South Carolina Law Review

Volume 14 | Issue 3 Article 1

Spring 1962

Titles to Marshlands in South Carolina, Part II

John M. Horlbeck
Cornish & Horlbeck (Charleston, SC)

TITLES TO MARSHLANDS IN SOUTH CAROLINA

JOHN MILES HORLBECK*

PART II

C. *Navigability of Tidal Streams*

By the common law, all water was navigable which was subject to the flow of the tides.[257] This rule was first modified when the navigability of large inland rivers in South Carolina came before the courts. The history of the modification of the common law concept of navigability, as applied to both tidal and inland rivers, serves both to show that the common law has been modified in South Carolina, and also to contrast the modifications made necessary by the actual navigability of large inland rivers, with the rules which have been more and more strictly applied to all tidal waters, even in the face of plain facts proving non-navigability. In addition, the concepts and tests of navigability of tidal streams are necessary ingredients in any appraisal of marshland titles, because the simple rule of the *Pacific Guano* case,[258] that beds of tidal navigable streams are held in trust by the state, has been extended to include marshlands by the apparent ruling of the *Cape Romaine* case, that, because marshlands are situated below high water mark, they constitute tidal, "navigable streams."[259] Discussion of the more recent cases is under headings of the factual situation in which they arose, chronologically wherever possible.

To those familiar with history, it is not surprising that the powers of the Federal Government over navigation have been construed by federal courts to include all lands lying below

*B.A. 1947, Yale University; LL.B. 1950, University of Virginia; Member S. C. House of Representatives, 1955-58; Member, Firm of Cornish & Horlbeck, Attorneys, Charleston, S. C.

257. Gould, *op. cit.*, Sec. 42, p. 103. The various state courts are in conflict on this matter, some having adopted the common law rule, while others and the U. S. Admiralty Courts, have repudiated the common law rule; but even where repudiated, there is conflict as to whether the landowner holds to high or low water mark. TIFFANY, REAL PROPERTY 454-455 (1940).

258. *Supra*, notes 201, 202.

259. *Infra*, notes 300-311 and text.

mean high water mark of inland (fresh water) rivers as well as of tidal rivers.[260]

It is noteworthy that the South Carolina Court in a recent case turned to federal decisions for a definition of the bed of a navigable stream.[261] Since the federal courts appear to apply the same test for navigability of both tidal and non-tidal waters, what has now become of the common law distinctions between the law as to fresh and salt water rivers in South Carolina?

(1) *Earlier cases re navigability in general*

Navigability of rivers has often been compared with movement on land highways. The South Carolina Supreme Court has stated, "We shall refer to land roads as dirt highways and to navigable rivers as water highways."[262] In the case of *Witter v. Harvey*,[263] Mr. Justice Nott, in comparing land highways to river highways, stated that rivers not navigable belong to the owners of the soil, but this principle is not applicable to the large navigable rivers, and he recognized the necessity of navigable and other streams as natural boundaries.[264] Conversely, the fact that a tract of land was

260. Lewis Blue Point Oyster Co. v. Briggs, 229 U. S. 82, 33 S. Ct. 679, 57 L. Ed. 1082 (1913); United States v. Chicago, 312 U. S. 592, 61 S. Ct. 772, 85 L. Ed. 1064 (1941); Willink v. United States, 240 U. S. 572, 36 S. Ct. 422, 60 L. Ed. 800 (1916); Gibson v. United States, 166 U. S. 269, 41 L. Ed. 996 (1897); South Carolina v. Georgia, 93 U. S. 4, 24 L. Ed. 34 (1876). And see further, for example, Kilpatrick, "The Sovereign States" (Regnery Co., 1957) pages 287-291.

261. Early v. South Carolina Pub. Serv. Authority, 228 S. C. 392, 405-406, 90 S. E. 2d 472, 478-479 (1955). Where the court recognized that "the dominant power of the government in the interest of navigation" "extends to the entire bed of the stream, *i.e.*, to ordinary high water mark on either side." For several cases dealing with the paramount rights in oyster lands of the United States Government for navigation and commerce, see Brown v. United States, 81 Fed. 55 (1897) and 100 Fed. 1006 (1900); Richardson v. United States, 100 Fed. 714 (1900); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U. S. 82, 57 L. Ed. 1083 (1913).

262. Speights v. Colleton County, 100 S. C. 304, 84 S. E. 873, 874 (1915).

263. 1 McCord 67 (1821).

264. "*The ebbing and flowing of the tide cannot give character to our rivers as it appears to do in England.* In rivers which are navigable for many hundred miles above the flowing of the tide some other criterion must be resorted to. But that does not alter the principle, where it is admitted that the stream is not navigable."

" . . . In the *subdivisions of land* which are *daily taking place* in our country, we find that *the most permanent boundaries, such as rivers, creeks,* and roads are usually sought for. The occupants on neither side can claim an exclusive right; because it is the boundary of both. They cannot have a common interest, because there is no community of interest in the soil on each side. Policy forbids it, because it would lead to endless contention and strife. The various purposes of machinery to which a creek or river may be applied requires that each should exercise an exclusive right to the middle. . . . " (*Italics added.*) *Id.* at 69-70.

divided into two parts by a navigable waterway was held not to create an impediment so as to prevent possession of all by possession of that part on one side of the river only, because possession does not depend upon navigability or the size of a river; if it did, the benefit of the rules of possession would be denied when most needed.[265]

Where executors sold to defendant all the right and title in a tract as shown by plat, which included one half of the Enoree River to the thread or center line thereof, and later sued on the bond covering the purchase price, the court refused to set aside the jury verdict for plaintiff-executors for alleged failure of consideration on the ground that the river was capable of being made navigable. The Court repudiated the common law test of navigability as to inland rivers, saying that it would not be suitable to South Carolina, where many large rivers are navigable many miles from the tidal influence.[266] This case held that landowner may own the soil under such a river, subject to the public uses for navigation and fishery, and that a river cannot be considered navigable, "the natural obstructions of which prevent the passage of boats of any description whatsoever."[267] A later case, considering the application of the common law, stated that it had not been changed, but added the Court would not likely extend it to any stream above the fall line.[268]

265. Alston v. Collins, 2 Speers 450 (1844); Brandon v. Grimke, 1 Nott & McCord 365 (1818).

266. Exors. of Cates v. Wadlington, 1 McCord 579 (1822).

267. *Id.* at 582.

