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TITLES TO MARSHLANDS IN SOUTH CAROLINA*

JOHN MILES HORLBECK†

PART I

I. INTRODUCTION

The purpose of this article is to explore the history and status of the ownership of marsh or tide lands in South Carolina.

Statements of the State Supreme Court in the *Cape Romaine* case,¹ and the affirmation thereof by the later *Rice Hope* case,² have been rather generally viewed as casting doubt upon private ownership of such lands. Attempts have been made to obtain title (a) by legislative enactment or grant, after purchase of any interest of the State from the Budget and Control Board,³ and (b) by legislation confirming title after continuous claim and payment of taxes.⁴ However, purchase of the State's interest from the Budget and Control Board apparently ceased after the ruling of the Attorney General of April 2, 1957,^{4a} that the Board had no authority to convey marshlands covered by tidal waters at normal high tide. This ruling did not interfere with the constitutional provision permitting confirmation of titles by the Legislature in its discretion;⁵ however, following two rulings from the Attorney General, dated March 27, 1959, and April

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1. *Cape Romaine Land & Improvement Co. v. Georgia-Carolina Caning Co.*, 148 S. C. 428, 146 S. E. 434 (1928).

2. *Rice Hope Plantation v. South Carolina Pub. Serv. Authority*, 216 S. C. 500, 59 S. E. 2d 132 (1950).

3. See for example Acts No. 414 and 415 of 1955.

4. See for example Act No. 418 of 1955.

4a. S. C. OPS. ATT'Y GEN. No. ____ (Apr. 2, 1957).

5. S. C. CONST. art. III, § 31 (1895).

And see for example, Act No. 519 of 1957, where title was confirmed to marshlands, although the Governor did not sign the act and it became law by reason of the provisions of Article IV, Section 23, S. C. Constitution, providing that a bill not returned within three days shall have the same force as if he had signed it, unless the General Assembly adjourn to prevent return.

10, 1959,⁶ two bills passed by the legislature were vetoed by the Governor. These 1959 rulings suggest the view that grants or title confirmations of marshlands by the General Assembly are forbidden by the *Cape Romaine* case, *supra*.

Thus, although the right to grant lands still inheres in the State Government,⁷ there is no apparent means for making payment for lands granted, as required by statute.⁸ Of course, if title is traced back to a valid grant of marshlands, then title may be good; but since the *Cape Romaine* case and subsequent *Rice Hope* case, lawyers generally have been loathe to pass title to marsh lands, because statements in those cases have been regarded as throwing doubt upon all grants below mean high water mark in and on tidal navigable streams, and doubt is created as to what a navigable stream is, because the *Cape Romaine* case appears to constitute marshlands as such a navigable stream as cannot be the subject of grant.

If titles could be confirmed by the Legislature or some procedure established for purchase of valid grant, matters might be cleared; or the Court might clarify the subject in a decision in a proper case. At any rate, the recent vetoes and rulings by the Attorney General have excited considerable interest in the problem of marshland titles.

In the light of this situation, it is appropriate to compile: definitions of useful terms; a brief discussion of sovereignty and tenure of lands, by individuals and by the State, and of grants and power to grant marshlands; a resume' of the common law and of federal and state statutes, an outline of cases which have arisen concerning submerged lands in South Carolina, with emphasis upon navigability and ownership of submerged lands, including presumptions and burden of proof, parties, ownership, rights and use, public and private, acts of possession, boundaries, remedies and defenses; and a conclusion covering present status of marshland titles.

II. DEFINITIONS

At the time of the controversy over the so-called Tidelands Oil Cases,⁹ (wherein the United States Supreme Court as-

6. S. C. OPS. ATT'Y GEN. No. 646 (Mar. 1959); S. C. OPS. ATT'Y GEN. No. 647 (Apr. 1959).

7. S. C. CONST. art. IV, § 19 (1895).

8. CODE OF LAWS OF SOUTH CAROLINA § 1-794 (1952).

9. *United States v. California*, 332 U. S. 19, 91 L. Ed. 1889 (1947); *United States v. Louisiana*, 339 U. S. 669, 94 L. Ed. 1216 (1950); *United States v. Texas*, 339 U. S. 707, 94 L. Ed. 689 (1950).

asserted the so-called "sliding interest rule" that the General Government had "paramount rights" in and power over the marginal sea lands of the states involved), the *South Carolina Law Quarterly* printed a thorough article criticising those decisions, and asserting the sovereignty of the States to such lands.¹⁰ While written in the sphere of relations between the General Government and the several States and with particular reference to marginal sea lands, that article is generally pertinent here, and the definitions there used of "tidelands" and "marginal sea lands" are worth repeating.

Briefly, "tidelands" are those lands submerged by the flow of the ocean tides and located between mean high water mark and mean low water mark, while "marginal sea lands" are those submerged lands extending seaward from mean low water mark to the seaward boundaries of the sovereignty of the State.¹¹

"Marshlands" is a term used herein synonymously with "tidelands," because most of the South Carolina cases use the word "marshlands," although the word "shore" or "shorelands" has been used to mean "tidelands." "Mean high water mark" or "high water mark" is the point reached at the height of an ordinary high or flood tide, and "mean low water mark" or "low water mark" is the point reached at the depth of the ordinary ebb tide, there being two times each lunar

10. 5 S. C. L. Q. 418 (1953).

11. The external boundaries of the United States have been held to be the external boundaries of the several States, as the United States did not acquire any territory after the Revolution, from the Treaty of Paris. *Harcourt v. Gaillard*, 12 U. S. (12 Wheat) 523, 527 (1827). The statutory boundary of the State of South Carolina is stated solely as "on the east the State is bounded by the Atlantic Ocean." CODE OF LAWS OF SOUTH CAROLINA § 39-1 (1952). By statute, waters and bottoms of bays, rivers, and creeks "within the State or within three miles of any point along low water mark on the coast thereof" and not previously granted, are reserved as a common for the people of South Carolina for the taking of fish, subject to acts of the General Assembly. CODE OF LAWS OF SOUTH CAROLINA § 28-754 (1952). By statute, the seaward boundaries of three of the coastal counties are given as the Atlantic Ocean, Beaufort, (§ 14-57); Georgetown, (§ 14-72); and Horry, (§ 14-76); while one county's are co-extensive with the "line of jurisdiction of the State." Charleston, (§ 14-60). Thus, there is authority for the three mile or one marine league limit, although the Royal Charters of Carolina and other ancient papers might shed further light, or same might be enlarged by act of Congress. 5 S. C. L. Q. 423 (1953).

For recent decisions on the seaward boundaries of Florida, Louisiana, Mississippi and Alabama in the original jurisdiction of the United States Supreme Court, see *United States v. Florida*, 363 U. S. 121, 4 L. Ed. 2d 1096 (1960); and *United States v. Louisiana*, 363 U. S. 1, 4 L. Ed. 2d 1025 (1960), cited 46 A. B. A. J. 1219-1220 (1960).

day when, due to the pull of the moon, the tides are in flood and reach their crest at high tide, and two times in each day when they ebb and diminish or recede at low tide. "Tidal" means subject to the ebb and flow of the ocean tides. "Navigable" should mean useful or capable of use for public commerce, but the term has been otherwise variously employed, as will later be noticed. "Stream" is defined as a current of water.¹² A better term than "stream" is "watercourse," which is defined as a natural stream of water in a defined channel, a "channel" being that portion of a watercourse where flows the chief volume of water.

It would be helpful to visualize a channel or main watercourse as becoming wider and deeper as the tide flows in, the boundaries of said channel being visualized as ceasing at those points where navigability in fact ceases and the non-navigability of the tideland begins. However, the Courts have used other definitions, as will be seen below.

"Bank" means an elevation or formation of soil or land which confines the waters of a watercourse when they rise out of the bed, and "bed" of a stream should mean the land that is covered by tidal waters at low tide, and, thus, below low water mark.¹³ A riparian owner is one owning land on the bank of a stream or watercourse, while a littoral owner is one owning land on the shores of seas or great lakes.¹⁴

Defining land titles by reference to water marks makes for difficulty, and one of the chief difficulties with marshland titles in South Carolina today is that dicta in the *Cape Ro-main* case apparently held that marshland is land located "in tidal navigable streams."

Both the word "navigable" and the word "stream" need more precise definition. The word "stream," meaning a definable body of water, is not a good word to use when describing a vast expanse of several thousand acres of marshland concealed under water at high tide. The word "navigable" is not an accurate word to use in describing waters over marshlands at mean high water mark when the depth of the waters is not over one or two feet, scarcely enough to support a boat of extremely shallow draft.

What happens twice in each lunar day is that the water,

12. BLACK, LAW DICTIONARY (4th ed. 1951).

13. *State v. Oak Point Mines*, 22 S. C. 593, 601-602 (1884).

14. BLACK, LAW DICTIONARY (3rd ed. 1951).

at high tide, overflows the banks of the watercourse and floods the tidal marshes, and then completely drains away again, only to commence the cycle of ebb and flood all over again. Twice in each lunar day, due to the pull of the moon, the water floods in toward the land during the flood stage of the tides, and twice the direction is reversed during ebb tide where the flow is away from the land.

Since the writing of the article concerning marginal sea lands, the United States Congress has enacted the "Submerged Lands Act."¹⁵ This Act released and relinquished to the several States or to those who on June 5, 1950, were entitled under state law, all right, title and interest of the United States in and to "lands beneath navigable waters within the boundaries of the respective States," expressly reserving to the United States (a) powers over the same for purposes of commerce, navigation, national defense and international affairs, which are stated to be paramount to but not to include proprietary rights of ownership, and (b) reserving also the right to buy at prevailing market prices or to condemn submerged lands needed for national defense, and (c) reserving constitutional authority over flood control and production of power. The Act recognized grants and leases to individuals previously made by the States or by predecessor sovereigns.¹⁶ For the purposes of the act, "navigable" was defined to include, *inter alia*, "all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress extends seaward . . . beyond three geographical miles. . . ."¹⁷ This Act has held constitutional,¹⁸ and its general effect was to remove the Federal Government from the field of tidelands except for the powers reserved, and leave the same to the States.

Therefore, it is important to determine what law applies

15. Popularly known as the Tidelands Oil Act, 67 Stat. 29, 43 U.S.C.A. §§ 1301-1343 (Supp. V, 1958), and recently construed in *United States v. Louisiana and United States v. Florida*, note 11, *supra*.

16. 43 U. S. C. A. § 1311 (a) (2) (Supp. V, 1958).

17. 43 U. S. C. A. § 1301 (a) (2) (Supp. V, 1958).

18. *Alabama v. Texas*, 347 U. S. 272, 98 L. Ed. 689 (1954). (Justices Black and Douglas dissenting).

in South Carolina, because the use of high water mark by the Federal Government to define the limit of its easement for navigation does not require a State to use the same definition, unless this is deemed by the General Assembly and the Courts to be in the public interest.

III. SOVEREIGNTY AND POWER TO GRANT

Sovereignty of the territory comprising South Carolina was first held by the Crown, then by the Lord Proprietors, in tenure of the Crown, until 1719,¹⁹ and then by the Crown itself, before Sovereignty passed to the State of South Carolina in 1776, when the Provincial Congress of South Carolina met and formed an independent republic.²⁰ Later, partial Sovereignty was delegated to the United States, first by the Articles of Confederation, then by the present Constitution of the United States.

The State of South Carolina "succeeded at the Revolution to all of the rights of the British Crown, one of which as, Lord Coke tells us, was 'that all lands are holden mediately or immediately of the King.'"²¹ The State succeeded to the tenure and titles of lands not previously granted, but recognized previous valid grants.²² There are statutes which expressly validate grants prior to 1731,²³ and prior to July 4, 1776.²⁴

19. SIMMS, HISTORY OF SOUTH CAROLINA (revised edition, Russell & Jones) at 91-94 § 2 (1860); THE SOUTH IN THE BUILDING OF THE NATION at 31 (1909).

20. SIMMS, *id.* at 30.

21. State v. Pinckney, 22 S. C. 484, 502 (1884).

22. There can be no doubt that all lands in this state are held under the sovereign,—first the royal authority of Great Britain, and afterwards the State of South Carolina, the successor to all of its rights. And when the state sets up her claim, *prima facie* the right must be in her. To require proof from her that she has not granted the land would require proof of a negative. The argument is plausible enough to be sound. At all events, we are bound by it, as the utterance of the supreme court of the state upon a local law affecting property rights. But the State of South Carolina succeeded to the obligations as well as the rights of the crown. She became, upon the Revolution, the owner of lands not granted by her predecessor. She is bound by those grants. This qualification is admitted even by the case of the Pacific Guano Company which, under pressure of public opinion, carried the supposed rights of the state to an extreme limit. If it be shown that the lands had once been granted by the crown, the presumption in favor of the state is at an end, and upon those who assert her claims devolves the burden of proving either that the grant was void, or that subsequent thereto she had in some way reacquired title. *Chisolm v. Caines*, 67 Fed. 285, 287 (1894).

