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THE RIGHTS OF THE PUBLIC VERSUS THE RIGHTS OF RIPARIAN OWNERS TO THE USE OF THE SHORE BETWEEN THE WATERS EDGE AND THE HIGH WATER MARK ON LAKE MURRAY

I. INTRODUCTION

Lake Murray is a large man-made navigable lake located for the most part in Lexington County and was constructed in the late 1920's by damming the Saluda River for the purpose of producing electrical power by the use of a hydro-electric plant. The lake was constructed by the Lexington Water Power Company which was the predecessor of the South Carolina Electric and Gas Company. The high water mark of the lake is the 360 foot elevation. However, it is seldom that the water level ever reaches this mark and normally it ranges between the 355 and 357 foot elevations, sometimes falling to even lower levels.¹ Consequently, there is normally a stretch of beach or shore between the water's edge and the high water mark at the 360 foot elevation. The question to be studied in this report is whether the riparian land owner has the right to exclude members of the public from entering on this strip of land in front of his lakefront property or whether the public also has the right to enter thereon.

In view of the fact that title to the shore may be of importance in determining the rights of the public versus the rights of riparian owners, the preliminary question should be considered as to who holds title to the beds and banks of inland navigable waters in South Carolina. The common law of England recognized that title to the beds and banks of navigable waters was in the crown but that only tidal waters were considered technically "navigable" for purposes of ownership.² Therefore, the beds and banks of all inland waters in England were privately owned by riparian land owners.³ The South Carolina case of *State ex. rel. The Columbia Bridge Company v. The City of Columbia*⁴ approved the English view that title

1. Interview with Robert Cassals, Director of Land and Public Facilities for the South Carolina Electric and Gas Company, in Columbia, South Carolina, April 5, 1969.

2. R. E. CLARK, 1 WATERS AND WATER RIGHTS 267, 268 (1967).

3. *Id.* at 268.

4. 27 S.C. 137, 3 S.E. 55 (1887).

to the beds of inland waters was not in the state but was held in private ownership by riparian land owners. The court referred to an earlier South Carolina decision in the case of *McCullough v. Wall*⁵ which had adopted the English rule that the title to the beds and banks of nontidal waters is held in private ownership although the public has a right of passage or easement over the water where the stream is in fact navigable for boats and rafts. Thus, while South Carolina recognizes private ownership of the beds and banks of non-tidal streams, it also recognizes the right of the public to travel over inland waters which are navigable in fact. The following quotation from *State ex. rel. The South Columbia Bridge Company v. The City of Columbia* clearly states the South Carolina position: "[i]t is true that this proprietary right to the center of such streams is subject to the right of the public to use such streams for transportation as a highway, where such streams are in fact, though [are] not technically navigable . . ."⁶ Since there is no ebb and flow of the tide in Lake Murray, the beds and banks of the lake are not owned by the State of South Carolina.

Actually the title to the great bulk of land covered by Lake Murray is held by the South Carolina Electric and Gas Company. Upon construction of the lake, the Lexington Water Power Company, predecessor of the South Carolina Electric and Gas Company, purchased most of the land that was to be covered by the lake. In some instances the land was purchased up to the 360 foot high water mark, and in some other cases the land was purchased up to the 365 foot elevation. The 365 foot elevation marks the project boundary line, and the land between the 360 and 365 foot elevation is known as fringe land. At various times since 1955 the South Carolina Electric and Gas Company, under the supervision of the Federal Power Commission, has sold some of the fringe land to the riparian owners. At some places on the lake portions of the lake bed are owned by riparian owners. In these instances the South Carolina Electric and Gas Company merely has flowage rights over the land up to the 360 or 365 foot elevations. Thus, the fact is that some property owners on Lake Murray only own the land down to the 365 foot elevation while others won down to the 360 foot

5. 4 Rich. 68 (1850).

