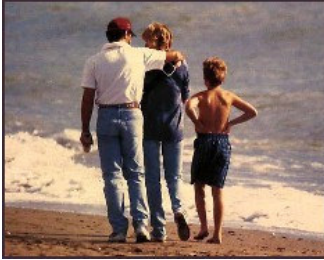


The Public Trust Doctrine: A Gift From A Roman Emperor



The next time you're strolling down the beach, thank an emperor for the right to do so. Unless you're in Maine or Massachusetts. Then blame the colonial authorities for giving away this gift of the emperor.

Roman Emperor Justinian, in 530 A.D., gathered together his top legal scholars and ordered them to put in writing all of the laws of the Empire. Thus, the “Institutes of Justinian”, the body of Roman civil law, were written. Tucked away in these numerous volumes covering every aspect of Roman life and commerce, was the provision that:

“By the law of nature these things are common to all mankind; the air, running water, the sea, and consequently the shores of the sea.”

No one, therefore, was forbidden to approach the seashore. Over the next millennium, Rome fell and the western European countries rose. But the civil law of Rome, the Institutes, formed the basis of law for many of the European countries. Most important, from an American perspective, the law of England adopted much of the Roman civil law, recognizing the public nature of tidelands and waters, and giving them protection in the name of the King for the use of all English subjects.

As the Kings of England granted charters to the colonies, the English law of public shorelands came to America. With the only true highways for commerce being the rivers, bays, and open ocean, nearly all commerce depended upon ships, wharves, and harbors. Free use of the shorelands and waters was imperative, not only for commerce, but also for sustenance and survival.

Early court records are replete with the colonists using the shores for hunting; fishing; swimming, bathing and washing clothes; beaching their boats; collecting sedge, seaweed and shellfish; cutting ice; watering their cattle; preparing flax; and as a clear passage for walking, riding horses, or driving carriages from cabins to town.

So important were the shorelands to the colonists, that when the thirteen colonies formed the Union and granted to the new federal government vast expanses of land known as the

Northwest Territory, the 13 states kept the shorelands under their control. As the next 37 states entered the Union, they did so on an “equal footing” with the original 13, and they, too, gained control over their shorelands. The shorelands were now given protection, in the name of the state, for the use and enjoyment of the public, both living and future generations.

These rights of the public to the shorelands and waters are known today as Public Trust rights, and the shorelands and waters known as Public Trust lands and waters. States hold these lands and waters, not as they “own” upland for state parks or forests, but in trust for the benefit of the public. Hence the name Public Trust Doctrine.

So today, thanks to Emperor Justinian, you can stroll down the beach and enjoy your trust rights just about everywhere in the United States, including the five U.S. territories and commonwealths -- the Virgin Islands, Puerto Rico, Guam, American Samoa and the Commonwealth of the Northern Mariana Islands. The exceptions are Massachusetts and Maine.

In these two areas the need for wharves became the critical factor. The shorelands of the Colony of Massachusetts (which included what is now Maine), sloped so gently, and had such vast mudflats, that long wharves had to be built in order to reach water deep enough for the trading ships to dock. Without such lengthy docks and wharves, commerce was strangled. But the colonial coffers were empty, consequently the Massachusetts colonial government couldn't build them at public expense.

So to encourage private citizens to build them, the common law of England was altered in 1641 and again in 1647 by a colonial ordinance, providing that the owner of waterfront land owned not just to the high water mark of the beach, but to the low water mark--which in Massachusetts could be a great ways out. The public still had some rights on the privately owned shores, according to the ordinance, but these rights were limited (and remain so today) to “fishing, fowling, and navigation.” Thus, in Massachusetts and Maine, you can stroll down the beach with a fishing pole or shotgun in hand (if you have the proper licenses), but not your granddaughter's hand in hand.

But, just about anywhere else in the United States, with some limited exceptions of other “private beaches”, one can stroll the beach at ease, just as long as you stay on the beach and don't trespass on the landward private property. With the proper fishing license, you have the right to fish from shore. You can swim from the beach, sail your boat over the waters, collect shells, or just collect your thoughts. You can't trespass over private land to get to the beach, but once there, these are the Public Trust rights of every member of the public in the United States.

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