23. CODE OF LAWS OF SOUTH CAROLINA § 57-52 (1952).

24. CODE OF LAWS OF SOUTH CAROLINA § 57-57 (1952).

Our State Supreme Court has held that the State can hold tenure to tidelands, grant them to citizens and tax them when granted.²⁵ In *State v. Pinckney*, it was held:

That salt marsh has for one hundred years been considered by the general assembly of this State as such land as when vacant was owned by the state appears from the act of 1784 (4 Stat., 627) to raise supplies. By this act 'all lands granted by the State' were classified and rated for taxation. This classification was continued from year to year in the annual acts to raise supplies, until the year 1815. In that year an act to fix the value of lands in the state for taxation, &c (6 Stat., 7) was passed. In all these acts salt marsh is included as taxable when granted. In addition to this, the state has from ancient times actually exercised the power to grant lands of this description without question. See act of 1787 (5 Stat., 39, par. 4); and act of 1836 (7 Stat., 151). See also grant of marsh land to William Fripp in 1787, in evidence in this case. From this it appears that there is nothing in the fact that land is marsh land to affect the nature of the state's tenure of the soil.²⁶

In *State v. South Carolina Phosphate Co.*,²⁷ the opinion of the Circuit Court, ordered to be reported by the Court in *State v. Pacific Guano Co.*,²⁸ includes a precise definition of "vacant lands," and sufficient statutory authority to show that marsh lands were treated as other lands, were subject to grant and to taxation:

... Vacant lands, in the sense of our statutes, are lands that have not been 'taken up' by individuals, nor appropriated to particular public purposes. . . .

It appears, therefore, that *there is nothing in the legal signification of the term 'vacant land,' to restrict its ap-*

25. *State v. Pinckney*, 22 S. C. 484 (1884); *Oak Point Mines*, 22 S. C. 593 (1884).

26. *Id.* at 488-489. Judge Simonton held in *Chisolm v. Caines*, *supra*, note 22, that "The uniform rule in South Carolina has been to treat marsh lands as subject to grant, to grant them and to tax them when granted." 4 Stat. at Large 627; 5 Stat. at Large 39; 6 Stat. at Large 7; *State v. Pacific Guano*, 22 S. C. 50; *State v. Pinckney*, 22 S. C. 488; *Frampton v. Wheat*, 27 S. C. 293, 3 S. E. 462; *State v. S. C. Phosphate Co.*, 22 S. C. 593; *Chamberlain v. R.R.*, 19 S. E. 743, 67 Fed. 285 (1894).

27. 22 S. C. 593, at 600, 601 (1884).

28. 22 S. C. 50 (1884).

plication, so as to exclude land covered by water, which has not been appropriated to individual or public use, by authority of law. (Italics added.)

That land flowed by the tide is the subject of grant in this state is conclusively shown by statutes in which 'all lands granted in this state' were classified and rated for purposes of taxation. The first of these was the act of 1784 (4 Stat., 627) to raise supplies. This classification was continued in the supply acts of each succeeding year until 1815, when it was made permanent by 'An act to fix the value of lands in this state for taxation,' etc. (6 Stat., 7). In these acts 'tide swamp not generally affected by salt or freshets' and 'salt marsh' proved to be 'incapable of immediate cultivation' are set down, the first taking rank as the most valuable land in the state. There is no trace of any special legislation providing for the location and grant of lands of this character, and the necessary inference is that they were disposed of under the general regulations prescribed by the statutes relating to vacant lands.

An act of 1714 (7 Stat., 61 and 62, Sections 3 and 5) recognizes claims of individuals, under grant of conveyance to sundry lots on the bay in Charleston, 'from high to low water mark,' and imposes penalties and forfeiture for neglect by such claimants to build their proportion of the sea wall. An act of 1719 (7 Stat., 69, Section 20), reciting that owners of front lots on the bay were discouraged from building their part of the sea wall by reason of others claiming lots before them to low water mark, provides a mode of adjusting disputes, and declares that upon failure of the claimant of the lower lot to present his claim within a stated time, said lot should be vested in the owner of the front lot, 'he paying to the owner of the lot to the eastward from high to low water mark his full charges that he was at for his grant for the same,' etc; and section 22 provides that 'upon the title to the front and lower lots becoming vested in the same person, they should not again be separated, and if the front lot should be disposed of by sale or gift, the other should go along with it as an appurtenance.'

An act of 1787 (5 Stat., 39, Section 4) allowed persons to carry off oysters and oyster shells below high water

mark from land for which surveys had been taken out but not passed and confirmed by grants under the signature of the governor since the opening of the land office by the act of 1784. And Section 6 allowed owners of wharves and low water lots in Charleston exclusive privilege, for six months after the passage of the act, of obtaining grants for land covered by water in front of their wharves or lots as far as the western channel of Cooper River and the northern channel of Ashley River. By act of 1836 (7 Stat., 151) all vacant land are not legally vested in individuals in the harbor of Charleston, covered by water, was vested in the city council of Charleston for public purposes, etc.

IV. EXAMPLES OF MARSHLAND GRANTS

In the Office of the South Carolina Secretary of State and the Historical Commission of South Carolina are found many grant and plat books and indices in various states of use, covering grants of lands by the Lord Proprietors, the Crown of England, and, later, by the State of South Carolina. Among these valuable records may be found many grants of marshlands, and plats thereof.

From a perusal of these grant books, and the plats thereof, it is apparent that it was the custom at all periods in our State's history to treat marshlands as being subject to grant—by the Lord Proprietors, by the Crown, and by the State. Sometimes these grants refer simply to "lands," sometimes expressly "marsh lands," sometimes "broken islands and marshes," sometimes "rush lands," "low lands," "sands" or simply "marshes." Thus, we find at page 167 of Salley's *Warrants for Lands in South Carolina, 1692-1711*, the following random examples of grants from the Lord Proprietors:

Mr. Isac Mazicq had a warrt. out of ye Secretarys Office for all that marshland which bounds to ye Southward on ye Plantation of said Mazick near Charles Town to ye Northward on ye Plantation lately belonging to Richard Tradd now belonging to said Mazicq, and So to ye head of said Marsh. Dated ye 28th day of February Anno D., 1700.

And on page 191 of the same volume, that

Thomas Pinckney had a Wart. for all ye marsh lying before his plantation on Ashley River. Dated 14th 7 br (sic) 1704.

Typical phraseology,—acreage, location and names being omitted,—as taken from an actual grant by the Crown in 1768, in Royal Grant Books, Office of the Secretary of State, reads in part:

Know Ye that We, of our special Grace, certain Knowledge and mere Motion, have given and granted, and by these Presents for Us, our Heirs and Successors, DO GIVE AND GRANT unto_____his Heirs and Assigns, a Plantation or Tract of Land containing _____acres of Marsh Land on the North East part of the _____near _____in _____County Bounded on the West by lands of the said _____, to the North East by vacant marsh, to the East by a small Creek to the South by the said _____.

And hath such Shape, Form and Marks, as appear by a Plat thereof, hereunto annexed: Together with all Woods, Underwoods, Timber and Trees, Lakes, Ponds, Fishings, *Waters*, Water-Courses, Profits, Commodities, Appurtenances and Hereditaments, whatsoever thereunto belonging, or in anywise appertaining: Together with Privelege of Hunting, Hawking and Fowling in and upon the same, and all Mines and Minerals whatsoever; Saving and Reserving, nevertheless, to Us, Our Heirs and Successors, all white Pine Trees, if any there should be found growing thereon; and also Saving and Reserving, nevertheless, to Us, our Heirs and Successors, One Tenth Part of Mines of Gold and Silver only: (Emphasis added.)

Typical phraseology of an actual Grant from the State of South Carolina in the decade of the 1850's, omitting acreage, location and names, reads:

Know Ye, that in Pursuance of an Act of the Legislature, entitled 'An Act for establishing the mode of granting the lands now vacant in this State, and for allowing a commutation to be received for some lands that have been granted,' passed the 19th day of February, 1791; We have granted, and by these presents DO GRANT unto_____his heirs and assigns, a plantation or tract of land, containing _____acres surveyed for him the _____day of _____, situate in _____

District_____Parish on the Sea Shore and_____
 _____Creek, having such shape, form and marks
 as are here represented by a plat hereunto annexed, together with all woods, trees, *waters*, *water-courses*, profits, commodities, appurtenances and hereditaments whatsoever, thereunto belonging. . . . (Emphasis added.)

Generally, both Royal and State Grants contained at the bottom thereof a place for the Certificate of the Surveyor General's signature and date, the certificate in each case reading, "And hath thereunto a Plat thereof annexed, representing the same, certified by_____, Surveyor General." It has generally proven more difficult to locate plats of grants by the Lord Proprietors, than plats of Royal or State Grants.

V. THE COMMON LAW

Our Court often held that the common law of England is in force in the State of South Carolina, unless repealed or modified by statute.²⁹ A presumption exists that no change in the common law was intended by any statute unless the language employed clearly indicates such intention.³⁰ But state courts, in construing the common law existing in the state, are not necessarily bound by decisions of courts of England.³¹

It becomes of some interest then, to see what appears to have been the common law in regard to ownership of submerged lands.

In Chapter 6 of Hale's *De Jure Maris*, referred to in *Shirley v. Bowlby*,³² he says:

The seashore and the maritime increases belong, *prima facie*, to the king; yet they may belong to the subject, in point of propriety, not only by charter or grants thereof, there can be but little doubt, but also by prescription or usage.

Hale defined the shore or seashore (*litus maris*) to mean land between common high and low water mark,³³ and

29. *State v. Charleston Bridge Co.*, 113 S. C. 116, 101 S. E. 657 (1919); *O'Hagan v. Fraternal Aid Union*, 144 S. C. 84, 141 S. E. 893 (1928).

30. *Coakley v. Tidewater Constr. Corp.*, 194 S. C. 284, 9 S. E. 2d 724 (1940); *Nuckolis v. Great A & P Tea Co.*, 192 S. C. 156, 5 S. E. 2d 862 (1939).

31. *State v. Wilson*, 162 S. C. 413, 161 S. E. 104 (1931).

32. 152 U. S. 1, 11, 38 L. Ed. 331 (1894).

33. BLACK, LAW DICTIONARY (3rd ed. 1951) p. 1125.

said it might belong to a subject in gross or as parcel of a manor.³⁴

At an early period, England claimed dominion over the seas surrounding her coasts, and, in maintaining the Crown's right to those waters, included also title to the *fundus maris*, or bed of the sea;³⁵ and, from this claim of the Crown to sovereignty over the seas, stemmed the rule that the King claims lands under the seas within the territory of England, apart from ownership of the adjoining highlands, due to his claim over the ocean.³⁶

Lord Hale, in *DeJure Maris*, Chapter 6, as quoted by Gould, writes as follows on this subject:

The King of England hath the propriety as well as the jurisdiction of the narrow seas; for he is in a capacity of acquiring the narrow and adjacent sea to his dominion by a kind of possession which is not compatible to a subject; and accordingly regularly the king hath the propriety in the sea; but a subject hath not nor indeed cannot have that property in the sea, through a whole tract of it, as the king hath; because without a regular power he cannot possibly possess it. But, though a subject cannot acquire the interest of the narrow seas, *yet he may by usage and prescription acquire an interest in so much of the sea as he may reasonably possess, VIZ., of a districtus maris*, a place in the sea between such points, or a particular part contiguous to the shore, or of a port or creek or arm of the sea. *These may be possessed by a subject and prescribed in point of interest both of the water, and the soil itself covered with the water, and the soil itself covered with the water within such a precinct; for these are manoriable, and may be entirely possessed by a subject.*³⁷ (Italics added.)

34. Hale, as cited in *Chisolm v. Caines*, 67 Fed. 285, at 290, 291 (1894).

35. GOULD, LAW OF WATERS § 3 (2d ed. 1891).

36. *Id.* § 19.

37. *Id.* § 3 at 5, 6 n. 2. § 3, 2. There has been some controversy over Hale's authorship of this work. In *Johnson v. Barrett*, Aley 10 (1646), it was held that if a wharf were erected below low water mark, it was Crown property of common right, but if between high and low mark, belonged to the owner of the adjoining land, and plaintiff had judgment, in an action of trespass. Hale was of counsel in this case, and unsuccessfully argued for the right of the crown, but did not refer to the case in his treatise, *DE JURE MARIS*, being a work posthumously published.