6. 27 S.C. 137, 146, 3 S.E. 55, 58 (1887).

high water mark and still others own land out into the bed of the lake.⁷

II. APPLICABLE CASE LAW

There is no law in South Carolina and very little in other jurisdictions on the question of whether a riparian owner has the right to the exclusive use of land in front of his property between the high water mark and the water's edge. In fact the only treatment given by *Corpus Juris Secundum* on this point in regards to inland navigable lakes is as follows:

Members of the public have no right to enter and travel on that portion of the shore on an inland navigable lake between the ordinary high-water and low-water marks, whether it is owned by the riparian owner or the state, and the riparian owners may maintain an action of trespass for such injury.⁸

A conclusion as to whether or not this is an accurate statement of the general law on the subject will be reserved for discussion later in this article.

There are a few relevant cases in other jurisdictions which may help us draw a conclusion as to what the law ought to be in South Carolina, particularly as it would relate to Lake Murray. The case of *Diana Shooting Club v. Hustling*⁹ is representative of the generally accepted position that the public has the right to enter upon navigable bodies of water.¹⁰ In this case, the plaintiff owned a tract of land which had a navigable stream passing through it, and he held title to the bed of the stream. The defendant paddled up the stream in a boat and over the stream bed owned by the plaintiff. While in the boat and floating on the navigable stream, he hunted waterfowl which resulted in the plaintiff bringing a trespass action against him. The court held that the defendant was not guilty of any trespass. Under the common law, the rights of hunting and fishing are incident to the right of navigation which the public has in navigable waters. In regard to the right of

7. Interview with Robert Cassals, Director of Land and Public Facilities for the South Carolina Electric and Gas Company, in Columbia, South Carolina, April 5, 1969.

8. 65 C.J.S. *Navigable Waters* § 60 (1966).

9. 156 Wis. 261, 145 N.W. 816 (1914).

10. 65 C.J.S. *Navigable Waters* § 55 (1966). See also R. E. CLARK, 1 WATERS AND WATER RIGHTS 200 (1967).

navigation and its incidents, it is immaterial whether the title to the stream bed is held by the state or the riparian owners. The defendant in this case was hunting while in a boat on a navigable stream; therefore, he had committed no trespass. The court specifically noted that it was not deciding whether the public had the right to hunt on a navigable stream, between ordinary high water marks, which, because of a low stage of water, was unnavigable, or on land between such marks which had become dry or exposed.

The case of *Stewart v. Turney*¹¹ dealt specifically with the right to exclude the public from land lying between the waters edge and the high water mark. In that case the plaintiff had leased a tract of land from a riparian owner along the shore of Caguya Lake, and inland navigable lake in the State of New York. The plaintiff sought an injunction to prohibit the defendant from hunting on land between the high and low water marks along the lake in front of the leased property. The case turned on the question of whether the plaintiff's lessor had title to the land above the low water mark. The court held that the plaintiff's lessor did have title to the shore down to the low water mark and granted the injunction. The property in question was in private ownership, and the plaintiff could prohibit the defendant from entering on the land above the waters edge.

A more recent New York decision, *People v. Kraemer*,¹² follows the spirit of the *Stewart* case, although the factual situation is different and does not involve an inland navigable lake. In *Kraemer* there was a prosecution for the violation of a town trespass statute. The alleged trespass occurred in the village of Lloyd Harbor which borders on Lloyd Point Basin, a navigable man made harbor, located just off Long Island Sound. The information charged each of several defendants with anchoring their vessels upon private property in the harbor, and it charged one defendant with entering upon the shore of the harbor on land below the high water mark. Although the defense asserted that the land upon which the alleged trespasses occurred was owned by the State of New York, the court found that the bed of the harbor and the shores were privately owned. The defense also asserted that, even though the land in question may have been privately owned, the waters over the land were navigable waters and, therefore, were subject to the public right of navi-

11. 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 90 (1923).

