the bottoms of natural navigable water bodies or seashore at or prior to the issuance of the various land patents by the State, "the State did not run afoul of any alienation restriction for public things." No separate and independent state law "public trust" limitation was recognized to apply to "tidal" lands originally acquired by Louisiana under the federal public trust doctrine as announced in *Phillips*.

Apart from these considerations, it might also be argued that the title acquired by the States by right of inherent sovereignty remains irrevocably vested with a public trust and that State public trust limits do not preempt federal public trust concepts with respect to affected lands or waterbottoms. In this regard, the Louisiana Supreme Court commented in *Gulf Oil Corporation v. State Mineral Board*, 317 So. 2d 576 (La. 1974), as follows:

> "It was held in *Illinois Central Ry. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110, 118, 36 L. Ed. 1018 (1892), that the states cannot abdicate their trust over property in which the people as a whole are interested so as to leave it entirely under the

use and control of private parties. In that case, the United States Supreme Court even held that a legislative grant of the State's title to submerged lands under Lake Michigan could be repealed by subsequent legislation because the lands in question were held in trust for the public use. See dissenting opinion of Hawthorne, J., from denial of writs in *State v. Cenac*, 132 So. 2d at 933. In *Federal and State Lands in Louisiana*, Madden says the following about the application of the public trust concept in Louisiana:

'It appears only realistically factual and legally sound to adopt and state the view that the public policy of the state treating navigable water beds as inalienable and insusceptible of private ownership actually arose when Louisiana attained statehood, for the public trust was then created, resulting in the vesture of a fixed and indestructible public right, only changeable by the *consent and positive action of the people of the state in their collective sovereignty*. Under that premise, doubt has been expressed as to the legal effectiveness of legislation to surrender the vested rights of the people themselves, the more plausible and stronger view being that the abdication of such vested public rights could only be lawfully accomplished by constitutional means and procedure.' (Emphasis supplied.) Madden at 335.

This theory casts grave doubt upon whether the legislature could have alienated the beds of navigable waters under the 1912 repose statute or, for that matter, under any legislative pronouncement; for this reason, we stated above that the notion of public trust could be dispositive of this case." 317 So. 2d 576, at 589.

Despite the foregoing comment, Louisiana Supreme Court did not acknowledge that express constitutional authority was required for the alienation of a public trust title, recognizing instead that for pre-constitutional purposes, because the beds of navigable waters of Louisiana are held in "public domain" for the people of the State, that at the very least (if at all possible) any alienation or grant of the title to navigable waters by the legislature must be expressed and specific and is never implied or presumed from general language in a grant or statute. See 317 So. 2d at 589. The Court did indicate, in dicta, that under the public trust doctrine[32] as enunciated in *Illinois Central Ry.*, supra, Act 727 of 1954 would be valid whether classified as interpretive legislation or not, since in that case the United States Supreme Court allowed the legislature to repeal a grant of public lands to private individuals because it violated the public trust. Nonetheless, the suggestion of a requirement

32. "public doctrine" in original.

for express constitutional authorization for the alienation of public trust lands would run counter to earlier pronouncements of the Court which recognized that the State legislature, unlike Congress, is invested with the power to do whatever is not prohibited by its constitution, which, as previously indicated, has simply prohibited since 1921 the alienation of navigable waterbottoms. See *Bozant v. Campbell*, 9 Rob. 411 (1845); *State v. Gutierrez*, 15 La. Ann. 190 (1860). Note also *State v. Bayou Johnson Oyster Co.*, 130 La. 604 at 612-613, 58 So. 405 (1912); *State v. Capdeville*, 146 La. 94 at 107, 83 So. 421 (La. 1919); *Realty Operators v. State Mineral Board*, 202 La. 398, 12 So. 2d 198 at 203 (1942); *O'Brien v. State Mineral Board*, 209 La. 266, 24 So. 2d 470 at 473 (1946).