The rights of the Crown were two-fold in navigable waters: first, the *jus publicum*, a right of jurisdiction and control for the benefit of subjects similar to the right of jurisdiction over highways on land, though the soil may be in the owners of adjoining estates, so that the king may protect the rights of the public for navigation and fishing; and second, the *jus privatum*, or the Crown's feudal or private right, which is subject to the *jus publicum* and cannot be conveyed free from the *jus publicum* or public rights of navigation and fishery.³⁸

A violation of the *jus publicum* was held to create a public nuisance, while an invasion of the *jus privatum* or proprietary interest of the Crown was called a purpresture, being an encroachment upon the king by a littoral owner without grant or license from the Crown, even though public rights of navigation and fishery were not thereby impaired. The remedy for nuisance is an abatement in civil courts, or an indictment for maintaining nuisance; while for a purpresture, which is a term sometimes incorrectly used for nuisance, the remedy is either by information of intrusion at common law or by information in equity at the suit of the attorney general, or by civil suit for abatement. Of course, if an invasion be of both the *jus publicum* and the *jus privatum*, it is held a nuisance, and may be the subject of a private action of individuals sustaining a distinct injury other than that sustained by the public at large.³⁹

The right to the soil between high and low water mark was *prima facie* in the Crown, and although title might be in a subject, according to the terms of the grant, yet the burden was upon those who set up an adverse title.⁴⁰ Under a royal grant no alienation may be presumed beyond what is clearly expressed.⁴¹ But where title to submerged lands is claimed by the owner of the adjoining lands, usage has been held admissible to interpret the grant⁴² and to establish a title to lands between high and low water mark as part of the adjoining lands. Gould lists these acts of usage or ownership as being erection of embankments,⁴³

38. Gould, *op. cit.* § 17.

39. *Id.* § 21.

40. *Id.* § 19, at 41 n. 1.

41. *Id.* § 23, at 50 n. 3, citing *Royal Fishery of the Banne*, Sir John Davies, 149; *Somerset v. Fogwell*, 5 B & C 375; *Attorney General v. Farnen*, 2 Lev. 171.

42. *Id.* § 23.

43. *Id.* § 23.

constant and usual fetching gravel and seaweed and sea-sand between the high-water and low-water mark, and licensing others so to do; inclosing and imbanking against the sea, and enjoyment of what is so inned; enjoyment of wrecks happening upon the sand; presentment and punishment of purprestures there in the court of a manor; and such like.⁴⁴

The public has no right to remove sand, soil or shell-fish from a private beach, nor from a public beach where the title remains in the Crown;⁴⁵ and the same with seaweed. Ancient deeds and plats may be placed in evidence to show the location of a creek which has been filled since making such deeds and plats.⁴⁶

The Crown could grant to a subject the soil of tidal non-navigable waters, and also exclusive rights of fishery therein. The shore between high and low water mark "may be, and commonly is," parcel of the manor adjacent, and a subject might possess the creeks or smaller arms of the sea, but not those portions of the sea which would require a naval armament for their defense against foreign powers.⁴⁷

In more modern times, it has been held incompetent for the Crown to abridge or destroy the public rights of either navigation or fishery,⁴⁸ but at the time the American Colonies were being colonized from abroad, the present doctrines had

44. *Id.* § 22.

45. *Id.* § 24.

46. *Id.* §§ 23, 25.

47. *Chisolm v. Caines*, 67 Fed. 285, at 290, 291 (1894); GOULD, *op. cit.*, § 21, 43, 44, quoting HALE, *DE JURE MARIS*, Chap. 4, II, 3.

Lilly, writing prior to publication of *DE JURE MARIS*, States, "Lands between the high-water and low-water mark belong to the lord of the manor next adjoining, as part of his manor; and he can claim by prescription to have wreck and fishing there." 2 *Lilly's Practical Register*, tit. Rights, quoted in GOULD, *op. cit.* § 18, at 38 n. 1.

In *Lord Advocate v. Blantyre*, 4 App. Cas 770, 773 note, as quoted by Gould, Lord Curriehill, Lord Ordinary, said in the court below: "There is no longer any doubt, if such ever existed, that the foreshore of the sea and of navigable rivers, though belonging to the Crown, subject to certain public uses connected with navigation and the like, are nevertheless alienable by the Crown subject to such public uses." GOULD, *op. cit.*, § 18, at 37 n. 1.

But there must have been some controversy, as one writer suggested that "if it were understood that the soil between high and low water mark might belong to a subject by grant or prescription, as might well be the fact, and that the soil below low-water mark belonged to the Crown, as being of little or no value as the subject of a grant, there would be no difficulty in reconciling . . . opinions . . ." WOOLRYCH, *WATERS*, 20, as cited and quoted by GOULD, *op. cit.*, § 18, at 38 n. 1.

48. GOULD, *op. cit.*, § 21 at 44.

not been settled in England.⁴⁹ No instance is known where the Crown, for its own benefit, ever made claim for any exclusive rights under *jus privatum*⁵⁰ in the tide waters of the provinces in America or in the soil under them.⁵¹

Blackstone says, "By the feudal law all navigable rivers and havens were computed among the regalia, and were subject to the sovereign of the state. And in England it hath always been holden, that the king is lord of the whole shore, . . ."⁵² He writes that the erection of beacons and lighthouses and sea marks is part of the royal prerogative, usually exercised by the lord high admiral under letters patent.⁵³

Blackstone defined the word "land" to include

[. . . not only the face of the earth, but everything under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal, and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are equally sufficient to pass them, except in the instance of water; by a grant of which, nothing passes but the right of fishing. . . .]⁵⁴

Blackstone says elsewhere that an action cannot be brought for water as such, but that action must be brought "for the land that lies at the bottom, and must call it twenty acres of land covered with water," the reasoning being that water is a "moveable wandering thing, and must of necessity continue common . . ." while the land which that water covers, is ". . . permanent, fixed, and immoveable. . . ."⁵⁵ In the same passage, quoting Sir Edward Coke, he writes that land ". . . comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, woods, moors, *waters, marshes, furzes* and heath. . . ." (Italics

49. *Id.* § 18.

50. Sergeant Merewether searched the Saxon charters and laws, Domes-day book and ancient legal writings and cases without finding any trace of the royal right to *jus privatum*, or theory to support the same, and attributed the arising of the theory to the arbitrary reigns of the Stuarts and their claim of the royal prerogative by devine right of kings. GOULD, *op. cit.*, § 17, at 36.

51. GOULD, *op. cit.*, § 31, at 72.

52. I BLACKSTONE, ch. 7, "Of the King's Prerogative" (Christian ed. 1818).

53. I BLACKSTONE, ch. 7. (Christian ed. 1818).

54. II BLACKSTONE, ch. 2, "Of Real Property" (Christian ed. 1818).

55. II BLACKSTONE, ch. 2, "Of Property in General" (Christian ed. 1818).

added.) Of "alluvion," the gradual gaining of land from the sea, and of "dereliction," when the sea shrinks back below the usual watermark, Blackstone says that it shall go to the owner of the land adjoining, but, if sudden or considerable, then to the king; and the same with arising of small islands in rivers, which pass to the owner or the proprietor of the nearest adjacent shore, but if arising in the middle, "where the soil of the river is equally divided between the owners of the opposite shores," in common to those who have lands on each side thereof, but to the king, if a new island arise in the sea, for whatever has no other owner, vests by law in the king.⁵⁶

Blackstone recognized three types of fishing rights: a common of piscary was a liberty of fishing in another man's water; a free fishery was an exclusive right of fishing in a public river, being a royal franchise, even though the making of such grants was prohibited by Magna Charta; and a several fishery, wherein the owner "must also be (or at least derive his right from) the owner of the soil. . . ."⁵⁷ However, he acknowledged the three species of fishery to be very much "confounded" in the law books.⁵⁸

VI. FEDERAL STATUTORY AND CONSTITUTIONAL LAW

It is not the purpose of this article to dwell on the interests of the Federal Government in tidelands, as these may be regarded as having been clarified in and by the Submerged Lands Act.⁵⁹ Although some of the powers next enumerated have been generally regarded as inapplicable (particularly the treaty making and general welfare powers), they have been listed⁶⁰ as the war power,⁶¹ the commerce power or power over navigation,⁶² power of eminent domain,⁶³ the treaty making power,⁶⁴ and the general welfare power.⁶⁵

With regard to the navigation power, the federal statute prohibits alteration of the channel of a navigable water with-

56. II BLACKSTONE, Chap. 16, "Title by Occupancy" (Christian ed. 1818).

57. *Ibid.*, Chap. 3, "Of Incorporeal Hereditaments."

58. *Ibid.*

59. *Supra*, notes 15-18.

60. See generally, Woodbridge, *Rights of the States in Their Natural Resources Particularly as Applied to Water*, 5 S. C. L. Q. 130 (1952).

61. U. S. CONST. art. I, § 8, Clauses 1 and 11, and art. I § 9, Clause 7.

62. U. S. CONST. art. I, § 8.

63. *Id.* at art. IV, § 3.

64. *Id.* at art. VI.

65. *Id.* at art. I, § 8.

out prior approval of the Secretary of the Army.⁶⁶ The Secretary of the Army authorizes wharves, docks, breakwaters and other structures in navigable waters, and may establish harbor lines to which structures may be extended without permission.⁶⁷ His approval, or that of the Army Engineers, is required prior to construction for the location and plans of bridges, dams and causeways across navigable waters.⁶⁸

VII. CONSTITUTIONAL AND STATUTES OF SOUTH CAROLINA

A. *Granting of Lands*

Most of the State Statutes relate to lands of the state, vacant and ungranted. There are many sections of our code and Constitution which closely relate to private ownership of marshlands.

The present Constitution of the State of South Carolina provides that "All grants . . . shall be issued in the name and by the authority of the State of South Carolina, Sealed with the Great Seal, Signed by the Governor, and countersigned by the Secretary of State."⁶⁹ It also provides that lands "belonging to or under the control of the State shall never be donated, directly or indirectly. . ." nor sold to corporations for a price less than that for which it can be sold to individuals; but the General Assembly may grant a right of way not exceeding one hundred fifty feet to railroads across State land, and in its discretion, may "confirm the title to lands claimed to belong to the State, but used or possessed by other parties under an adverse claim."⁷⁰

By statute "no grant of vacant lands shall be issued except to actual purchasers thereof for value";⁷¹ and the State Budget and Control Board ". . . shall sell and convey, for and on behalf of the State, all such real . . . property . . . belonging to the State as not in actual public use . . . from time to time in such manner and upon such terms as it may deem most advantageous to the State . . .," but this section ". . . shall not be construed to authorize the sale. . . of any property held in trust for a specific purpose by the State or the property of

66. 33 U. S. C. A. § 403 (1957).

67. 33 U. S. C. A. § 404 (1957).

68. 30 Stat. 1151; 33 U. S. C. A. §§ 401, 491, 523-533; 34 Stat. 84; 60 Stat. 847.

69. S. C. CONST., art. IV, § 19.

70. *Id.* at § 31.

71. CODE OF LAWS OF SOUTH CAROLINA § 1-794 (1952).

the State in the phosphate rocks or phosphatic deposits in the beds of the navigable streams and waters and marshes of the State."⁷²

B. *Confirming Certain Grants*

By statute all persons possessed of lands by and under any original grants, patents or deeds by the Lord Proprietors of any three of them or their deputies, are guaranteed quiet enjoyment against the State forever.⁷³ Such grants are expressly validated notwithstanding omission of names of the proprietors; any want of significant and necessary words in law for conveying such lands; want of a proper seal; insufficient description in such grants if all or part of such lands have been surveyed by a sworn surveyor or certified before August 20, 1731; any want of livery and seisin or enrollment; if the heirs of a grantee caused such lands to be meted out or ascertained to them by survey; or any other defect, omission or commission in form or substance, law or fact, if such lands or some part have been meted out or ascertained to grantees or returned into the late Surveyor General's office as aforesaid, before August 20, 1731.⁷⁴ Grants which comply with these conditions are ratified;⁷⁵ and no grant, patent, etc., prior to August 20, 1731, shall be impeached for want of certain ceremonies or for certain named defects, if good but for those defects.⁷⁶

By statute the Act by which the Lord Proprietors surrendered their titles in the Province of South Carolina to the King is confirmed as are the titles of John Lord Cartaret.⁷⁷

Another code section provides that actual peaceable and quiet possession of lands five years previous to July 4, 1776,

72. *Id.* at § 1-793 (1952). The Attorney General, by his opinion of April 2, 1957, advised the Budget and Control Board that since marsh lands are held by the State for navigation, fishing and other public purposes, the Board did not have the right under this section, to sell marsh lands. *Query*, whether, even under this ruling, the Board could sell marsh lands previously validly granted, title to which returned to the Board or its predecessor, the Sinking Fund Commission, for failure to pay taxes, provided phosphatic deposits be reserved? Also, under S. C. CONST., art. III, § 31 could not the General Assembly confirm titles in its discretion, despite this ruling?