12. 7 Misc. 2d 273, 164 N.Y.S. 2d 423 (1957).

gation which included both the right to anchor and to enter upon the shore. Since the harbor was navigable the court found that the defendants as members of the public had the right to navigate therein. In holding that the public had a right of navigation, the court concluded that the public also had the incidents necessary to enjoyment of that right, one of these incidents being the right of temporary anchorage. Thus, the court found the defendants not guilty on the trespass charge of dropping anchor in Lloyd Point Basin. However, the court did find one of the defendants guilty of trespass in entering upon the shore of the harbor below the high water mark. The court stated: "the public right of navigation does not include the right to enter upon the foreshore when it is in private ownership, except where and to the extent necessary in the exercise of the right of navigation. The defendant . . . does not contend that an emergency arose while he was in the harbor, that required him to go ashore."¹³ The *Kraemer* case follows the general rule that navigators have no right to use the foreshore or bank of a navigable stream which are in private ownership except where a temporary use is made of the bank or shore in case of peril or emergency, or where the right has been obtained by agreement, grant, or prescription.¹⁴ In the light of the foregoing cases, it would appear that the public does not have the right to enter upon the foreshore below the high water mark when that strip of land is privately owned.

The cases thus far discussed have dealt with the situation in which the beds or shores of navigable bodies of water have been held in private ownership. The next line of cases to be discussed deal with right to the use of the shore where the bed of the navigable water is held in state or public ownership. *Anderson v. Reames*¹⁵ is a very interesting case although it presents a somewhat complicated factual situation. The plaintiffs in this case operated a commercial fishing camp along the shores of Grand Mere Lake, a navigable inland lake in the State of Arkansas. The entire bed of this lake is owned by the state. The defendants, as lessees, occupied property bordering on the lake, the boundary of which extended only to the high water mark. The plaintiff's camp facilities were located partially on the surface of the lake and partially along the shore between the high and low water marks in front of the property leased

13. *Id.* at 434.

14. 65 C.J.S. *Navigable Waters* § 25 (1966).

15. 204 Ark. 216, 161 S.W.2d 957 (1942).

to the defendants. The plaintiffs brought an action to restrain the defendants from enclosing the shore with a fence along the waters edge in front of the leased property. The defendants brought a cross-action to have the plaintiff's facilities removed from their location both on the shore and on the surface of the lake. On appeal, a decree of the lower court was affirmed which, among other things, required the defendant to remove the fence along the shore line. The decree also directed the plaintiff to remove their facilities from the shore and prevented them from receiving or discharging customers along the shore in front of the property in question. The decree did uphold the plaintiffs' right to continue their operation on the surface of the lake. The fact that the decree required the plaintiff to remove his facilities from the shore would seem to indicate that the defendants had the right to control the use of the shore bordering on the lake. However, the court went on to discuss the rights of the public generally in the use of the shore. The court concluded that the rights of the riparian owners along the lake front did not permit them to interfere with the right of the public generally in the use of the shore or beach between the high water mark and the waters edge for the purpose of bathing, hunting, fishing, and the landing of boats, so long as such use did not unreasonably interfere with the riparian's right of ingress or egress. Thus, the dicta of this case gives the public substantial rights in regard to the use of the shore and effectively negates the conclusion that the riparian owner has any right to the exclusive use of the land between the waters edge and the high water mark.

The case of *Evans v. Dugan*¹⁶ involved a factual situation similar to that in the *Anderson* case. In this case the plaintiff owned a tract of land bordering on Lake Bistineau in the State of Louisiana. The defendant operated a commercial fishing camp on the shore in front of the plaintiff's property and had erected some buildings between the waters edge and the high water mark. The plaintiff brought an action to compel the defendant to remove the buildings from the shore and to prohibit him from operating the fishing camp in front of the plaintiff's lake front property. The plaintiff did not contend that the camp interfered with his free use of the shore but alleged that the existence of the camp made it impossible for him to sell lake front lots along the lake where the camp was

16. 205 La. 398, 17 So. 2d 562 (1944).

located. Apparently the plaintiff proceeded on the theory that the camp constituted a public nuisance. The court found that the bed of the lake, an inland navigable lake, was owned by the state between the high water marks. Lake Bistineau by act of the legislature had been declared a state game and fish preserve. The Lake Bistineau State Game and Fish Commission had been created to manage this property, and the defendant had obtained permission from the Commission to establish a commercial fishing camp on the shores of the lake. It was concluded that the defendant had the right to operate the fishing camp on the land between the waters edge and the high water mark and that the camp was in fact a public convenience. Specifically, the court held that the plaintiff, as a riparian owner, had no right to appropriate to his exclusive use the shore of Lake Bistineau lying on front of his property, nor did he have any private property right in the use of the land in question which was public and under the control of authorized state agencies. The court noted that the plaintiff was not deprived of his rights as to fishing, boating, landing, or traveling along the shore.