268. "The occasion does not require any exact definition to be now given of a navigable river, according to the law of this State, in which the ownership of the soil shall not belong to the riparian proprietors; perhaps *the principal occasion of dispute on the subject has been the use of the term navigable, which has a popular signification different from the technical one which is given by the common law.* We can, however, safely say, that *no authoritative decision has yet been made in this State which has changed the common law on the subject.*

. . . The rivers of our own State are not of remarkable magnitude, and *whether we adhere to the common law definition* or consider as navigable all rivers that may be navigated by sea vessels, or all that are by nature floatable, we hesitate not to declare that this Court, if it should feel itself at liberty, from considerations of public convenience, to assume legislative discretion in the matter, is not likely by any decision to extend the rules which, by the common law, are applicable to navigable rivers, to any stream above those falls which by nature obstructed the serviceable use of its water for transportation. Above those falls, as below, the right of the public to improve a river, and to use it as a highway, subsists: to that the proprietary right in the soil is subject; but so subject the proprietary right exists in the owners to whom it has been granted — above the falls, at any rate, as we may now safely say. (*Italics added.*)

"And so in regard to fishing in the rivers. *'A right of fishing in navigable or tide waters is a common right.* In rivers and streams not navi-

In the case of *Boatwright v. Bookman*,[269] the Court, discussing a fishery on the Congaree River, recognized that whether the public is the actual owner of the soil covered by water or has merely a servitude for the public interest for a highway by water would depend, perhaps, on the grants or on the acts regulating the issuing of grants for lands, neither of which had been placed in evidence, but held that in either case the public rights to navigation and fishery were to be protected.[270]

In *State v. Duncan*[271] a motion for new trial by a defendant, convicted of nuisance by a jury for obstructing Cummings Creek on the west side of the City of Charleston, was granted because of insufficient evidence as to whether this tidal creek, which ran dry at low tide, was a public way or a private way, obstruction of the former only being indictable.

(2) *Early changes by statute*

We have seen that the status of a navigable stream as a natural boundary was recognized by the enactment of the fence law of 1827 (by which a navigable stream was deemed the statutory equivalent of a fence), and applied as to an island surrounded by tidal, navigable waters,[272] and as to marshlands actually unenclosed save for such act, without which the digging of a cut through such marshlands would not have been adverse to the owner.[273]

It has been held that appropriations by the legislature to improve a stream or placing such stream under charge of public functionaries rendered it a public highway.[274]

By statute, erecting a dam across any stream used for navigation by boats or rafts of timber was made a nui-

gable as tide waters, the owners of the soil over which they flow have at common law the exclusive right of fishing, each on his own soil, unless some other person can shew a grant or prescription for a common of piscary, in derogation of the right naturally attached to the ownership of the soil: and such right is held subject to the public use of the waters as a highway, and to the free passage of fish, and in subordination to the regulations to be prescribed by the Legislature for the general good.' 5 Kent's Com 418 . . . " McCullough v. Wall, 4 Rich. 68, 83, 85, 86, 87 (1950).

269. Rice 447 (1839).
270. *Id.* at 450-451.
271. McCord 403 (1821).
272. Fripp v. Hasell, *supra*, notes 193-218.
273. Heyward v. Chisolm, *supra*, notes 218, 248.
274. State v. Thompson, 2 Strob. 12 (1847).

sance.[275] In one case, an indictment and conviction for placing a dam across such a stream was held not to lie, and a new trial was granted because the stream was not identified as having been improved by the legislature or by a riparian owner who had improved it, nor was it shown that it was a stream which was used for navigation at the time the Act of 1825 was passed.[276]

(3) *Phosphate cases*

In the *Pacific Guano* case, the South Carolina Supreme Court stated that the term "navigable" is equivocal, in that rivers were navigable if subject to the tidal flow at common law, while "in our statutes and popular speech, 'navigable' rivers means those which may be navigated by ships or boats . . . "[277] The Court added that the "doctrine that all tidal streams are navigable is purely technical. . . ."[278] The test of navigability approved here was navigability in fact, and by that test certain streams were found non-navigable and the beds thereof belonged to the riparian land owner, while as to navigable streams, the beds belonged to the State. The rule of construction (that a grant of the shore adjoining tidal navigable streams carries only to high water mark) was limited to "channels in which the tide ebbs and flows"[279] unless "altered by law or modified by custom,"[280] and this provided a basis for possible future distinction between "channels" *in* which the tide flows, and "marshlands" *over* which the tide flows. In the *Pacific Guano* case, marshlands were admitted to belong to the landowner, and beds only were before the court. However, the Court felt obligated to add, as it had done in the *McCullough* case, that no law or judicial decision had changed the common law in South Carolina.[281]

In the *Pinckney* case, marshlands were directly involved, and the court held that the deed of the United States Direct Tax Commission did not carry the marshlands within the natural boundaries of the navigable streams stated by the deed, save for one tract expressly granted because of the

275. 6 Stat. at Large 269 (1825), cited in State v. Collum, 2 Speers 581 (1844).
276. State v. Hickson, 5 Rich. 447 (1852).
277. 22 S. C. 50, 75 (1884).
278. *Id.* at 76.
279. *Id.* at 79.
280. *Id.* at 83-84.
281. *Id.* at 75-77.

rule of construction strictly applied, that a conveyance which calls for boundaries on tidal navigable streams carried title only to high water mark. Evidence of usage was held not produced[282] or was deemed insufficient, as the Court found no authoritative reason to change the rule.[283]

In the *Oak Point Mines* case (a Circuit Court decision) it was held that the test of navigability is general and common use for some purpose of trade or agriculture.[284] The bed of the navigable stream was held to belong to the state, but the soil "between ordinary high water and low water mark in said creek, embraced within the lines of said grant" was held to belong to the riparian owner. The rule of construction (that titles to lands on navigable streams carry only high water mark) was not mentioned, but, presumably went out of the case when the Court found that the statutes of the legislature conclusively proved that marshlands were the subject of grant.[285] The Court said of navigability:

> . . . 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 low water mark. . . .[286]

In the *Farmers Mining Company* case,[287] the Court stated that the *Pacific Guano* case[288] had repudiated the common law, and announced that "to be navigable, a stream should have sufficient depth and width of water to float useful commerce. . . . The test is navigable capacity, and not that the surroundings should be such that it may be useful for the purpose of commerce."[289]

282. *Id.* at 508-509.
283. *Ibid.*
284. *Id.* at 597.
285. See Text, page 41, *supra.*
286. 22 S. C. 50, 602 (1884).
287. 42 S. C. 138, 19 S. E. 963 (1894), *supra,* notes 180, 198, 201.
288. *Supra,* note 275.
289. 19 S. E. at 970-971.