73. CODE OF LAWS OF SOUTH CAROLINA § 57-52 (1952).

74. *Id.* at § 57-53 (1952).

75. *Id.* at § 57-54 (1952).

76. *Id.* at § 57-56.

77. *Id.* at § 57-55.

shall be deemed a good and sufficient title, and any subsequent grant of the same land or grant later obtained is declared null and void.⁷⁸

C. Navigable Waters

The State Constitution provides that "All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed" and that no tax shall be imposed for the use of the shores or any wharf "erected on the shores or in or over the waters of any navigable stream unless . . . authorized by the General Assembly."⁷⁹ The State has concurrent jurisdiction over all rivers forming boundary with another State, and these rivers are common highways without tax unless expressly provided by the General Assembly.⁸⁰

By Statute "all streams . . . capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions, and all navigable watercourses and cuts are hereby declared navigable streams and . . . shall be common highways and forever free . . ." unless taxed by the Legislature.⁸¹ Landowners have the statutory duty to clean out all streams upon and adjacent to their lands at least twice in each year according to the directions of the respective governing bodies of the State. Dams may be erected, provided that suitable floodgates and waterways allow free passage of the sand and water so that the streams may be properly cleaned out and adjacent lands properly drained. Such governing bodies are empowered to require the building of floodgates and their periodic opening when necessary.⁸² Obstruction of streams, navigable rivers or harbors is subject to penalty.⁸³ These statutes do not specify whether they apply to both navigable and non-navigable streams, but there would seem to be a basic inconsistency in declaring all navigable streams to be

78. *Id.* at § 57-57, cited in *Nathans v. Steinmeyer*, 57 S. C. 386, 35 S. E. 733 (1900).

79. S. C. CONST., art. I, § 28. By statute, the owner of the shores or of any wharf erected on the shores or in or over the waters of any navigable stream may charge reasonable tolls for the use thereof. CODE OF LAWS OF SOUTH CAROLINA § 70-163 (1952). See *State v. Young*, 30 S. C. 399, 9 S. E. 355 (1899) involving indictment for nuisance for overcharging wharfage.

80. S. C. CONST., art. XIV, § 1. See *State v. Young*, *supra*, note 79.

81. CODE OF LAWS OF SOUTH CAROLINA § 70-1 (1952).

82. *Id.* at § 70-3.

83. *Id.* at §§ 70-2, 70-4.

public highways, and then requiring private persons to keep them clear.

An interesting case arose under these statutes where it was held that a county was not liable for damages under a 1912 code section requiring county road commissioners to keep "all navigable streams, watercourses and cuts" in repair at all times. Plaintiff was riding a lumber raft down a navigable river at night when he was precipitated into the water and made sick when the raft came in contact with the cable of a county-operated ferry. The cable was on the surface instead of being lowered to the bottom when the ferry was not in use. The Court held that the injury was not an injury which might be sued upon as a defect in a public highway, but should be abated as a nuisance, and the Court would not hold a county liable in such a case as this "unless shut up to it by the plain mandates of the General Assembly."⁸⁴ By statute one may now sue a county for defect in a county-operated ferry.⁸⁵

D. Aids to Navigation and Other Grants of Tidelands

The Governor has been given authority to grant not more than ten acres belonging to the State and covered by the navigable waters of the United States for lighthouse, beacon or other aid to navigation,⁸⁶ provided that jurisdiction for service of process be retained.⁸⁷ Specific sites have been granted for lighthouses;⁸⁸ for forts;⁸⁹ for military installations;⁹⁰ for spoil disposal;⁹¹ for improvement of inland navigation;⁹² for jetties to channel currents;⁹³ for a sanatorium;⁹⁴ for national forest reserve;⁹⁵ for a national migratory bird refuge (which includes much of the lands over which the *Cape Romaine* controversy arose, with a reverter clause if the land be no longer used for a migratory bird refuge and

84. *Speights v. Colleton County*, 100 S. C. 304, 84 S. E. 873 (1915).

85. CODE OF LAWS OF SOUTH CAROLINA § 33-921 (1952).

86. *Id.* at § 39-71.

87. *Id.* at § 39-72.

88. *Id.* at §§ 39-102, 39-103, 39-106. See also §§ 39-113, 39-116, 39-119, 39-128.

89. *Id.* at §§ 39-114, 39-123, 39-124, 39-134.

90. *Id.* at §§ 39-110, 39-111, 39-117.

91. *Id.* at § 39-124.1.

92. *Id.* at 39-108, 39-109, 39-118.

93. *Id.* at §§ 39-120, 39-130, 39-134 (12).

94. *Id.* at § 39-122.

95. *Id.* at § 39-91.

subject to rights to serve process and to rights of the State Board of Fisheries);⁹⁶ and for other purposes.⁹⁷ Not all of these statutes specify marshlands as such, but some of them do.

E. Intracoastal Waterway

In addition⁹⁸ the Governor and Secretary of State were authorized to issue to the United States grant or grants of perpetual right and easement for the present Intracoastal Waterway, for canal prism, anchorage areas, turning basins and their slopes and berms,⁹⁹ in all land, including all submerged lands "insofar as such lands are subject to grant by the State . . ."¹⁰⁰ If title to any part of the lands "including submerged lands" be in any private person, the State Research, Planning and Development Board were empowered to purchase the above described rights of way and spoil disposal areas,¹⁰¹ or to condemn the lands,¹⁰² or the United States might condemn,¹⁰³ and condemnation would not be affected by any conveyance for a public use and need not be declared to be for a purpose paramount to all other public uses¹⁰⁴ (although oyster leases might be condemned,¹⁰⁵ and oyster lessees might be reimbursed for losses, any damages incurred are to be paid by the dredging companies and not by the State).¹⁰⁶

F. Fish and Fishery

The General Assembly has declared that "the waters and bottoms of the bays, rivers, creeks and marshes within the State or within three miles of any point along low water-mark on the coast, not previously granted, shall be a common for the taking of fish, subject to regulation by the Legislature."¹⁰⁷ "Bottoms" have been defined by statute as all of the tide lands of the State covered by water when at

96. *Id.* at § 39-121.

97. *Id.* at § 39-134.

98. *Id.* at §§ 39-108, 39-109, 39-118.

99. A "berm" is a ledge at the bottom of a bank to catch earth that may roll down, and/or to strengthen the bank. BLACK, LAW DICTIONARY (4th ed. 1951).

100. CODE OF LAWS OF SOUTH CAROLINA §§ 70-251, 70-281 (1952).

101. *Id.* at §§ 70-254, 70-282.

102. *Id.* at §§ 70-255, 70-283.

103. *Id.* at §§ 70-256, 70-284.

104. *Id.* at §§ 70-257, 70-285 (1952).

105. *Id.* at § 70-260.

106. *Id.* at § 70-261.

107. *Id.* at § 28-754.

the state of ordinary high tide, and extending to one foot below ordinary low water mark.¹⁰⁸ The South Carolina Wildlife Resources Commission has power to lease such bottoms,¹⁰⁹ which are defined by the statute as "oyster beds," no future grant, lease or conveyance of which, except special grant from the General Assembly, shall convey "any private ownership or control of any fishing or fisheries therein."¹¹⁰ The Commission may lease to any one party, up to one thousand acres to be used for oyster culture for commercial purposes for a period not exceeding five years and up to four acres to all other persons for any purpose other than for commercial use.¹¹¹ Such leases carry an option for renewal for five additional years.¹¹² Previous leases have preference and any person "owning highlands abutting upon tidewaters" has preference in applying for lease of two acres of bottoms adjacent to such highlands for planting of oysters within the limits prescribed.¹¹³

G. Budget and Control Board, and Secretary of State

By statute the Secretary of State has been directed to take charge of all property of the State, care and custody of which is not otherwise provided for by law; to hold such property subject to the directions of the State Budget and Control Board¹¹⁴ and to act as its agent in the lease or sale thereof as for forfeited and vacant lands.¹¹⁵ All vacant lands and lands of the former land commissioners of the State are subject to the directions of the Budget and Control Board,¹¹⁶ and it may negotiate leases of mineral rights of all lands and waters belonging to the State.¹¹⁷ It has exclusive charge of phosphatic deposits "in the navigable streams and in the marshes thereof"¹¹⁸ and charge over all mining therein,¹¹⁹

108. *Id.* at § 28-752.

109. *Id.* at § 28-791.

110. *Id.* at § 28-791.

111. *Id.* at § 28-811.

112. *Id.* at § 28-811.

113. *Id.* at §§ 28-815, 28-812.1. *Query*, whether one owning highlands and marshes with marshlands directly butting upon tidewaters, has any preference?

114. For powers of the Board over vacant lands, see notes 71 and 72, *supra*.

115. CODE OF LAWS OF SOUTH CAROLINA § 1-205 (1952).

116. *Id.* at § 1-357.

117. *Id.* at § 1-361.1.

118. *Id.* at § 1-364.

119. *Id.* at § 1-372.

and it may grant license to dig or mine phosphates" . . . from all the navigable streams, waters and marshes of the State and also from such of the creeks, not navigable, lying therein as may contain phosphatic rock and deposits belonging to the State and not previously granted . . ."¹²⁰ The Board may inquire into and protect the interests of the State in any phosphates "whether in the navigable waters of the State or in land marshes or other territory owned or claimed by other parties, and in the proceeds of any such mines. . . ."¹²¹

H. *South Carolina State Ports Authority*

The South Carolina State Ports Authority is an instrumentality of the State for developing, maintaining and operating the harbors of the State, namely, Charleston, Georgetown and Port Royal.¹²² Its jurisdiction extends "over the waters and shores of such harbors or seaports and over that part of all tributary streams flowing into such harbors or seaports in which the tide ebbs and flows and . . . to the outer edge of the outer bar at such harbors or seaports."¹²³ It has been held that the Authority as an agency of the State is in a real sense a part of the State shares its sovereignty, and has duties of a governmental character.¹²⁴ It may construct bridges, wharves, and causeways;¹²⁵ buy or condemn property;¹²⁶ and the "power of eminent domain shall apply not only as to all property of private persons or corporations but also as to property already devoted to public use."¹²⁷ It is authorized, subject to all laws and regulations of the United States with respect to navigable waters, to take, use and exclusively occupy, for the purposes stated, "any areas of land owned by the State and within the counties of Beaufort, Charleston and Georgetown, not in use for State purposes, including swamps and overflowed lands, bottoms of streams, lakes, rivers, bays, the sea and arms thereof and other waters of the State and the riparian rights thereto pertaining."

120. *Id.* at § 1-367.

121. *Id.* at § 1-365.

122. *Id.* at § 54-1, (enacted 1942 (42) Stat. 1535).

123. *Id.* at § 54-12.

124. *S. C. State Ports Authority v. Seaboard Air Line R. R.*, 124 F. Supp. 533 (1954).

125. CODE OF LAWS OF SOUTH CAROLINA § 54-14 (1952).

126. *Id.* at § 54-15.

127. *Id.* at § 54-15. In other words, it may pre-empt use of public lands, even if devoted to other public uses. *Query*, whether this would permit a taking of public property subject to a trust for the use of the public?