The cases thus far reviewed seem to indicate that the right of the public and the riparian owner to the use of the shore turns on the issue of who has title to the strip of land between the waters edge and the high water mark. The case of *Doemel v. Jantz*¹⁷ was the only case discovered in researching this article in which the rights to the use of the shore were determined without deciding who held title to the shore. In that case the plaintiff owned a tract bordering on Lake Winnebogo, an inland navigable lake in the State of Wisconsin. The defendant entered upon the shore in front of the plaintiff's lot which was being used as a pasture, and the plaintiff brought an action for trespass. The lower court upheld the plaintiff's demurrer to the defendant's answer and the defendant appealed. The question to be decided on appeal was whether a member of the general public could legally enter upon and use for purpose of public travel that strip of land which lay between the ordinary high and low water mark. The plaintiff contended that he owned the property down to the low water mark and thus could prohibit the public from entering upon the land. In the alternative, the plaintiff contended that, even if he held title only down to the high water mark, that by reason of being a riparian owner he had the exclusive right to use the shore in front of his

17. 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 90 (1923).

property between the ordinary high and low water marks. The court recognized that the rights of the public in navigable waters was confined to the right of navigation, but that the term "navigation" has been employed to include the use of waters for purposes of travel, fishing, bathing, recreation, and hunting. However, the court indicated that the right to navigation existed only upon the actual body of water and not upon the shore. It was noted that the *Diana Shooting Club* case affirmed the right of the public to hunt game up to the high water mark of a navigable stream while the water of the stream actually extended to that high water mark. The court concluded that, when the strip of land between the high and low water marks was covered by water, the public had the right of navigation over the land, but that, when the water receded, this right was succeeded by the exclusive right of the riparian owner. The exclusive use of the shore was found to be a riparian right, and the court found it unnecessary to decide whether or not the plaintiff held title to the shores. The plaintiff's demurrer to the answer was sustained. This case was cited as authority for the proposition of general law appearing in *Corpus Juris cundum*¹⁸ which was quoted in full earlier in this article.

The decision in this case was analyzed and criticized in a 1958 *Wisconsin Law Review* article.¹⁹ The writer of that article is of the opinion that the holding of the case merely assumes that the defendant invaded a riparian right and that there was no justification given for this assumption. While the reasoning in the decision isn't crystal clear, this writer believes the case may be justified if the decision is viewed not as an expansion of riparian rights but as a limitation upon the public to use only the navigable water and not the dry land bordering upon the navigable body of water.

In any event, the Wisconsin article concluded that the decision was probably influenced by the plaintiff's policy argument which portrayed a bleak future of idlers, hunters, and ill-mannered loafers carousing and annoying many lakeshore farmers if the public was allowed to travel freely along the shore.²⁰

18. *Supra* note 8.

19. Waite, *Public Rights to Use and Have Access to Navigable Waters*, 1958 Wis. L. Rev. 335.

20. *Id.* at 372, 373.

III. CONCLUSION

In applying legal principles to the question of whether or not riparian owners have the right to the exclusive use of the shores on Lake Murray, only the rights of those property owners will be discussed who own property down to the 360 foot high water mark or who own property out into the bed of the lake. As previously mentioned, some property owners have title only down to the 365 foot level along the project boundary line. However, there are many legal questions involved in regard to their rights to the use of the shore including the basic issue of whether they are even riparian owners. These questions are not within the scope of this report and will not be discussed herein.