The Court also distinguished navigable waters of the United States, namely, waters having connections with other highways and being subject, therefore, to the laws of interstate commerce from the navigable waters of the state (waters not subject to interstate commerce laws).[290]

(4) *Trespassing upon private marshlands*

In the United States Circuit Court case of *Chisolm v. Caines, et al.*,[291] plaintiffs, lessees of marshlands and creeks in Georgetown County which were a part of the Cartaret Barony granted in 1733,[292] brought suit to restrain repeated trespasses. A temporary restraining order was issued, and defendants were ruled to show cause why they should not be cited for contempt for violating the restraining order. The answers denied ownership of the marshes and creeks.[293]

The State of South Carolina intervened by information, and set up the claim of the state, denying the ownership of complainant's lessors. Circuit Judge Simonton then ordered issues to be made up as to whether the lands were granted by the Crown before the Revolution, or by the state thereafter, as to which the burden was on complainants; but, if the grant were produced in court, then the presumption arising from possession would be available, and the burden would be on defendants to show better title.

After the rendition of the opinion ordering issues to be made, the state withdrew her intervention, the issues at law

290. "The third condition enumerated by the Circuit Judge is . . . 'connections with other highways.' This test has only been applied in cases where the question was whether a stream was a navigable water of the United States, so as to subject them to the laws of interstate commerce, that do not apply to navigable streams under the control of the state. Among these conditions is that mentioned by the Circuit Judge." 19 S. E. 971.

291. 67 Fed. 285 (1894), *supra*, note 21.

292. See note 77, which statute was held by Judge Simonton in this case to constitute recognition of the Cartaret grant by South Carolina. 67 Fed. at 289.

293. In the Order and Opinion on motion to set aside restraining order, filed January 25, 1894, but not reported, the fact of ownership of marshlands was specifically recognized:

"From time immemorial the right of individuals to obtain exclusive possession and ownership of lands below high and low water mark, not the bed of a navigable stream, has been recognized in the Colony and in the State of South Carolina. Large portions of the City of Charleston were once covered at high water and upon them are lots filled up, houses erected and buildings. The whole coast of South Carolina, back of the sea Islands, shows a vast extent of marsh land, extending from the inner shore, and lining the banks of the navigable rivers. These marshes were used constantly by the riparian owners for fertilizing purposes and food for Cattle. . . ." In Equity #57, Clerk of Court U. S. D. C., E. D. S. C.

were withdrawn, and the case was heard on the bill, answer and testimony.

In deciding whether plaintiffs' landlord owned the marshlands and creeks or whether they were navigable waters and subject to the *jus publicum*, the right of the sovereign over marsh lands was stated to be a matter of local law, and they were held grantable under South Carolina law. The marshlands were treated separately from the creeks, and were held to be "not aids to, but obstructions to navigation."[294]

Judge Simonton gave the following tests of navigability:

> It is evident that to make a body of water a public, navigable stream, it must be accessible to the public. The essential characteristic of a navigable stream is that it is, or is capable of becoming, a public highway (*Ball v. Herbert, infra.*), a means open to the public of passing from one place, where they have a right to be, to another,

294. "It would seem that there is a great distinction between the shores of the great ocean, the beds of harbors, the channels of rivers and highways of commerce, and these mud shoals cast up by the currents on the sides of harbors and streams. The former must always be kept open for public use, commerce, trade, and pleasure. The latter can be separated from any public use, and can be vested in individuals or corporations, at the will of the sovereign power. *They are not aids to, but obstructions to, navigation*, and can be utilized for the public good in any way the sovereign may decide. And, when it can be done without detriment to the lands and waters remaining, they can always be disposed of, and vested absolutely in private persons." Illinois Cent. R. Co. v. Illinois, 146 U. S., at pages 456, 457, 13 Sup. Ct. 110.

* * * * *

"What of the creeks which penetrate these marshes? Although the sovereign can determine for itself, in the matter of marsh lands, and can grant them to private persons in fee, giving them title to the exclusive use of them, it is not competent for the sovereign to grant the exclusive use of public navigable streams, bays, and harbors, or the beds thereof, so as to prevent the use of them by the public for commerce, travel, or even pleasure. The title of the sovereign in public navigable streams is subject to the public use. It is held by the sovereign as the representative of the public, and in trust for them, — a part of its prerogative rights, and not as private property. Martin v. Waddell, 16 Pet. 367. Nor can the sovereign, by any act, divest itself or the property of this public use. Every grantee from it is affected by the use. The only *exception*, perhaps, is the erection of docks and wharves, and piers of bridges, and the like, on the beds of navigable streams. See Dutton v. Strong, 1 Black 23. These are aids to commerce, navigation, and passage, and promote the public good. They are lawful, so long as they do not unreasonably impede the navigability of the stream. See Atlee v. Packet Co., 21 Wall 389. The crucial question in this case, therefore, is: Are these creeks, or any of them, — those which bound and those which permeate these marshes, — public, navigable streams, or capable of becoming navigable streams? If they are, although they may have passed with the marshes which surround them, they are held subject to the use of the public for passage and navigation. Shively v. Bowlby, 152 U. S. at page 13. 14 Sup. Ct. 548." (*Italics added.*) 67 Fed. at 291.

in which they have the same right. *The Montello,* 11 Wall 411, 20 Wall 439.[295]

. . . . . .

All the cases concur in treating as the test of a navigable stream, that it is or can be used as a highway of commerce, over which trade or travel are or may be conducted in the customary modes of trade or travel on water. *The Daniel Ball,* 10 Wall 557; *Hickock v. Hine,* 23 Ohio St. 523; *Brown v. Chadbourne,* 31 Me. 9. In order to be of use for the purposes of commerce, trade or travel, the stream must be a means of intercourse and communication with points between which commerce, trade or travel is conducted, and conducted by the public. The public may use any highway for any purpose of trade, travel or pleasure. But it must be a highway . . . So a waterway into a man's land, surrounded on all its sides by his land, whatever its capacity, cannot be said to be a highway, and so open to the public for its use of trade, travel, or commerce.

There is a case in South Carolina which seems to conflict with these views. *Heyward v. Mining Co.,* 42 S. C. 138, 19 S. E. 963 (1894). In that case the Supreme Court of South Carolina goes beyond any case theretofore decided by it, and holds that a creek having an outlet on a navigable stream, and losing itself in the private lands of a citizen, which surrounded it on all sides, without another terminus, is a navigable stream to this extent, at least: that the state owns the phosphate rock in its bed.[296]

Navigable water of the United States was stated to require a continuous connection, in whole or in part, between different places in different states, but if it lies wholly within a state and is only navigable between different places within a state, it is not navigable water of the United States, but only of that state, the essential characteristic of navigability in each case being as a highway between places.[297] After holding certain named streams navigable or non-navigable, respectively, complainants were granted injunctive relief as to non-navigable streams, and also the marshes, but not as

295. 67 Fed. at 292.
296. 67 Fed. at 294.
297. 67 Fed. at 294.

to the streams found navigable. This injunction is still in force, but only as to those originally enjoined or privies thereto.[298]

Judge Simonton remarked in the course of his opinion that there was no line of South Carolina cases following the rule of *Pacific Guano* and *Heyward v. Farmers Mining Co.* His statement should be interpreted in the light of *Erie Railroad v. Tompkins*[299] wherein the United States Supreme Court ruled that the federal courts follow the latest adjudications of state courts regarding statutes and substantive laws. The rules of substantive law to be applied in any federal case would be those announced in the South Carolina cases, subject to applicable statutes, such as the Submerged Lands Act.