Moreover, the United States Supreme Court in *Phillips* left little doubt regarding the authority of each state to relinquish its public trust claim to tide lands. According to the majority decision:

> ". . . it has been long-established that the individual States have the authority *to define the limits of the lands held in public trust* and to recognize private rights in such lands as they see fit. *Shively v. Bowlby*, 152 U.S., at 26, 14 S. Ct. at 557. Some of the original States, for example, did recognize more private interest in tide lands than did others of the 13—more private interests than were recognized at common law, or in the dictates of our public trusts cases." (emphasis added)
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> * * *
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> ". . . And as for the effect of our decision today in other States, we are doubtful that this ruling will do more than confirm the prevailing understanding—which in some States is the same as Mississippi's, and in others, is quite different. As this Court wrote in *Shively v. Bowlby*, 152 U.S., at 26, 14 S. Ct. at 557, 'there is no universal and uniform law upon the subject; but . . . each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy.'
>
> Consequently, our ruling today will not upset titles in all coastal States, as petitioners intimated at argument. . . . As we have discussed *supra* at 475, many coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent upland property owners long ago. Our decision today does nothing to change ownership rights in States which previously relinquished a public trust claim to tidelands such as those at issue here." See 108 S. Ct. 791, at 794-795, 798-799.

In a footnote comment to the foregoing, the Court notes that even in some of the States in which tide lands are privately held, public rights to use the tide lands for purposes of fishing, hunting, bathing, etc.,

have been long recognized. By implication, the Court thereby acknowledged that alienation by an individual state of public trust tide lands into private ownership does not require for its validity the retention of a public right of use conformable to the original public trust. In *Appleby v. City of New York*, 271 U.S. 364, 46 S. Ct. 569 (1926), the United States Supreme Court expressly recognized that the power of a State to part with property under navigable waters to private persons, free from subsequent regulatory control of the water over the land and the land itself, is a state question to be determined from the law of the state at the time the deeds to the property were executed. Moreover, the Court distinguished the limitations imposed by its *Illinois Central Ry. Co.* decision as follows:

> "It is urged, against our view of what these deeds conveyed of the sovereign power of the State and the ownership of the city at the time of their execution, that it is opposed to the judgment of this Court in *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 13 S. Ct. 110, in which the validity of a grant by the Illinois Legislature to the Illinois Central Railroad Company of more than 1,000 acres, in the harbor of Chicago in Lake Michigan, was under consideration. It was more than three times the area of the outer harbor, and not only included all that harbor, but embraced the adjoining submerged lands which would in all probability be thereafter included in the harbor. It was held that it was not conceivable that a legislature could divest the State of this absolutely in the interest of a private corporation, that it was a gross perversion of the trust over the property under which it was held, an abdication of sovereign governmental power, and that a grant of such right was invalid. The limitations on the doctrine were stated by Mr. Justice Field, who delivered the opinion, as follows, at page 452 (13 S. Ct. 118):
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> "The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one

> which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled." *Appleby*, 271 U.S. 364 at 393-395, 46 S.Ct. 569 at 578.

Accordingly, the public trust doctrine does not impose any limitation upon the power of a state to dispose of public trust property as an incident and part of its sovereignty, whether the disposition be in full ownership or subject to public easement, provided the disposition is reasonable and can fairly be said to be for the public benefit and without substantial impairment of the public interest in the lands and waters remaining. See *Shively v. Bowlby*, 152 U.S. 1, 14 S. Ct. 548 at 565, 38 L. Ed. 331 (1894); see also, *Weber v. Commissioners*, 18 Wall. 57 (1873), *McGilvra v. Ross*, 215 U.S. 70, 30 S. Ct. 27, 54 L. Ed. 95 (1909) and *United States v. Cress*, 243 U.S. 316, 37 S. Ct. 380 (1917). Nor has Louisiana jurisprudence historically recognized such a limitation upon the right of the State to dispose of lands received by it by right of inherent sovereignty independent of limitations imposed by state law. See, for example, *State v. Bayou Johnson Oyster Co.*, 130 La. 604, 58 So. 405 (1912); *State v. Richardson*, 140 La. 329, 72 So. 984 (1916); *Palmer Co. v. Wilkinson*, 141 La. 874, 75 So. 806 (1917); *State v. Capdeville*, 146 La. 94, 83 So. 421 (1919), cert. den. 246 U.S. 581, 40 S. Ct. 346, 64 L. Ed. 727 (1920); *Realty Operators v. State Mineral Board*, 202 La. 398, 12 So. 2d 198 (1942); *O'Brien v. State Mineral Board*, 209 La. 266, 24 So. 2d 470 (1946).