When so taken, such areas are "granted to and shall be the property of the Authority"; but "in case it shall be held by any court of competent jurisdiction that there are any lands owned by the State which may not be so granted, then the provisions of this section shall continue in full force and effect as to all other lands owned by the State."¹²⁸ It may transfer property to the United States,¹²⁹ have supervision over all wharves in the port of Charleston,¹³⁰ fix the lines along the bay and harbor of Charleston and the rivers and creeks flowing therein within which riparian owners may erect wharves,¹³¹ and issue permit for building such wharves without which any wharf owner may be fined.¹³² The Authority is also charged with preserving peace and good order in the bay and harbor of Charleston and with protecting and preserving said harbor rivers and creeks therein from injury by deposit of ballast, creation of obstructions, *etc.*,¹³³ and may designate where material excavated by dredging in Charleston harbor shall be deposited.¹³⁴

I. *South Carolina Public Service Authority (Santee-Cooper)*

In addition to its authority to lease mineral rights on its lands other than phosphatic deposits¹³⁵ the South Carolina Public Service Authority has statutory power to develop the Cooper River, the Santee River and the Congaree River in this State for intrastate, interstate and foreign commerce and navigation; to reclaim and drain swampy and flooded lands; to investigate, study and consider all undeveloped power sites and navigation projects in the State; and to acquire and/or develop the same as need may arise;¹³⁶ and to condemn land, water, water rights, and riparian rights.¹³⁷ It is a corporation, and as stated in the statute it is supposed to be "completely owned by and to be operated for the benefit of the people of South Carolina."¹³⁸

128. *Id.* at § 54-17.

129. *Id.* at § 54-19.

130. *Id.* at § 54-31.

131. *Id.* at § 54-51.

132. *Id.* at §§ 54-52, 54-53.

133. *Id.* at § 54-123.

134. *Id.* at § 54-124.

135. *Id.* at § 1-361.

136. *Id.* at § 59-3.

137. *Id.* at § 59-5.

138. *Id.* at §§ 59-8, 59-9. See the case of *Rice Hope Plantation v. S. C. Pub. Serv. Authority*, 216 S. C. 500, at 515, 59 S. E. 2d 133, at 137.

J. Water Pollution Control Authority

The General Assembly has declared the public policy to maintain "purity of the waters of the State" consistent with public health and enjoyment of such waters, propagation and protection of fish, shellfish and wildlife.¹³⁹ The Water Pollution Control Authority may abate pollution and sewage, and set standards for particular waters, and has set such standards for some tidal waters.¹⁴⁰ It has been directed to make a study as to need for changes in laws due to presence of nuclear materials in the State.¹⁴¹ This body is likely to become of ever increasing importance to the State, for the practice of dumping raw sewage from large populations of human beings into our rivers and harbors has polluted them to the point where commercial oyster industry may be deprived of the use of many oyster bottoms.

K. State Highway Department

The State Highway Department, by statute under certain conditions, may build a "dam, levee, or other facility for controlling water, constructing ditches or waterways or doing some other thing to control water. . ."¹⁴² It has authority to bridge streams, both intrastate and between South Carolina and adjoining states,¹⁴³ and to grant permission for toll bridges.¹⁴⁴

L. Counties

The governing bodies of the respective counties may construct footpaths or bridges over streams, swamps and marshes and along the highways of the county;¹⁴⁵ condemn lands for securing gravel, clay, sand, stone and other material for road building;¹⁴⁶ build bridges;¹⁴⁷ form bridge districts with other counties;¹⁴⁸ and condemn, under the process of Article 9, Section 20, South Carolina Constitution, so as to

139. CODE OF LAWS OF SOUTH CAROLINA §§ 70-101—139 (1952).

140. RULES AND REGULATIONS of the WATER POLLUTION CONTROL AUTHORITY, CODE OF LAWS OF SOUTH CAROLINA (1952); 1955 ACTS AND JOINT RESOLUTIONS 1576; 1956 ACTS AND JOINT RESOLUTIONS 3036-7; 1957 ACTS AND JOINT RESOLUTIONS 1532-3.

141. CODE OF LAWS OF SOUTH CAROLINA § 1-395 (1952).

142. *Id.* at § 33-167, § 33-168.

143. *Id.* at § 33-601.

144. *Id.* at § 33-605.

145. *Id.* at § 33-813.

146. *Id.* at § 33-831.

147. *Id.* at § 33-608.

148. *Id.* at § 33-609.

acquire a right of way through any lands for inland waterways.¹⁴⁹

Certain of the counties are authorized to coöperate with the Federal Government concerning beach erosion,¹⁵⁰ provided there is no State agency qualified to deal with the United States Government.

M. *Cities*

All cities in South Carolina having a population of 50,000 or more are authorized by statute, if located upon a navigable stream, whether tidal or non-tidal, to establish a port utility commission, with power to purchase or otherwise acquire, within or without corporate limits, lands, water or riparian rights and wharves, for use in aid of commerce and for public use.¹⁵¹

When desiring to extend water front for public purposes, such cities are empowered to acquire private property by condemnation in the manner of railroad companies upon payment of just compensation.¹⁵² When improvements make necessary the filling of lowlands owned by private persons, and such filling is to be done by excavation from the bed of a stream bordering the water front, the lowlands may be filled at the expense of the private owners. This expense constitutes a lien on the lands so filled and is to be determined on a per cubic foot basis.¹⁵³ Such private owners may fill up their lands at their own expense, and shall be entitled to use the mud or soil in the bed of the river in front of such land for the purpose of filling up this land in preference to any other, to the extent necessary to fill such lands.¹⁵⁴

N. *Soil Conservation and Drainage Districts and other Governmental Agencies*

By statute, the drainage of swamps, the drainage of surface water from agricultural lands and the reclamation of tidal marshes is sometimes considered a public benefit and

149. *Id.* at § 70-164.

150. *Id.* at §§ 63-211, 14-1011 (4).

151. *Id.* at § 54-101.

152. *Id.* at § 59-561.

153. *Id.* at § 59-562.

154. *Id.* at § 59-563. Powers of condemnation were also given. §§ 59-564, 59-565; but § 59-565 has been repealed by Act No. 225 of 1953.

conducive to the public health, convenience, utility and safety.¹⁵⁵ This statute and the following sections permit the creation of levee or drainage districts with power to locate and build levees, drains, canals, ditches, embankments, tide gates and pumping plants for the purpose of drainage and reclaiming wet swamps or overflowed lands.¹⁵⁶ Similar districts may also be created under the 1920 Drainage Act.¹⁵⁷

Soil conservation districts may perform work on public lands,¹⁵⁸ and erosion districts for beaches have been created¹⁵⁹ among other special authorities.¹⁶⁰ The written consent of the South Carolina Public Service Commission is required for a railroad to cross "navigable or tide waters."¹⁶¹

O. Conclusion

Those statutes dealing directly with ownership of marshlands by citizens are discussed in the cases cited in the next section of this article. Of the statutes dealing with the vacant, ungranted marshes of the State, no comment is necessary, except to say that there appears to be an overlapping of authority among various agencies or departments of the State Government. Some of the statutes do not apply to marshlands which have been granted, while others do apply. Deciding which statutes would apply in a particular instance would be of importance.

VIII. SOUTH CAROLINA DECISIONS

In the following section, an effort has been made to state, both generally and as applied to tidelands, the principles of law relating to grants, construction of grants, prescription, riparian rights, and navigability of tidal streams.¹⁶² When marshlands *per se* or rights therein were involved, that fact has been stated.¹⁶³

155. *Id.* at § 18-201.

156. *Id.* at § 18-211.

157. *Id.* at § 18-401.

158. *Id.* at § 63-54.

159. *Id.* at §§ 63-291, 65-325.

160. *Id.* at § 70-51, Act No. 784 of 1954.

161. *Id.* at § 58-992.

162. See general principles discussed in Woodbridge, *Rights of the States in their Natural Resources Particularly as applied to Water*, 5 S. C. L. Q. 130 (1952), particularly pages 137-139.

163. See Appendix for list of marshland cases, which have been marked by asterisk. (To be published with Section II of this article.)

A. Law of Grants and Deeds

As we have seen, the right of the State to grant lands arose by its succession as sovereign in the place and stead of the Crown of England.¹⁶⁴ The Supreme Court has held that no grant to the State from the King was necessary.¹⁶⁵

1. State's Title

Prima facie, title to lands is in the State when she sets up her claim. This prima facie title constitutes a presumption in favor of the State until a grant from the sovereign be proven.¹⁶⁶ This prima facie title has elsewhere been spoken of as the sovereign's title paramount, bare assertion of which is sufficient until grant be proven; but, after proof of a grant, "... the state, like any other plaintiff, is bound to show that it has regained the title, either by purchase or escheat, or in some other way."¹⁶⁷

By a tideland grant title to real estate should pass as distinguished from a *franchise* to dig phosphates¹⁶⁸ or a perpetual and exclusive right to take shellfish.¹⁶⁹ A legislative act declaring tidelands to be a common for the City of Charleston and vesting same in city council has been held a "reservation" and not a grant, and, therefore, not binding on later legislatures, while another act held city council to be

164. *Supra*, pp. 5-6 and notes 21, 22 and 25.

165. *State v. Pinckney*, 22 S. C. 484, 502, where the Court says, "We do not see how the State could produce any paper title as to lands which, as alleged, had never been granted, unless perhaps she had been required to produce the history of the revolution."

166. *Supra*, note 22.

167. *State v. Evans*, 33 S. C. 184, 11 S. E. 697, (1890).

168. *State v. Coosaw Mining Company*, 144 U. S. 550, 36 L. Ed. 537, (1892), *affirming* 47 Fed. 225. (cir. ct. S. D. S. C. 1891).

169. *Cape Romaine Land & Improvement Co. v. Georgia-Carolina Caning Co.*, 148 S. C. 428, 146 S.E. 434 (1928). The Cape Romaine Land and Improvement Company was the grantee from the Sinking Fund Commission of a perpetual and exclusive right to take shellfish in the tidelands in question, given by recorded deed pursuant to act of the General Assembly, 20 Stat. at Large 1097, deed dated Feb. 12, 1899, recorded Book Z 22, page 479, R. M. C. Office for Charleston County. And see 5 S. C. L. Q. 138 (1952), wherein the author, Mr. Dudley W. Woodbridge, Dean, Dept. of Jurisprudence, William and Mary College, says that, "to the extent that a state owns in its public right it owns in trust for all its citizens and can grant no monopoly," citing *Commonwealth v. Newport News*, 158 Va. 521, 164 S. E. 689 (1932), wherein it was held the Legislature might grant the *jus privatum*, including the soil, but might not grant free from the rights of the public under *jus publicum*, and that the *jus publicum* was what the Legislature said it was, so that the Legislature might authorize the City of Newport News to dump raw sewage into public tidewaters, despite ruinous and destructive effect upon fishery rights.

"mere trustees" with power to improve and sell.¹⁷⁰ Generally speaking, a grant carries all that is necessary to its complete enjoyment.¹⁷¹

2. *Presumption of Validity; Contest*

It has often been held that the courts will not question the validity of a grant which appears regular and legal on its face,¹⁷² but such is presumed valid, the burden of proof being upon him who contests validity; and a grant may not be avoided in a collateral proceeding.¹⁷³ Although the manner of granting differed from time to time, depending upon statutory law or authorized regulation then obtaining, the manner of obtaining grant has been discussed in South Carolina cases.¹⁷⁴ A grant cannot be revoked except by some legal proceeding, because the holder or owner may be able to show why it is good;¹⁷⁵ but it may be assailed as being upon its face absolutely void as to all the world, where the State had no title to grant, or the officer had no authority to sign it.¹⁷⁶

Before issue of a grant, the granting process might be stopped by *caveat* to prevent issue, but the court of *caveat* had no power after a grant had issued.¹⁷⁷ In the event that more than one grant issued on the same property, the second is a grant merely void, carrying nothing, and is not any more color of title or evidence of the extent of a possession than would be a deed or survey accompanied by claim.¹⁷⁸ The younger grant cannot be considered as any evidence of the revocation of the elder, but the elder remains in full force,¹⁷⁹ and a surveyor is estopped from making survey of lands already granted.¹⁸⁰

170. *West End Dev. Co. v. Thomas*, 92 S. C. 229, 75 S. E. 450 (1912).

171. *State v. McGowen*, 1 N. & McC. 387 (1818).

172. *Frampton v. Wheat*, 27 S. C. 288, 3 S. E. 462 (1887).

173. *Id.* at 464-65; *contra*, *Cape Romaine*, *supra* note 169.

174. *Barker v. Deignan*, 25 S. C. 252 (1886); *Frampton v. Wheat*, 27 S. C. 288, 3 S. E. at 462, (1887).

175. *Duncan v. Beard*, 2 N. & McC. 400 (1820) wherein the Constitutional Court says: "Despotic indeed would be that government which would exercise the power of revoking at will, all grants of land which it may have made to individuals, or of determining, without the intervention of a judicial tribunal, where there was ground for a revocation."

176. *Frampton v. Wheat*, 27 S. C. 288, 3 S. E. 462 (1887).

177. *Trapier v. Wilson*, 2 McCord L. 191 (1822); *Nichols v. Hubbard*, 5 Rich. L. 267 (1851).