(5) *Oyster cases and Cape Romaine*

In *Alston v. Limehouse, et al.*,[300] and companion case *Donaldson v. Nesbit, et al.*,[301] plaintiff in each case claimed title through grant to John, Lord Cartaret.[302] In each case, plaintiff landowner alleged trespass of defendants on lands for gathering oysters, and prayed injunctive relief. Injunctions *pendente lite* were granted by one circuit judge, and orders of reference were made by another. Defendants contested plaintiffs' titles, alleging that the lands where the alleged trespasses took place were public lands held by the state in trust for the public, and defendants were rightfully there. Defendants appealed, and the Supreme Court upheld the grant of temporary injunctive relief, but held that the order

298. In 1897, 1901 and 1903, additional persons were named as respondents and the above injunction ordered applied to them also.

In 1953, a rule was brought to show cause why certain named persons should not be enjoined from trespassing in the described marshlands and cited for contempt in not observing the injunction already issued. The order of the District Court, E. D. S. C., filed March 20, 1954, held that the present rule 65 (d) of the Federal Rules of Civil Procedure limited rules to show cause in such cases to persons who were agents or in active concert with the original parties, and since such connection was not shown, they could not be held to be guilty of contempt. The order "emphatically rejected" the contention that the marsh lands and creeks in question belonged to the State of South Carolina, as the state was a party to *Chisolm v. Caines* and is bound by the decree therein, and has no interest in the marshlands described. The court also held that injunctive relief would lie to secure the owner of the premises against trespass. Equity case #57, Clerk of Court, U. S. D. C., E. D. S. C.

299. 304 U. S. 64, 82 L. Ed. 1188 (1938).

300. 60 S. C. 559, 39 S. E. 188 (1901).

301. 60 S. C. 570, 39 S. E. 967 (1901).

302. See notes 77, 289.

of the circuit court was binding only as to the issue of temporary relief and could neither preclude defendant's right to jury trial, nor establish facts solely within the jury's prerogative. Since plaintiff alleged fee simple title, the Court held a jury trial was necessary to permit proof of title, and that the legal issues should have been tried before determining permanent injunctive relief.

It is worth noting that the order of the lower court said that the locations where defendants took oysters and whether such locations were navigable, were questions of fact, and that the rights of plaintiffs under the grant and their extent to high or to low water mark, were questions of law. The Court gave the following tests of navigability as to the channels of streams as compared with the "navigability" of marshlands:

> In this country the tides have no relevance to navigability. It was otherwise in England, whence the common law and its terminology came. There tide waters and navigable waters were convertible terms. Here, if a water course is navigable, it is so because the depth and width of it are sufficient to float useful commerce. *If the depth and width of a stream are augmented by a periodical increase of water, called 'tide', that fact may make the stream navigable at those points in it where it is so in fact, to wit, in its channel, but not navigable where it is not so in fact, to wit, out of the channel in the marshes.* The state owns (because it has refused to sell) the beds of navigable streams.[303] (Emphasis added.)

In the *Cape Romaine* case, plaintiff alleged ownership under stated grants; trespass on the lands granted; and removal of oysters by defendants and prayed for damages and injunction. Plaintiff's evidence of possession, besides deeds and grants in chain of title, consisted of payment of property taxes, posting, leasing to oyster canning concerns, employment of persons to protect, burning of oysters to make lime, and taking of shellfish for food and canning. Both sides showed that the land was mostly covered by water at high tide, and defendants showed that it had been leased to them by the State Board of Fisheries. The master found

303. 60 S. C. 559, 39 S. E. 188, 190 (1901).

for defendants, and when the matter was argued before the circuit judge an order was passed reciting that the parties agreed that the narrow issue was plaintiff's title to "the land between high and low water mark in the navigable streams within the territory described in the complaint." The circuit court held simply that plaintiff failed to prove title to such land, and judgment was given for defendants.

Plaintiff excepted, alleging error in holding that plaintiff had failed to prove title to land between high and low water in the navigable streams bordering and intersecting plaintiff's lands, on the grounds: (1) that grants in chain of title carried to low water mark, subject to rights of navigation and as to phosphates, and plaintiff had never lost or forfeited its rights to hold to low water mark and (2) that the order extended to all of the lands of plaintiff, whereas it should not have included two grants from the state, the plats for which expressly showed that the state had granted to low water mark, and for a period greater than twenty years, so that the state and the public had been out of possession for more than the statutory period sufficient to presume a grant and could assert no title save for navigation and phosphates.

The respondent's brief on the first page specifically and unequivocally stated that plaintiff had misinterpreted the extent of the lands involved and had extended the scope of the case by taking the position that all of the streams involved were navigable. The lack of any definition of navigability must have led plaintiff to throw its property rights into the breach in this case. At any rate, the statement of respondents on the first page of their brief is striking because they were trying to limit the issues to less than ten per cent of the streams in the areas covered by grants in plaintiff's chains of title and also because the Court and plaintiff completely failed to limit the issues and the holdings to those specific, navigable streams involved and to lands in the channels of those navigable streams only. This statement is reprinted here verbatim:

> *Note:* It is stated by the plaintiff-appellant that all of the streams in the marsh involved are navigable. This is absolutely inaccurate. Not over ten per cent of the streams in these marshes involved are navigable. There is a network of non-navigable streams about which there

> is no question, and it is most misleading and inaccurately stated, as the contention of the defendants is limited only to the navigable streams, and the judge only found that title was lacking between high and low water mark in the navigable streams.

Despite this plain attempt of respondents to confine the issues to those ten per cent of the streams that were navigable, plaintiff threw all of their titles to non-navigable areas into the case, and all titles were lost in the resulting confusion.