Finally, it may be suggested by some that *Phillips* effects no change in Louisiana regarding ownership of non-navigable, tidal waterbottoms by its suggestion that such bottoms are affected by the waters of the *sea* by the mere consequence of tidal influence (see 106 S. Ct. at 797) and that such sea bottoms are inalienable by the long-standing classi-

fication of sea under the Civil Code. This position is untenable for several reasons. First, *Phillips* expressly recognized that states have the authority to define the limits of the lands held in public trust and Louisiana state law has not recognized "sea" or "seashore" to reach to the limits of *Phillips* tidewater bottoms. Secondly, such a result would require reclassification of tidally-influenced navigable rivers as "sea" and produce ownership results with respect to the banks of such streams at variance with Louisiana law. Would, for example, state ownership of the bottom of the navigable Jourdan River, if situated in Louisiana, extend to the ordinary high water mark? Are "seashore" principles to be applied to the banks of such streams? In this regard, it is noteworthy that even the oyster statutes affecting waterbodies along the Louisiana coast recognize the limits of riparian ownership to extend to the ordinary low water mark.

Some mention should also be made of other factors and policy considerations which may ultimately have some significance in the resolution of the ownership issues presented by the *Phillips* decision. For example, with respect to specific properties now in private ownership, consideration should be given to the historic recognition and treatment of "public trust tidelands" by the State and its agencies under the *Phillips* criteria in the way of segregation, taxation, use and protection of public trust interests, allocation of mineral resources etc. and to the potential impacts arising from a present divestiture of historic private titles (particularly, for example, with regard to existing commercial or residential development or claims for prior mineral revenues from affected lands). Equally important is a consideration of the effects of various acts of man, both public and private, in the construction of levees, canals and pipelines and related oil and gas activities on the natural processes of subsidence and erosion which have operated to greatly expand the inland reach of the influence of the gulf tides beyond the 1812 limits and of the impact of those artificial works on ownership changes as inland private property becomes coastal tidelands. For a perspective on the causes of land loss along the coast, see Houck, Land Loss in Coastal Louisiana: Causes, Consequences, and Remedies, 58 Tul. Law Rev. 3 (1983).

V.

House Bill 539 was introduced in the 1991 Regular Session of the Louisiana Legislature to clarify Louisiana law through codification of Louisiana's long-standing jurisprudential construction of seashore. Its provisions are consistent with Louisiana law.

Such legislative action is clearly within the province of the legislature. As interpretive legislation which does not create new rules, but merely establishes the meaning that the interpreted law had from the time of

its enactment, the measure is similar to the policy declarations and objectives of the Legislature under Act 727 of 1954 in response to the Louisiana Supreme Court decision in *California Co. v. Price*, 225 La. 706, 74 So. 2d 1 (1954). See *Gulf Oil Corp. v. State Mineral Board*, 317 So. 2d 576 at 590-592 (La. 1974). Moreover, as recognized in the *Miami Corp.* decision, the public policy of the state is whatever the Legislature has declared it to be, and the proposed measure would be appropriate even if not regarded as a mere clarification of existing law. Indeed, the *Miami Corp.* decision, in questioning the distinction between Lake Calcasieu and Lake Pontchartrain under the *Erwin* analysis as inland lake versus "arm of the sea," commented:

> "Certainly this phrase should have some definite meaning and its explanation should not be left to the discretion of the court in a particular case, in order that the jurisprudence and the law may be uniform and effective." See *Miami Corp.*, 186 La. 784, 173 So. 315 at 326 (1936).

CONCLUSION

From the opinion set forth above, it follows that with respect to "Phillips Lands" (i.e. lands not covered by navigable waters including the sea and its shore but which are lands subject to being covered by water from[33] the influence of the tide), which previously have been alienated by the state under laws existing at the time of such alienation, the U.S. Supreme Court's *Phillips* decision does not reinvest the State of Louisiana with any ownership of such lands, i.e. by the *Phillips* decision, the State of Louisiana has not acquired any new ownership of property which the state disposed of under laws applicable at the time of disposition.

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33. "form" in original.