As to property owners along the lake whose property extends into the bed of the lake, it would seem that they have a strong case for claiming the exclusive right to use the shore between the waters edge and the high water mark. As we have seen in other jurisdictions, the case law seems to indicate that the riparian does have the right to the exclusive use of the shore in these cases. Of course, if the issue arose in South Carolina in regard to Lake Murray or any lake, it would be a question of novel impression, and our court would not be bound by the case law in other states. It could be argued on behalf of the public that Lake Murray is an important recreation area for the general public and that the modern approach is to consider the public right of navigation in navigable waters to include the rights of fishing, hunting, boating, and recreational enjoyment in general. Although the South Carolina courts have not been called upon to define navigation in such broad terms, there is no logical reason for refusing to do so. Assuming the courts would accept this modern definition, it could be argued that in order to exercise this broadened right of navigation, it is necessary that the public be given the right to enter upon private shores. *Corpus Juris* states that "[f]ishing implies a reasonable use of the water and shore line of a navigable stream."²¹ Likewise, it is only logical that boating and recreational enjoyment of the lake should imply a reasonable use of the shore line. It goes without saying that it would be difficult indeed to enjoy a pleasant day of recreation on the lake without being able to enter upon the shore. The right of the public to use the lake should necessarily grant to the public the right to the reasonable

21. 26 C. J. *Fish* § 17 (1921).

use of the shore between the waters edge and the high water mark.

The riparian owner could counter this argument with his own argument that to allow the public to enter upon the shore in front of his property would intrude on his right of privacy. In addition, there are a large number of commercial recreational facilities all along the shores of Lake Murray including boat landings and campgrounds which have complete recreational facilities, including even picnic tables. Also, there are several areas on the lake which have been developed by the South Carolina Electric and Gas Company for the recreational use of the public. Therefore, there is no need to allow the public to use private property in pursuit of fun and frolic, especially considering the fact that the public may freely engage in these activities on the surface of the lake. In view of both policy arguments and the relevant American case law, the law should be that property owners on Lake Murray who own property out into the bed of the lake have the right to exclude the public from entering upon the shore below the high water mark.

The rights of the public versus the rights of the riparians to the use of the shore is a more difficult controversy where the riparian owner holds title only down to the 360 foot level. As previously noted, the bed of Lake Murray up to the high water mark at the 360 foot level and adjacent to these property owners is owned by the South Carolina Electric and Gas Company and not by the State of South Carolina. Nevertheless, for the purpose of determining the rights of the public and the riparians in regard to the shore below the high water mark, it would seem logical for the South Carolina courts to consider the issue as though the title to the bed of the lake were held by the state in trust for public use. This would be an appropriate way to analyze the issue in view of the fact that the policy of the South Carolina Electric and Gas Company is to allow the public to use, for purposes or recreation, the land owned by the company along the shores of the lake.²²

Assuming that the courts would analyze the problem as though the bed of the lake were owned by the state, the case law of other jurisdictions does not reveal any uniform principle of law to be applied. Some of the cases reviewed in this article

22. Interview with Robert Cassals, Director of Land and Public Facilities for the South Carolina Electric and Gas Company, in Columbia, South Carolina, April 5, 1969.

used strong language in support of the public right to enter upon the shore where title to that strip of land was held in public ownership. However, the holding in the *Jantz* case stands for the position that the riparian owner may exclude the public from entering upon the shore regardless of whether or not the riparian holds title to the shore. Consequently, policy arguments will be important factors in determining the outcome of the controversy. Basically the same policy arguments as previously mentioned would also be applicable in this case. In the opinion of this writer, the argument on behalf of the riparian owner is the stronger argument. This is particularly true in regard to Lake Murray because of the ample recreational facilities currently available to the public. As a practical matter, there are many miles of shore line on Lake Murray which have not been developed, and the public could in most cases enter upon the shore in these areas without objection from riparian owners. There appears to be no real need to give the public the right to enter upon the shore over the objection of a riparian owner. Considering the American case law and balancing it with the policy arguments and the factual circumstances in regard to the problem on Lake Murray, it is this writer's opinion that the riparian owner should have the right to exclude the public from entering upon the shore.

In conclusion, the riparian owners along the shores of Lake Murray, including those who hold title to land down to the 360 foot high water mark and those who hold title to land out in the bed of the lake, should have the exclusive right to use and to exclude the public from entering upon the shore between the water's edge and the high water mark.

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