The opinion of the Supreme Court per Mr. Justice Carter, stated the question to be this:

> . . . has the plaintiff title to low water mark in navigable streams, the *testimony showing that all streams named were navigable*, and there being no proof that any oysters were gathered or other trespass committed between high and low water mark on the shores of Bulls Bay, or in Bulls Bay?[304]

The Court answered this question before commencing the body of the opinion. "We have made a careful examination of the record and fail to find proof of title in the plaintiff between high and low water mark *in* the navigable streams *on* the land in question."[305] (Emphasis added.) It may be that plaintiff stated itself out of court by agreeing that the question before the Court related to navigable streams, without distinguishing marshlands in any way from navigable streams. Throughout the opinion, the unanswered questions, what is a navigable stream, and are marshlands navigable streams, arise to plague the reader and the Court. The Court seems never to have decided definitely, whether the streams were on the land or whether the land was in the streams. Thus, says the majority opinion, assuming plaintiff proved title to the lands described, "it does not follow that title was proved to 'low water mark in navigable streams' in question."[306] This poses an ambiguous assumption, for it was shown, as the dissenting opinion of Justice Cothran says, that " . . . practically every foot of the 34,290 acres (with the exception of 6.2 acres on Cassena Island), was entirely submerged at high tide, . . ."[307] and no other boundary line for

304. 148 S. C. 428, 146 S. E. 434, 436 (1928).
305. *Ibid.*
306. *Ibid.*
307. 148 S. C. 428, 146 S. E. 434, 439 (1928).

lands lying below high water mark is possible except low water mark, unless the streams be deemed non-navigable, in which case the boundary line may carry to the center thereof. If title be assumed to lands in question, for purposes of an hypothetical question, and if it be proven that all of them lie below high water mark, to what boundary was title assumed if not to the low water mark? The answer of the majority is that since the language of the grants and deeds did not specifically use the words "to low water mark", then the unalterable rule must apply, that the boundary is construed to be high water mark, even if several express grants from the state using the terms "marsh" or "marshland" and sealed with the great seal of the state, (which should import at least some consideration), be reduced to the worthless status of a "scrap of paper." Therefore, the real basis of the holding in the *Cape Romaine* case was the rule of construction, strictly applied, that a conveyance of lands butting on tidal navigable streams carries title only to high water mark, and that only language intending to show grant to low water mark is admissable to mitigate the strictness of the rule. The Supreme Court held that whether or not the proof established title in the owner of land bounded on navigable streams, was a question of fact for the lower court.[308]

In stating the law which it decided to apply, the Court cited: (1) the holding of *Shively v. Bowlby*,[309] wherein Mr. Justice Gray gave opinion that the common law rule that high water mark is the boundary is in force in South Carolina,[310] but did not add that the same opinion admits both language in the grant and long usage to indicate a contrary boundary,[311] (2) the holding of the *Pacific Guano* case involving creeks only, wherein the state did not even try to claim marshlands, but admitted titles thereto in defendant,[312] (3) the *Pinckney* case, which, although it was the first case to apply the strict rule that land abutting on tidal navigable streams carried title only to high water mark, nevertheless recognized title to one tract of marshland,[313] and (4) the *Farmers Mining*

308. The heading of headnote 7 reads "navigable," as does the content of the opinion under number 7, while the body of headnote 7 reads "non-navigable." 146 S. E. 434, 435 and 437-438.
309. 152 U. S. 1, 38 L. Ed. 331 (1894).
310. 148 S. C. 428, 146 S. E. 434, 437 (1928).
311. 148 S. C. 428, *Id.* at 439.
312. *Supra*, note 201.
313. *Supra*, note 282.

Company case, wherein the court reversed on other grounds and did not disturb the finding that the grant to the marshlands included all within its boundaries, if non-navigable, and stated that the state is estopped by a grant from claiming lands covered by tidal though not navigable waters.[314]

Appellant contended that if the grants in question do not carry to low water mark they convey nothing, to which the court answered:

> We do not agree with this contention. In the first place, the testimony on which appellant relies as showing or tending to show that a large portion of the land is covered by water at high tide is not conclusive of the question. Neither does the fact that the land described in some of the deeds is referred to as marsh land, to which attention is called, settle the question. Then, too, there are other facts in the case to be considered. While a marsh is land usually wet and soft and commonly covered wholly or partly with water and is often referred to as a swamp, it is also known as a meadow which remains green during the dry seasons. 38 C. J. 1363.[315]

Marshland subject to tidal flow does not bear too close comparison with fresh-water green meadows.

As to the meaning to be given the word "marshland," if the court was doubtful that it meant lands submerged under salt water at high tide the case could have been remanded for a new trial, as recommended in the dissenting opinion.

The court next considers that geological changes may have occurred. "What was an island when the deeds were executed in 1840 or 1855 may now be a marsh or land constantly or continuously covered with water. This would be no reason, however, for reading into the deeds a meaning not intended at the time of execution."[316] As to this, aside from the presumption in favor of grants under the great seal of the state, that the lands were validly granted and carried the contents, if the court desired to admit external evidence of intention at time of granting, presumably acts of usage would also be admissible to show what grantee thought was carried by the grant. Again, geological changes may be sudden or

314. *Supra*, note 180.
315. 148 S. C. 428, 146 S. E. 434, 437 (1928).
316. *Ibid.*

gradual, and if the court had no reason to believe the alluvion or reliction of any of these lands was anything other than gradual, then it had no reason to assume that gradual changes had returned the title of any of the granted lands to the state, if the rules of the common law stated by Blackstone be followed.[317] And, granting that sudden changes in wet lands occur and if land wash partly away or if it build up partly does the owner lose title entirely because what was once an island is now under water, or vice versa? If a grant conveys all land within certain identifiable natural boundaries has its meaning been changed by a subsequent judicial determination that, regardless of the presumption attaching in favor of grants, nevertheless, nothing has been conveyed by such grant?

The majority of the court next concluded that a surveyor's notation on one of the plats, that the boundary was low water mark on Bull's Bay did not have any bearing on the question of whether grants bounded on navigable tidal streams were intended to convey to low water mark, as " . . . it does not appear that Bull's Bay is a navigable stream . . . "[318] If any of the lands abutted upon low water mark of Bull's Bay the surveyor's note should have been accorded at least to have had "bearing on the question involved in the appeal," because the agreed statement of facts in the transcript on appeal contained the statement that " . . . the surveyor (states) that on Bull's Bay, an arm of the sea not a navigable stream, the line is at 'low water mark,' and on the same plat containing navigable streams, no such language is used," and "there is no testimony that any oysters were gathered or cultivated, or any stakes driven in Bull's Bay."[319] Here, again, plaintiff may have stated away part of its case by agreeing that Bull's Bay, "an arm of the sea" was not a navigable stream, because, if Bull's Bay be not navigable, it could not be questioned that it is at least as "navigable" as marshland or "shore" that goes completely dry twice a day. Besides, "arm of the sea" is defined as "a portion of the sea projecting inland, in which tide ebbs and flows. 5 Coke, 107."[320] If it is a physical fact of which judicial notice may be taken, that *water seeks its own level,* then at a given

317. *Supra,* note 56.
318. 148 S. C. 428, 146 S. E. 434, 437 (1928).
319. 148 S. C. 428, *Id.* at 436.
320. BLACK, LAW DICTIONARY (4th ed. 1951).

time and location, namely, at low tide and at low water mark, a given tract of marshland surrounded by identifiable watercourses and having one boundary at low water mark on Bull's Bay, could hardly have another boundary at any other place than low water mark.