178. *Nichols v. Hubbard*, 5 Rich. L. 267 at 272 (1851).

179. *Duncan v. Beard*, 2 N. & McC. 400 (1820).

180. *Heyward v. Farmers' Mining Co.*, 42 S. C. 138, 19 S. E. 963 (1894).

3. *Surveys, Acreage and Boundaries*

It was a statutory requirement of issuing grants in time past, even as far back as the days of the Lords Proprietors,¹⁸¹ that surveyors lay out vacant lands four chains back from "all creeks and rivers navigable for shipping or boats" for every one chain along such rivers.¹⁸² With reference to this act, two cases have upheld marshland grants.¹⁸³ In the *Frampton* case, the Court declared that a presumption exists that the officers had done their duty, and had properly located the lands, and the presumption would have to be rebutted. It held that the survey statute was complied with, unless it be proven that added vacant lands lay back of this survey.¹⁸⁴

In the case of *Shoolbred v. Vanderhorst*,¹⁸⁵ involving an error in the original survey of the grant, an early grant referred to Kiawah River as a boundary, and to certain bluffs as situate on said river. Resurvey established that both could not be correct and that the bluffs would have to be abandoned as a boundary in order for the grant to carry out to the river. The Constitutional Court found that a small creek near the bluffs had apparently been mistaken for the Kiawah River itself, and that the natural points (the bluffs), noted in grant and plat, confined the grant thereto, even though another natural boundary (Kiawah River) was called a boundary in the plat of the grant, because the surveyor had not gone to the river—and the Court established a small mud creek near the bluffs as the correct boundary.

181. See, for example, *SALLEY, WARRANTS FOR LANDS IN S. C. 1672-1679*, p. 4 (five chains for one).

182. 4 Stat. 592.

183. *Frampton v. Wheat* *supra* note 176; *Chamberlain v. Northeastern Ry.*, 41 S. C. 399, 19 S. E. 743 (1894).

184. . . . To make out the allegation so as to overthrow the grant, it seems to us that it was necessary to prove affirmatively at least two things: *First*, that the surveyor did not locate the land as required by the section aforesaid; and, *Second*, that there were sufficient vacant lands adjacent to the survey to make practicable a compliance with the provision, which manifestly contemplated vacant lands sufficient for that purpose, lying back of the survey. Unless there was such vacant land back of this survey, we think it was not a case for the application of the rule of the section; otherwise, there might be an isolated piece of vacant land lying on a stream, which could never be located or granted; and we suppose that such could not have been the intention of any part of an act, the preamble of which declared that "the granting of the vacant lands of this state will be greatly conducive to its strength and prosperity, by increasing the agriculture and population there of." *Frampton v. Wheat*, 27 S. C. 288, 3 S. E. 462 (1887).

185. 1 Brev. 315 (1804).

With regard to defective acreage on a plat showing a shortage, it has been held as a general rule, that where a person sells land by the metes and bounds of an original grant, even though the lines be in a different manner than contemplated or contain less than it purports to contain, the buyer has no complaint and no recourse upon the seller because every person accepts a grant upon the faith of the public and not of the grantee.¹⁸⁶ In a case where one, before purchasing, directed a survey to embrace only land not covered by water of the Catawba River, but later held to mid-stream, even corner trees marked on the river bank cannot prevent his holding to mid-stream when the river at the time of the grant was found by the jury to have been non-navigable;¹⁸⁷ and where a river is shown on a plat as an open line, that makes the river a boundary and carries the line to the center of the stream.¹⁸⁸

It has been held that, as to a non-tidal river, not navigable but capable of improvement for navigation, the right of the public to use for navigation and fishery did not impair the right of the individual to the soil and to use of the waters consistent with the rights of the public, and such possible future navigability of the river did not constitute partial failure of consideration as to the portion of land under water, because defendant purchased by certain metes and bounds, and is entitled to all therein.¹⁸⁹

In the case of *Trapier v. Wilson*¹⁹⁰ plaintiff asked for a *caveat* to prevent grant to defendant of some 500 acres of land on North Island, claimed to be already owned by plaintiff. An issue was made as to whether the 500 acre tract was vacant (hence, ungranted) land, and survey was made to determine the extent and location of previous grant. At

186. *Bond v. Quattlebaum*, 1 McCord 584 (1822).

187. *McCollough v. Wall*, 4 Rich. 68 (1850).

188. *Noble v. Cunningham*, McMul. Eq. 289 (1841), wherein the court says at page 295: This is the common method by which a stream is called for as boundary; and we see no evidence of any special design to exclude any part of the river from the tract; and where the common method of making a river a boundary has been pursued, as in this case, we must conclude that the design was not to exclude, but to include, the land to the centre or line of the river. The apparent hardship of being compelled to pay for the water, will be obviated when it is considered that the principle upon which the decision is made, is the only one which secures to the owner all the advantages of the streams contiguous to his lands, for mills, or other machinery, and for fish.

189. *Executors of Cates v. Wadlington*, 1 McCord 579 (1822).

190. 2 McCord 191 (1822).

trial (which, against defendant's objections, was by jury), the plaintiff produced the grant under which he claimed wherein the premises he claimed were described as bounded ". . . to the Westward on salt-water marsh partly, and partly on a creek, and south-westward on Winyaw River or Bay, and to the eastward on the sea, and to the northward on a place called the basin, near North Inlet."

The jury found that there was no vacant land, whereupon *caveat* issued, and on appeal, defendant's motion for new trial was refused. The question was whether the grant in plaintiff's chain of title should be limited to the acreage therein expressed, or, the natural stations or corners of the plat not being located, whether the "whole island" within the expressed boundaries should be deemed to pass by the grant. The contention seems to have been mainly over the more valuable highlands and the marshlands came in because defendant claimed that the grant in plaintiff's chain of title included "all down to low water marsh" [sic] as well as high land, thus using all the acreage in the grant and leaving some high land acreage vacant and available to grant to defendant. The Court held that the fact that the finding of surplus acreage within the bounds of the granted lands was of little consequence, for ". . . the quantity of land is whatever is contained within the true boundaries";¹⁹¹ but the opinion did not clearly include marshlands *per se* or *eo nomine*, because it stated elsewhere, "The whole island, (unless the marsh be so called) [sic] is clearly within . . ." the description of the grant.¹⁹²

191. *Id.* at 198. . . . The plat too is marked thus, "The North Island by a scale of 40." Why use the comprehensive name of the 'North Island', if a part only were intended to be delineated? The certificate of the surveyor also describes the land as being a place called 'North Island,' etc. Again, I ask, why this comprehensive term 'a place', unless in order to signify the whole. 'The Island,' or the 'place' means the whole island or place. . . . The plat and grant appear then easily reconciled. . . . Where there is no station or corner found, it becomes absolutely necessary to resort to boundaries, and even to the boundaries of surrounding lands, in order to locate the tract calling for them. . . . Assuredly, surplus land being found, is of little consequence; for the quantity of land is whatever is contained within the true boundaries; and the end of the location is to fix the boundaries, which being done, the quantity follows, being the contents within them. The notice in the plat of the number of acres is in fact but an expression in the general description, and is very seldom put down with accuracy. . . .

192. *Id.*, at 196. Later, this case was interpreted as not deciding the sufficiency of a grant, but as turning upon questions of location. Nichols v. Hubbard *supra*, note 177. For recent opinion of the Attorney General

It has been held that an island in Beaufort County was enclosed within the meaning of the fence act of 1827. This act constituted a deep, navigable stream the equivalent of a fence so that plaintiff was entitled to recover in an action of trespass *quare clausum fregit* for unauthorized hunting thereon.¹⁹³ Marshland as such was not mentioned in this case.

It was clearly held in the *Pinckney* case that a conveyance by the United States Direct Tax Commission¹⁹⁴ of an island in Beaufort County of the highland acreage, but reciting the boundaries of the navigable streams surrounding both the high and the marshland acreage thereof, carried only title to the highlands, save for one tract of marshland which the State had expressly granted.¹⁹⁵ The *Cape Romaine* case stated that, despite a surveyor's note that one boundary was at low water mark on Bull's Bay, "in the case of a tidal navigable stream, the boundary line is high-water mark, in the absence of more specific language showing that it was intended to go below high-water mark, and the portion of land between high and low water mark remains in the state in trust for the benefit of the public interest. . ."¹⁹⁶ The *Rice Hope* case specifically repeated the above excerpt from the *Romaine* case.¹⁹⁷

4. Proof, Boundaries or Extent, and Validity

It has been held that proof of a plat of a grant (to marshlands) fails if there is no proof of the grant itself.¹⁹⁸

Entirely apart from any statutory designations of low water mark,¹⁹⁹ the courts have drawn a dividing line at low water mark on the banks of tidal navigable streams.²⁰⁰ Below mean low water mark lie the beds of the said tidal nav-

that "marsh island" does not mean "marsh," see 1959 House Journal, p. 860, opinion dated April 10, 1959. See also *Cape Romaine* case, *supra*.

193. *Fripp v. Hasell*, 1 Strob. 173 (1846).

194. This commission was created under a punitive measure of the "Reconstruction" era, entitled, "An Act for the collection of direct taxes in the insurrectionary districts within the United States, and for other purposes," 12 U. S. Statutes, Section 14, p. 425.

195. *State v. Pinckney*, 22 S. C. 484 at 492 and at 510-511 (1884).

196. *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*, 148 S. C. 428, at 434, 146 S. E. 434, at 436 (1928).

197. *Rice Hope Plantation v. S. C. S. P. A.*, 216 S. C. 500, at 530, 59 S. E. 2d 132, at 145 (1956).

198. *South Carolina R. v. Toomer*, 9 Rich. Eq., 270 (1856), *Barker v. Deignan*, 25 S. C. 252 (1886).

199. *Supra*, note 108.

200. *State v. Pacific Guano Co.*, 22 S. C. 50, at 83, 84 (1884).

igable streams, which have been held to be the property of the State, subject to the *jus publicum*, not subject to grant save by special act of the Legislature, and held in trust for the public uses of navigation and fishery.²⁰¹ However, the principle has been recognized that the beds of non-navigable tidal streams or creeks have been the subject of grant.²⁰²

There have been many cases in which particular grants to marshlands have been specifically proven and upheld, being directly in issue,²⁰³ and several where grants were held not proven.²⁰⁴

There seems to be a conflict of authority on the question, whether a grant of marshlands butting on navigable streams: carried the marsh or whether the highwater mark is the boundary, three cases apparently holding that the usual rule (that a grant carries all within its bounds) does not apply;²⁰⁵ while the *Oak Point Mines* case²⁰⁶ and the *Farmers' Mining Company* case²⁰⁷ appear to apply the usual rule.

201. *Ibid.*: *State v. Oak Point Mines*, 22 S. C. 593 (1884); *Chisolm v. Caines*, 67 Fed. 235 (cir ct. D. S. C. 1894) *Heyward v. Farmers' Mining Co.*, 42 S. C. 138, 19 S. E. 963 (1894).

The requirement that title to river beds, as public highways, be vested in the State is at variance with the ordinary rule as to land highways, title to the soil under which remains in the land-owner subject to the easement or servitude of the public, unless fee has passed by deed to the public or by condemnation.

The necessity of vesting titles to beds of navigable streams, in the State in order to preserve free navigation ". . . loses sight of the fact that if the land was in the riparian owner, it would be subject to all the regulations which would be necessary to preserve it for the public use, and that for hundreds of years during which the beds of rivers of England have been in private ownership the public right therein has in no way been impaired . . ." ROGERS, *Title to Subaqueous Lands in Alabama*, 11 ALA. L. REV. 273, n. 45 (1959), quoting 1 FARNHAM, *WATERS AND WATER RIGHTS* § 53.

202. *State v. Pacific Guano*, 22 S. C. 50, 79 (1884); *Heyward v. Farmers' Mining Co.*, *supra*; *Chisolm v. Caines*, *supra*.

203. *Chisolm v. Caines*, *supra*; *State v. Pinckney*, *supra*; *State v. Oak Point Mines*, *supra*; *South Carolina R. R. v. Toomer*, *supra*; *Frampton v. Wheat*, *supra*; *Gadsden v. West Shore Inv. Co.*, 99 S. C. 172, 82 S. E. 1052 (1914); *West End Dev. Co. v. Thomas*, 92 S. C. 229, 75 S. E. 450 (1912); *Nathans v. Steinmeyer*, 57 S. C. 386, 35 S. E. 733 (1900).

204. *Cape Romaine Land & Improvement Co. v. Georgia-Carolina Canning Co.*, *supra*, note 169; *State v. Pinckney*, *supra*, note 165; *Barker v. Deignan*, 25 S. C. 252 (1836).