After dismissing plaintiff's claim of possession for over twenty years as "without proof"[321] the majority opinion concludes:

> It is conceded for the purpose of this appeal that the plaintiff owns all of the land contained within the boundaries appearing in the deeds executed by the agent of the state, unless such boundaries be construed to include lands between high and low water mark *in* the navigable streams, but, as we view the case, the plaintiff has failed to prove title to the lands between high and low water mark *in* the navigable streams, as held by the circuit judge, for the reasons we have stated above in connection with the authorities cited. The title to land below high-water mark *on* tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes.[322] (Emphasis added.)

As a matter of semantics, all land abutting or adjoining directly upon an identifiable stream may be said to lie along, upon, or "on" such stream, while only the soil or land actually lying within or inside the banks of a stream or under its channel may be said to be "in" that stream in the sense of within or inside it, and conversely, water may be said to be "upon" the land that it covers. Salt water is "upon" or on marshland twice a day — but it is on or upon all land below low water mark all of the time. It is true that the banks of tidal navigable streams may disappear from view at high tide, but, as pointed out in the reported opinion of the lower court in *Alston v. Limehouse, supra,* "if the depth and width of a stream are augmented by a periodical increase of water, called 'tide', that fact may make the stream navigable at those points in it where it is so in fact, to wit, *in its channel but not* navigable where it is not so in fact, to wit, out of the channel *in the marshes.*" If every acre of marshland, no matter where located, when

321. 148 S. C. 428, 146 S. E. 434, 438 (1928).
322. *Ibid.*

granted, how used or for what period, be held to be navigable because abutting upon tidal navigable streams or because located under normal high water mark, then no private person may own any marsh at all, a result scarcely intended by all of the colonial officials of England and officers of the state in time past, including expert surveyors, whose efforts may be accorded the status of scraps of papers subsequent judicial interpretation.

Judge Cothran dissented in part, as follows:

> There can be no question as to the correctness of the principle, that, under ordinary circumstances, a grant by the state to land bounded by tidal navigable water passes no title below high-water mark. (Citing cases.) I do not believe, however, that this principle can justly be applied where the state is presumed to know that, if this rule be applied, its solemn grant, with the great seal of the state affixed, is but a 'scrap of paper.'
>
> If there was nothing in these islands and marsh lands which the state, by reason of the fact that they were entirely submerged at high tide, could convey except the land bounded by low-water mark, common fairness would require that the grants should be so construed.
>
> * * * * *
>
> The cases cited, establishing the general rule as stated, all involved tracts of land upon which there was land of both descriptions, above and below the high-water mark; in the absence of a specific extension to low-water mark, it was but logical to declare the rule establishing the high-water mark as the limit of proprietorship. When, as in the case at bar, there is no high-water mark, and of course no land above it, the logic fails; the grant can have no effect at all unless the limit of proprietorship is extended to low water mark.
>
> * * * * *
>
> There is a marked distinction between grants of land between high and low water mark, which is considered the "shore", and grants of land that is always submerged, land below low-water mark. The first class is considered vacant land, and may be granted by the public land authorities as such; the second class is considered a part of the sovereign possessions of the state, in trust per-

petual for the benefit of the public, and may not be granted except by an act of the General Assembly.

It seems to be clear therefore, that all of this land limited by low-water mark was subject to grants by the state as vacant land and was conveyed by the proper state authorities, that the state intended to convey all that it possessed, which was the entire islands, with the exception of the land below low-water mark, and that the plaintiff has established its title thereto.

I think, therefore, that the decree of the circuit court should be reversed, and the case remanded to that court for a new trial. Nothing herein contained is intended as an adjudication of any issue of fact; all such issues are intended to be left open for such new trial.

In *Cape Romaine,* although the agreed issue involved only title to lands in tidal navigable streams, which were less than ten percent of the streams in the involved areas, the Court went beyond the question involved and included not only non-navigable creeks but also marshlands and even islands in its ruling. Since the ruling went beyond the agreed question on appeal, there is good reason for confining to the realm of *dicta,* so much of the opinion as went beyond, affirming the opinion of the court below. Certainly the application of the rule as to public trust was erroneously extended from beds of navigable streams to include marshlands, and should be regarded as *dicta,* as should its subsequent citation in the *Rice Hope* case.

In a subsequent case, it was held that title to oyster bottoms is a legal question for the courts and not for the Board of Fisheries, and the method of procedure used in the *Cape Romaine* case for bringing the matter of title before the Court was approved.[323]

In a recent case in Georgetown County,[324] the state brought action against defendant to restrain digging of a canal and yacht basin, specifically alleging that the state is the owner of "all marsh and tide lands below the mean high water mark of the ocean and the arms thereof except such tide and marsh lands as have been ceded or granted to individuals", and that such canal would disturb the oyster beds,

323. Jones v. State Board of Fisheries, 161 S. C. 309, 159 S. E. 651 (1931).
324. State of South Carolina v. Southpoint Corporation, Court of Common Pleas, Georgetown County, Judgment Roll 6318 (1956).

pollute the waters, etc. A temporary restraining order was issued but later dismissed, and was followed by a petition for rule to show cause and order to show cause before one of the justices of the Supreme Court why restraining order should not issue *pendente lite,* in that the defendant had commenced dredging the canal. No order was issued however, and by order of December 7, 1956, the sole issue of trespass was resolved to the question of the boundary line of defendant's lands, which was set by the order of the boundary of the canal which had been dug, which was declared to be the high water mark, and the dividing line between the lands of the defendant and the marshlands of the plaintiff.

(6) *Ricelands, Power Projects and Federal Cases*

While ricelands are not in exactly the same category with unenclosed marshlands, because they are usually enclosed and cultivated, nevertheless, they have been regarded as submerged lands in certain particulars, and a showing of a grant to them has been thought expedient in several cases wherein titles have come before the courts.

In *Lynah, et al. v. United States,*[325] and in *Williams v. U. S.*[326] actions were brought by owners of plantations along the Savannah River to obtain just compensation for alleged taking of rice fields by the general government for necessary improvements in the navigation of the said river. The improvements consisted in building dikes and other structures downstream (toward the ocean) of plantiff's lands, causing the natural level of the water in the said river to rise, with the result that the rice fields could no longer be properly drained, and became soggy, sour and unfit for rice cultivation.[327]

325. 106 Fed. 121 (1901).
326. 104 Fed. 50 (1901).
327. It was the distinguishing feature of coastal South Carolina rice culture that the canals for draining and flooding the fields emptied through embankments at and by means of trunks. At any low tide the water in the rice fields could be lowered or drained off entirely by opening the trunks, because the mouths thereof were so placed and dug as to be above the natural mean low water mark of the river outside the embankment. Also, because said trunks were below mean high-water mark of the river outside the field, water could be admitted into the enclosed area of the rice field so as to raise the water level on the rice. Most of the rice grown along the rivers of the Lowcountry was subject to some tidal influence, whether more or less depending upon proximity or distance from the open ocean, and was dependent upon tidal rise and fall of some degree, together with the use of reserves of water in impounded swamps, to control the level or amount of water in the rice fields. See United States v. Williams, 104 Fed. 50, 52.

In each case a majority of the U. S. Supreme Court[328] affirmed the judgment of the lower court for plaintiff landowner. In each case title was admitted. The main question was whether flooding rice lands constituted a taking, the majority holding that it did and such taking was compensable, while the minority, per Mr. Justice White, held that the owner of land below high water mark acquired no such easement or servitude in the bed of a navigable river by embanking his lands that he could exact that the level of the river water not be changed or raised, and that if there were any inequity, the Congress should appropirate funds to pay for it.

In the case of *Lachicotte and Springs v. Ford,*[329] plaintiffs brought action against defendant for flooding their plantation, Woodside, by turning loose waters from defendant's plantation, Rice Hope, both on the Santee River, in such manner as to overflow the rice fields of the former. Defendant demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action, and was overruled in the circuit court. The Supreme Court affirmed, saying that defendant had a right to flood his own plantation with waters from North Santee River, but his use of such waters would become unlawful when he thereby also flooded plaintiffs' land, "in the absence of any grant, license, or prescription authorizing the same." The Court refused to take judicial notice of the rise and fall of the tides as the cause of the flooding, although it stated that the flow of the tides and the general geographical areas subject thereto are judicially noticeable.

In *Manigault v. Springs,*[330] a demurrer to bill in equity to restrain erection of a dam across Kinloch Creek on the Santee River, Georgetown County,[331] was sustained although complainant used this creek to carry rice from his plantation to his mill over a mile away. Complainant's property was opposite the mouth of this creek, and the court held he was not proven to be a riparian owner. The parties had previously agreed that no dam was to be placed there, but an act of the legislature in 1903 permitted a dam provided the

328. Lynah v. United States, 188 U. S. 445, 47 L. Ed. 539 (1902); Williams v. United States, 188 U. S. 485, 47 L. Ed. 554 (1903). These cases were distinguished in Lewis Blue Point Oyster Cultivation Company v. Briggs, and overruled thereby.
329. 58 S. C. 557, 36 S. E. 916 (1900).
330. 199 U. S. 473, 50 L. Ed. 274 (1905).
331. 123 Fed. 707 (1903).

builders, respondents herein, pay damages to those harmed. The lower court held that the creek was not navigable and that the legislature could authorize it to be dammed. The U. S. Supreme Court said the legislature might close it even if it were navigable, as the S. C. Legislature had authority under the police power to authorize a dam across a navigable stream, despite the provisions of the State Constitution that all navigable rivers shall remain forever public highways.

In the Circuit Court case of *Mullins Lumber Company v. Blackwell, Secretary of State*,[332] the Secretary of State was sued under code section 1-205, 1952 S. C. Code, requiring him to take charge of State property not otherwise provided for by law. Plaintiff alleged that defendant had taken charge of many non-navigable streams belonging to plaintiff, which constituted a cloud on title amounting to an appropriation to the use of the public of private property without due process of law, in violation of Amendment XIV, U. S. Constitution and of Section 5, S. C. Constitution. The opinion was handed down by Judge Lide, who concluded that certain canals were artificial channels and private property of plaintiff, as were certain other creeks and a lake wholly within plaintiff's boundaries, while certain creeks which had been found navigable by the U. S. War Department were navigable waters. While the opinion stated that the finding of the War Department would have been sufficient to determine the question of navigability, it approved the test of navigability in the leading case of *Pacific Guano*, that a stream should have sufficient depth and width of water to float useful commerce, and added, as to a particular stream dry at low tide, that under the *Pacific Guano* test the stream was not navigable as a matter of law, and therefore, was the property of plaintiff.

This opinion held that this suit was really against the State of South Carolina, which usually cannot be sued without its consent, except when, as here, the State has unconstitutionally taken the property of plaintiff. Judge Lide concluded that there had been an unconstitutional taking of plaintiff's property, and he particularly named the streams

332. Decree filed Nov. 22, 1948, Office of the Clerk of Court of Georgetown County.

and waters so attempted to be taken, and distinguished them from those held to be public, navigable streams.

In the case of *Rice Hope Plantation v. S. C. Public Service Authority*,[333] plaintiff complained that the construction of a dam across the Santee River and diversion of waters into the Cooper River permitted salt water to infiltrate its lands. The Court, per Acting Associate Justice Lide, held that the State of South Carolina has the same easement as the United States over the land in the bed of a navigable stream, repeated the *Cape Romaine dicta* that lands lying between high and low water marks of a navigable stream are held by the state in trust for public purposes, including navigation, and added:

> But we do not deem it necessary or proper upon this appeal to determine under what circumstances and by what method, if any, title might be acquired by private owners, because any such ownership would be, in our opinion, subject to the dominant power of the government (State and Federal) to control and regulate navigable waters.[334]

The Court held also that the right to hunt and fish on one's own premises is a right of property, and added later that the water of the ocean and its bays of public watercourses are part of the public domain, diversion of which by the state may be authorized without compensation to riparian proprietors, being a disposition of the public property but not a taking of private property by eminent domain.

As in *Cape Romaine*, the citation by the Court in *Rice Hope* of the rule as to marshlands being held in trust constituted *dicta*, for the reason that the Court held that such lands were subject to the power in State and Federal Governments to regulate navigation.

The act creating the authority states that it is owned completely by the people of South Carolina, and all net earnings not used for operation are supposed to reduce their tax burdens. Although it was held to be an agency of the State, the Court held the liability of the authority to a riparian owner is substantially the same as if the United States were involved.

333. 216 S. C. 500, 59 S. E. 2d 132 (1950).
334. 216 S. C. 500, 530, 59 S. E. 2d 132, 145 (1950).