205. *State v. Pinckney*, *supra* note 165, held that a grant of lands bounding upon rivers and vacant marsh does not carry such marshes as it bounds upon, and *Cape Romaine* followed by *Rice Hope* stated the same rule.

206. *State v. Oak Point Mines* 22 S. C. 593 (1884).

207. *Heyward v. Farmers' Mining Co.* 42 S. C. 138, 19 S. E. 963 (1894).

B. Title by Prescription, Possession or Usage.²⁰⁸

1. Against the State

It has been stated that the State may lose its title to lands by charter or grant, and also by prescription or usage.²⁰⁹ Against the State, the applicable period is twenty years, as the statute provides that the State will not sue unless within that period the right or title accrue or the State shall have received the rents and profits from the land or some part thereof.²¹⁰ This statute is a vast change from the common law, the rule of which was *nullum tempus occurrit regi*—no time runs against the king. The common law doctrine has been held in a marshland case to have been the rule in South Carolina until 1870,²¹¹ the forty year statutory period then created having been later changed to a twenty year period in 1873.²¹² Although title by prescription was alleged in both the *Pacific Guano* and the *Farmers' Mining Co.* cases, in neither was it a decisive factor, as it was held in both cases that the necessary time had not run and the statute of limitations did not apply. However, the South Carolina Supreme Court plainly has held, "If the plaintiff can trace title back to a grant from the state to land covered by tidal, though not navigable waters, the state would be estopped by its grant."²¹³ In the *Oak Point Mines* case, the opinion of the circuit court stated that possession for the statutory period raises the presumption of a grant co-extensive with the limits of such possession, as to marshlands, but not as to the beds below low water mark of tidal navigable streams.²¹⁴

208. Properly speaking, "prescription" relates to acquiring title to incorporeal hereditaments by long and continued enjoyment, while adverse possession applies to land itself. BLACK, LAW DICTIONARY, (4th ed. 1951). "Usage" is defined as a reasonable and lawful public custom in a locality concerning particular transactions which is so well established and uniform as to be known or is presumed to be known. BLACK, LAW DICTIONARY, (4th ed. 1951). These words have all been used as to titles in marshlands in South Carolina, more or less interchangeably, to indicate an estoppel against a former owner, to assert title.

209. *Supra*, text, page 9, and note 32.

210. CODE OF LAWS OF SOUTH CAROLINA § 10-121 (1952).

211. *State v. Pacific Guano Co.*, 22 S. C. 50, at 83 (1884).

212. *Heyward v. Farmers' Mining Co.*, 42 S. C. 138, 19 S. E. 963 (1894).

213. *Id.* at 973.

214. These citations from our statutes are, to my mind, conclusive of the question under consideration. They show unmistakably that lands below high water mark in tidal navigable rivers have been uniformly recognized by the legislature as embraced within the description of vacant lands, and subject as such to location and grant under the general regulations of the land office. This

Although the matter was not decided, because the statutory period had not elapsed, the Court in the *Pacific Guano* case questioned whether constructive possession of the beds of navigable streams could be maintained against the trust of the State for the people.²¹⁵

2. Against Private Owners

Actual possession for ten years under written instrument or twenty years statutory possession have been deemed sufficient as to reclaimed marshlands.²¹⁶

It has been held that one obstructing a cut dug between two navigable streams through his unenclosed marshlands was not entitled to maintain an action of trespass for the removal of the obstructions by members of the public, who had been using the cut as a waterway for thirty-five years, despite fears of plaintiff that the cut would admit salt

practical interpretation of its own language by the legislature, being in accordance with the comprehensive meaning which it bears in law, there would seem to be an end to the question whether a grant of land to low water mark in the bed of a tidal navigable stream, issued in conformity to the provisions of the act of 1791, passed the title of the state to the grantor.

My conclusion is that defendants have valid title, under the grant of 1869 to Henry M. Stuart (from whom they derived), to the soil between ordinary high water and low water mark in said creek, embraced within the lines of said grant. As to the title to the bed of the creek below ordinary low water mark, I hold that it is in the state. No express grant conveying this land has been produced. No long-continued acts of ownership in the bed of the creek have been shown in support of a prescriptive right. Angell on Tide Waters, 96; Tyler on Boundaries, 36.

The Possession for forty years of the adjacent land by those under whom defendants claim undoubtedly raises the presumption of a grant co-extensive with the limits of such possession. But to extend the boundary to the centre of the creek would be to overturn an established rule of the common law which has never yet been questioned by any court in England or this country. The tendency of American decisions has been to restrict riparian proprietorship even upon navigable rivers above the tides, and not to enlarge it in respect to navigable streams in which the tide ebbs and flows. Whenever the common law test of navigability has been repudiated, the common law consequences of navigability have been held to attach. Nothing more can be claimed under the grant presumed from the possession of the upland than would result from an express grant calling for the creek as a boundary, conceding that usage would carry the line to the low water mark, the principle on which it could be extended further upon the facts of this case is not to be found in the common law, nor in any decision that has come within my notice. 22 S. C. 593 at 601-602 (1884). (Italics added.)

215. 22 S. C. at 82-84.

216. *Intendant & Wardens of Port Royal v. C & W. C. Ry.*, 136 S. C. 525, 134 S. E. 497 (1926). (See syllabus 7).

water into his rice fields.²¹⁷ The basis of the decision seems to have been that the marshlands were surrounded by navigable streams, and therefore were sufficiently enclosed under the fence act to support adverse user, and were not entitled to the presumption against adverse user of unenclosed lands.²¹⁸ The trial judge was dissatisfied with the result and Justice Munro dissented from the affirming decision on appeal, on the ground that the jury verdict appropriated private property to the public use and abandoned it to "the lawless rapacity of squatter sovereignty."

In the case of *Charleston Rice Milling Co. v. Bennett*²¹⁹ defendants owned a rice mill on Cooper River in Charleston, and later plaintiffs established a mill. Both mills were between the low-water mark and the edge of the marsh of Cooper River, and both traced to a common source of title in which there was a partition plat showing a canal along the northern side of the premises as far east as a proposed street known as Concord Street, but not extending past Concord Street to the channel of Cooper River. Defendant's lands were between the proposed Concord Street and Cooper River, and the partition plat showed no canal along the north side thereof. However, a later plat in the common chain showed the canal running along plaintiffs' lands, beyond the proposed line of Concord Street and along defendants' lands to the channel of Cooper River, and this enlarged canal bore this legend, "Canal in Common, now twenty feet wide to the channel."

The site for Concord Street had never been filled at this place, but remained in its original state as mud or water. The common grantors in both chains of title in 1834 conveyed to defendants' predecessor in title, "all that tide lot . . . bounded to the North on land laid out as a canal," and in 1849 they conveyed to plaintiffs' predecessor in title, "all that water lot . . . butting and bounding to the North, on a canal twenty feet wide, laid out for use in common of sundry heirs and assigns . . ." of the common grantors.

The case turned on two questions, whether the canal ever extended east of Concord Street through or along lands of defendants to the channel of Cooper River, and if so, whether defendants obstructed it.

217. *Heyward v. Chisolm*, 11 Rich. L. 253 (1858).

218. See *Fripp v. Hasell*, *supra* note 193.

219. 18 S. C. 254 (1882).

The jury found for plaintiffs, and the verdict was sustained on appeal. The Court upheld a charge that there was insufficient evidence of user of the canal along the exact lines thereof to establish a prescriptive right to its use, or to the water within the lines of the canal, because the canal through the lot of defendants was "... under an open sheet of water and not appearing on the surface," and also because there was no exception to this charge. The Court also held that the right to use the canal was a private right resting upon grant, and was a covenant running with the land, and there was no question of dedication to or acceptance by the public. The Court held that defendants were estopped to deny the canal across the northern boundary of their lot, and that the possible future filling of Concord Street so as to cut across the canal would not defeat plaintiffs' right to use the canal, because the laying out and dedication of the street did not divest plaintiffs of title, but only subjected the land to the easement.

3. *Possession of Tidelands*

It has been held that possession of marshland is presumed to be in him who has the right or title,²²⁰ and, conversely, that title to marshland is assumed to be in the party in possession.²²¹ Actual possession for ten years under written instrument, or statutory possession for twenty years has been deemed sufficient.²²² Constructive possession may not be presumed against the grant of marshlands or one claiming thereunder or in favor of one not claiming under grant, unless actual adverse possession has been within the limits of the grant.²²³

The difference between actual and constructive possession has been discussed in a marshlands case.²²⁴ In the *Steinmeyer*

220. *South Carolina R. R. v. Toomer* 9 Rich. Eq. 270 at 274 (1857).

221. *Chisolm v. Caines*, 67 Fed. 285 at 287 (1895).

222. *Intendant & Wardens of Port Royal v. C. & W. C. Ry.*, *supra* note 216.

223. *South Carolina R. R. v. Toomer*, 9 Rich. Eq. 270 at 273 (1857).

224. "... The 'possession of property' is a relative term. It is actually in your personal possession when it is in your immediate presence and control. It is constructively in your possession when you have the title thereto, and no one else is in actual possession against your will, or under a claim hostile to you. In this case these lots could only be possessed in a certain way and to a limited extent; that is to say, for such purposes as they were capable of being utilized by the owner, or person who claimed to be owner. J. H. Steinmeyer knew for what purpose these water lots could be used, and

case plaintiff sued to foreclose a mortgage on lands bounded by Wentworth Street extended, Gadsden, Beaufain and Barre Streets in the City of Charleston, and certain defendants answered and set up failure of consideration on the ground of paramount title in the City of Charleston by virtue of 7 Stat. at Large 151 (1836), by which act the General Assembly vested certain marshlands and mud flats in the City.²²⁵ The particular lands in question were part of lands granted by the Lords Proprietors to John Comings in 1675, and had passed through partition proceedings of *Harleston v. Harleston*, in 1770, the plat showing these lands having been adopted by the Court in said partition case and the boundaries under the Harleston chain of title having been recognized in the plat annexed to the act aforesaid. Defendants contended that the Comings grant²²⁶ carried only to high water mark, on the authority of the *Pinckney* and *Pacific Guano* cases, *supra*, but admitted that the State could grant marshlands, on the authority of *Heyward v. Farmers' Mining Company*, *supra*.

The Plaintiffs contended that the possession of the Harlestons came within the provisions of present Section 57-57, 1952 Code, Act of 1787, providing that actual possession of lands five years prior to July 4, 1776, should be deemed good title, and, therefore, that the State recognized the title by the said act, and estopped itself from claiming the water lots in question and admitted the title of the Harlestons.

Defendants had never been evicted from the possession of the water lots; nor had the State, the City of Charleston, nor any one at all ever questioned or in any way disturbed that possession.²²⁷

he knew the nature of the possession in which they could be and were held. He got the possession for which he bargained, and held it until he sold it. He considered it actual possession when he purchased and while he held these flats; and, according to his own testimony, he sold these flats, which of course, included his right of possession, for full value. I do not think that he can now question that possession,—certainly not in this case. Under the deed from the executors he got and held everything that deed calls for, and his grantees now enjoy the property. *Under the circumstances of this case, the usual presumption that possession follows the title should be applied to the defendants and their title . . .*" *Nathans v. Steinmeyer*, 57 S. C. 386, 35 S. E. 733, 736 (1900). (Italics added).

225. See text, p. 7.

226. Discussed in *State v. Duncan*, 1 McCord L. 403 (1821).

227. *Nathans v. Steinmeyer*, 57 S. C. 386, 35 S. E. 733 (1900).

It appeared that defendant's father conducted a sawmill on the premises, using the water lots or mud flats as a pond for the storage of lumber, the lot being staked off and not used except by permission. Storage was collected from persons storing lumber there, and a portion of the mud flat was filled in, unmolested. The lower court stated that defendant knew from actual knowledge the nature of the lots, and of what possession they were capable.

The lower court concluded that plaintiffs had nothing to do with the mistake of title (on defendant's part), which the latter at first thought to go to low water mark, but later thought carried only to the high water mark; and the Supreme Court affirmed, specifically holding that the conclusions of the lower court were sustained by the authorities cited, and reversed only the appointment of a receiver.²²⁸ On the crucial question of paramount title, the Supreme Court said:

We regard the law as settled in this state that neither partial nor total failure of consideration can be set up as defense on account of a paramount outstanding title, before eviction, and therefore see no practical benefit to be derived from commenting on the numerous cases, or tracing the history of this question, which has caused so much trouble, by reason of the fact that the courts of law and equity heretofore entertained different views upon the subject . . .²²⁹

As to the extent of possession that one may have in submerged lands, the Court said in the *Steinmeyer* case that marsh land lots "could only be possessed in a certain way and to limited extent; that is to say, for such purposes as they were capable of being utilized by the owner . . ."²³⁰

In *Barker v. Deignan*,²³¹ plaintiff's action for trespass and damages was met with claim of paramount title under grant in defendant, plus adverse possession. The property was a small lot covered with water, part of the Cleland grant, but defendant made the mistake of introducing only the plat thereof, which was later excluded for failure to prove the

^{228.} *Ibid.*

^{229.} *Id.* at 738-739.

^{230.} *Supra*, note 224.

^{231.} 25 S. C. 252 (1886).

grant in proper form, thus leaving defendant without color of title, and dependent upon claim of physical possession. Possession was held a jury question, and the verdict of the jury that defendant did not have possession was affirmed on appeal. In *Heyward v. Farmers' Mining Co.*,²³² the lower court holding that plaintiff was in possession and did not have to prove title was reversed on the ground that one claiming fee simple title to marshlands should prove the grant where the State was a party. The lower court had held that plaintiff's possession had been "such as this marsh land was capable of, and therefore sufficient."²³³ In *Lynah v. United States*,²³⁴ the federal circuit court found that "plaintiffs and their ancestors had been in the actual, exclusive, *pedis possessio* of all this land — high land and rice land — down to the embankment of the river at low-water mark, holding under a grant from the English Crown. This long-continued actual, adverse possession would give a complete title as against the world."²³⁵

It has been held that marshlands are the subject of levy and sale for non-payment of taxes.²³⁶ In *Gadsden v. West Shore Investment Co.*^{236a} defendant was refused specific performance because a link in the chain of title was a tax deed. The lands in question were granted by the Crown in 1742, and were later divided into two tracts, aggregating forty-four acres, adjoining, but without evidence of any dividing line between them. The Legislature in 1889 authorized the sinking fund commissioners to survey any lands which were on neither the tax duplicates nor the forfeited land list for ten or more continuous years and if on survey, such lands be found absent, to place them on the tax books in the owner's name, if known, and if not, in the name of "Unknown." In 1890 the two tracts were put on the tax books as "Unknown Ashley River, 44 acres assessed \$100.00 from 1885"; and in 1890 the land was sold by Ferguson, Sheriff, and bid in by Gadsden, Administrator.

232. *Supra*, note 212, at 148, 19 S. E. at 969.

233. *Id.* at 148, 19 S. E. at 966.

234. 188 U. S. 445, 47 L. Ed. 539 (1902), *affirming* 106 Fed. 121 (cir. ct. D. S. C. 1901); See also, *Williams v. United States*, 188 U. S. 485, 47 L. Ed. 554 (1903), *affirming* 104 Fed. 50 (cir. ct. D. S. C. 1900).

235. *Lynah v. United States* 106 Fed. 121, at 122. (1901).

236. *Chamberlain v. Northeastern Ry.*, 41 S. C. 399, 19 S. E. 743 (1894); *Gadsden v. West Shore Investment Co.*, 99 S. C. 172, 82 S. E. 1052 (1914).

236a. 99 S. C. 172, 82 S. E. 1052 (1914).

On June 6, 1913, Sheriff Martin, successor to Ferguson, gave a deed to Gadsden.

The Court held that the sheriff was presumed to have taken possession in 1890, and that a tax title under South Carolina statutes is presumed to be good, the burden being upon him who alleges defect, and affirmed for plaintiff. Payment of taxes was held no evidence of title, but failure to pay was held evidence that no claim was made.²³⁷ An unfavorable result arose in the *Pinckney* case,²³⁸ which might be said to have involved non-payment of taxes to the United States Direct Tax Commission.

Acts of possession of tidelands which have come before the courts include renting the right to cut marshes,²³⁹ embankment and planting of rice lands,²⁴⁰ leasing of premises for hunting,²⁴¹ floating rafts and lumber and staking same to ground under water,²⁴² placing sawmill and staking lot, storage of lumber in pond on lot and not admitting trespassers,²⁴³ taking oysters, posting, and burning oyster shell to make lime for cement.²⁴⁴

While the cases cited²⁴⁵ (concerning reclaimed marshlands used for rice fields) necessarily involved the reclamation of marshlands by embankment, one case has arisen wherein

237. *Id.*, at 180, 82 S. E. at 1053.

It is said that there could be no actual possession of this marsh land. In that case, the defaulting taxpayer had no actual possession. In 1890 the tax officials put this land on the tax books as land upon which taxes had not been paid in ten or more years. *The payment of taxes is not evidence of title as is supposed in popular myth, but the failure to pay is evidence that no claim was made.* We have then that for thirty-three years neither Guignard nor Lucas nor their heirs have made any claim to the land. There is a presumption that Sheriff Ferguson took possession in 1890. There is no evidence of a change in the status, except that Sheriff Martin put Norman Gadsden in possession in 1913 and made the deed as he was authorized to do. The statute authorizes the succeeding sheriff to make the deed, and there is no limit in the statute. (Italics added).

238. *Supra*, note 193.

239. *Frampton v. Wheat*, *supra*, note 203.

240. *Lynah v. United States and Williams v. United States*, *supra*, note 234.

241. *Chisolm v. Caines*, 67 Fed. 285 (cir. ct. D. S. C. 1894).

242. *Barker v. Deignan*, *supra*, note 231.

243. *Nathans v. Steinmeyer*, *supra*, note 224.

244. *Cape Romaine Land Improvement Co.*, *supra*, note 204; and see *Alston v. Limehouse*, 60 S. C. 559, 39 S. E. 188 (1901) and *Donaldson v. Nesbit*, 60 S. C. 570, 39 S. E. 967 (1901); *Brown v. United States*, 81 Fed. 55 (cir. ct. E. D. Va. 1897); *Richardson v. United States*, 100 Fed. 714 (cir. ct. E. D. Va. 1900).

245. *Supra*, note 234.

a town claimed title to a deposit of oyster shells, and sued the defendant railroad for trespass for alleged intent to remove the shells.²⁴⁶ In the *Port Royal* case defendant alleged title for more than thirty years; the lower court directed a nonsuit, and plaintiff appealed, specifically alleging that ownership to lands below high water mark is presumed to be in the public in the absence of statute, and the town had a right to prevent trespass if defendant showed no better right; that title to lands on tidewater does not extend below high-water mark; and that the town was in exclusive possession of the shell deposits, and, therefore, of the lands underneath. The Court held that the town was not entitled to show its tax books or its purchase at its own tax sale, and affirmed the holding that plaintiff had not shown exclusive possession of the lands; and, as plaintiff had not shown title either by deed or title of adjoining highlands so as to claim alluvion soil, non-suit was proper, leaving both parties where they were, with leave to file subsequent suit if so minded. In reaching this conclusion, written title and possession for ten years, or twenty years statutory possession of the tidelands were stated as the alternatives to proof of ownership of the adjoining high land, ownership of which was considered to vest title to alluvion soil or soil reclaimed. The Court affirmed a holding of the lower court that oyster shells above high water mark were land if oyster shells below high water mark were land. The Court stated:

. . . . It is agreed that at the outset the purpose and intent of depositing the oyster shells was to create real estate. The testimony does not show any change of such intent or purpose as the deposit grew beyond high-water mark, and therefore we conclude that the original intent and purpose persisted, and that the intent and purpose of the deposit of shells above high-water mark was likewise to build up and create real estate. It follows that even if the circuit judge was in error in his reasoning, such error [*i. e.*, in holding that the oyster shells above high-water mark were land if the oyster shells below high-water mark made land] was without prejudice, as his conclusion was correct.

246. *Intendent & Wardens of Port Royal v. C. & W. C. Ry.*, 136 S. C. 525, 134 S. E. 497 (1926).

. . . . Strictly speaking, the building up of the marsh lands in question was not accretion but was rather in the nature of reclamation. 29 Cyc. 351 (b). But, whether the process of building up be considered as accretion or as reclamation, the plaintiff failed to show that it was the owner of the adjoining high-lands, so as to vest in itself the title to the alluvion [sic] soil.²⁴⁷

The case of *Momier v. Koebig*²⁴⁸ involved a situation where a landowner and the contractor he hired to drive the necessary piling for a building to be built upon "made land" were sued for negligence in damaging nearby structures of plaintiff by the shaking thereof caused by driving the piles. The building was being built upon land created by building a "concrete retaining wall around what was formerly marshland in the lower section of the City of Charleston, and pumping in of mud and sand from the bottom of the Ashley River into the area behind the wall."

Judgment was directed below for the landowner, and, on appeal, was also directed for the contractor, on the ground that piling is customary because of the type of land in the area, and there was no evidence to support the allegations of negligence.

4. Usage

Although usage, as relates to marshland titles in South Carolina, has not been defined precisely, it would include the general custom in the coastal counties of the State to convey and use marshlands along with the high or fast lands to which they are appurtenant, and to deal with such marshlands as parts of one tract consisting of high and marsh land.

247. *Id.* at 541, 134 S. E. at 502.

Accretion is the act of growing to a thing, or the increase of real estate by the addition of soil through natural causes to that already in possession of the owner, and is usually applied to the gradual accumulation of land by natural causes. Accretion is of two kinds, alluvion, or the addition or washing up of sand or soil so as to form firm or fast land, and dereliction, as when the sea shrinks back below the usual water-mark. Alluvion carries the connotation of slow, periodic change, while avulsion is sudden, rapid change of the channel of a stream or sudden gain or loss of land by sudden action of the elements. Accretion apparently may be applied only to gain of soil, while avulsion may mean either gain or loss of soil. BLACK, LAW DICTIONARY, (4th ed. 1951).

248. 220 S. C. 124, 66 S. E. 2d 465 (1951).

It is easy to see how this usage arose, when it is considered that in time past, before the days of paved roads and modern transportation, designation of navigable streams as public highways was a necessity, and access to these water highways, or waterways, whether across marshlands or not, was also a necessity.²⁴⁹ There is considerable evidence to show that the early settlers knew the value of the marshlands adjoining their highlands, and obtained grants for much of it, long before the time that phosphate deposits were discovered in certain areas. In addition to access, fertilizer for cattle, and as locations for wharves, marshlands were embanked and used for the planting of rice, where sufficient fresh water could be obtained; and the local rice planting industry created great prosperity in its day.

We have seen that both prescription and usage applied to tidelands at common law;²⁵⁰ and at common law, usage was admissible to interpret a grant.²⁵¹ Despite these common law rules, our Court has been of the impression that usage is not admissible to mitigate the strict rule which the Court has persistently attributed to the common law, namely, that a grant of marshlands carries only to high water mark. Sworn testimony of usage was not produced in the *Pinckney* case, but, too late, it was argued on appeal.²⁵² The *Cape Romaine* case required language in the grant to include the words "to low water mark," as if there were no concept of usage at all,²⁵³ even though the result was to abrogate several express grants under the Great Seal of the State, most of which grants used the word "marsh" or "marshlands" as applied to lands which were proven to be

249. See *Heyward v. Chisolm*, *supra*, note 217.

250. *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331 (1894).

251. *Supra*, notes 42-44, 46-47.

252. It is strongly urged upon us that the line of high water, as a limit to the rights of riparian proprietors on navigable tidal streams, will be uncertain, inconvenient, and difficult of enforcement; that it will be against the settled usage of our people and an injustice to such of them as live upon the seaboard. *We have heard nothing of the 'usage' spoken of through the medium of sworn testimony in the case. If the enforcement of the rule (it is no new law or principle) should produce inconvenience, we would most sincerely regret it. But finding it incumbent upon us to decide the question, seeing clearly the rule of the common law, and failing to find any authoritative decision which changes that rule, we must hold that it is now, as it always has been, the law of the state.* (*Italics added.*) *State v. Pinckney*, 22 S. C. 484, at 508-509 (1884).

253. *Supra*, note 204.

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covered by high tide; — so that nothing except marshlands could possibly have been intended to be granted.²⁵⁴

A more reasonable viewpoint was adopted in the *Oak Point Mines* case, wherein usage was conceded to carry the boundary line of marshlands appurtenant and adjacent to high land under possession, to the low water mark.²⁵⁵ Both usage and prescription were recognized in *Chisolm v. Caines*.²⁵⁶

END OF SECTION ONE

254. See dissent of Judge Cothran, *Id.* at 471, 146 S. E. at 439.

255. 22 S. C. 593 (1884).

256. *Chisolm v. Caines*, 67 Fed. 285 at 290 (1894).

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