In the subsequent case of *Early v. South Carolina Public Service Authority*,[335] the owners of a tract of land in Georgetown County bordering on and traversed by both navigable and non-navigable tidal streams and waters tributary to the Santee River, sued for damages to their fast land, alleging that fresh water formerly in the Santee River had been taken from that river and dumped into the Cooper River, causing an invasion of salt water into the Santee River and onto the lands of the plaintiff causing damage to timber, loss of pasture land, etc. The area involved, including dikes and banks, lay wholly above mean high water mark, and was used to pasture live stock. The salt water destroyed normal vegetation and rendered portion of the property useless for pastureland, and some timber was killed.

The main question was whether the damage to plaintiff's land constituted a taking within the purview of Article I, Section 17, of the Constitution.

The Court outlined and reviewed the federal decisions on this subject; pointed out that the concept of taking under the Constitution includes any governmental action the effect of which is to deprive the owner of the property; and that damaging of property constituted a taking. The Court found that the property in question had been damaged and therefore taken, and that compensation should be paid.

It is worth comparing the above cases with those dealing with swamps or fresh water marshland. It has recently been held that high land is "presumably of greater value per acre than marshland," and that swamp lands until recently were generally considered of insufficient value to warrant the expense of survey.[336]

IX. CONCLUSION

The decisions of the courts through the years have interpreted both the uses of the public protected by the state and the rights of private owners. The right of the state to phosphates was deemed in the *Pinckney* case to include ungranted marshlands, although not marshlands which had

335. 228 S. C. 382, 90 S. E. 2d 472 (1955), note 291, *supra*.
336. Nash v. Gardner, 232 S. C. 215, 101 S. E. 2d 283 (1957). Compare Forshur Timber Co. v. Santee River Cypress Lumber Co., 203 S. C. 225, 178 S. E. 329 (1935); Ex parte Keller, 189 S. C. 26, 199 S. E. 909 (1938); Santee River Cypress Lumber Co. v. Elliott, 153 S. C. 179, 150 S. E. 683 (1929); Wheeler v. Wheeler, 111 S. C. 87, 96 S. E. 714 (1918).

been granted, as in the *Oak Point Mines* case, and as in *Chisolm v. Caines*. At common law, the rules of construction applied to marshland grants were not as strict as those applied by the South Carolina courts.

Aside from the introduction in the *Pinckney* case of the strict boundary rule that lands bounding on tidal, navigable streams carry title only to the mean high water mark, most of the controversy swirls about the *Cape Romaine dictum* and the subsequent citation thereof by the *Rice Hope* case.

The present doubts upon marshland titles have arisen despite: (1) a general usage and custom in all the coastal counties to convey high and marsh lands together, plat them together, and use them together; (2) the rules of construction that grants are presumed valid, and that the Governor, land officers and surveyors in the government of the province and state did their duty and solemnly used the great seal, and validly granted the lands in the state, including marshlands, to the people for their use; (3) the common law rules of construction permitting evidence of usage, boundaries, and any other facts tending to show what was granted.

The majority of the Court in *Cape Romaine* apparently viewed the rule as to the public trust as an incomplete rule, and by ill-considered *dicta* extended its application from low water mark as set in the *Pacific Guano* case, to high water mark, without any authority for doing so in South Carolina. This was done without going into the rules of construction that should have been applied, and without looking to see whether the boundary rule as applied was incomplete or capable of modification by evidence of usage or otherwise.

The controversy has arisen because there is no way to reconcile the plain fact that marshlands in South Carolina were regarded as vacant lands, were granted and were and are used by the grantees and their successors and the rules which the majority gratuitously set out in the *Cape Romaine* case.

The present situation as to marshland titles claimed by private parties is not that lawyers cannot pass titles to them, but that they have no guide to show when to pass such titles due to the doubt thrown by the *Cape Romaine* and *Rice Hope* cases upon grants to all lands below high

water mark not only in (within) but on (upon and adjacent to) navigable streams flowed by the tide. At present, titles to marshlands are simply thrown in to mortgages for whatever they may be worth, most of the value being given to the high lands.

The courts have encountered some difficulty in defining some of the terms and deciding the limits of some of the rules which come into play in marshland cases. This has made for confusion. In the *Pinckney* case, the decision on petition for rehearing refers to high water mark as "that line (whatever it may be)".[337]

In the *Pacific Guano* case, the Court says that limiting the riparian owner to high water mark accords with the view that beds of tidal channels below mean low water mark are held by the state in trust under *jus publicum,* which would leave the area between high and low water marks as not subject to the trust,[338] while the *Cape Romaine* case by *dicta* extended the trust to include marshlands between high and low water marks.[339]

In the *Rice Hope* case, in rejecting the contention that the state has not such a servitude as the United States has in the bed of a navigable stream, the court repeated the *Cape Romaine dictum* that lands between high and low water mark are held in trust by the state;[340] whereas beds of tidal navigable streams were clearly and properly defined in the *Pacific Guano* case as "the bottom proper" or "the soil lying below low water mark"[341] so that the trust referred to should not and does not extend to lands between low and high water marks. The *Cape Romaine dictum* was a fundamental departure from the *Pacific Guano* case.

Again, the rule that beds of navigable streams below mean low water mark are held in trust by the state for navigation and for fishery, stated plainly and accurately in *Pacific Guano* and *Oak Point Mines,* was extended by the *dictum* in the *Cape Romaine* case, repeated in *Rice Hope,* to include all lands below high water mark, without any citation of

337. 22 S. C. 484, 510-511 (1884).
338. 22 S. C. 50, 83-84 (1884). See also Oak Point Mines, 22 S. C. 593, 601 (1884).
339. 148 S. C. 428, 146 S. E. 434 (1928).
340. 216 S. C. 500. 529-530. 59 S. E. 2d 132, 143-144 (1950).
341. 22 S. C. 50, 81 (1884).

new authority for the change. This has been done by placing absolute emphasis upon the boundary rule while ignoring rules of construction of grants and common law rules presuming validity in solemn grants of lands under the great seal of the state. The common law did not lay down a blanket rule that every boundary upon every tidal navigable stream carried title only to high water mark, but permitted language and usage to show what title was granted and what usage had been made of the property. To assert that the common law in South Carolina did not permit either grants of land butting upon tidal, navigable streams to mean low water or a showing of usage of such lands when granted is to try to re-write much of the history of coastal South Carolina.

To extend the definition of navigability to include what is plainly not navigable; to change the trust rule from beds of navigable streams to all soil covered at high water; to assert that non-navigable streams and marshlands are "beds" of navigable streams, and that no grants carried same below high water mark unless the magic words "to low water mark" be contained in such grant, is to create *ex post facto* distinctions far beyond what is necessary to protect the interests of the public, and to strain to the breaking point the concepts and legal principles governing grants of land and navigability of streams. What is more to do so is unnecessary to protect the public rights.

As pointed out above,[342] there is no reason why title to the soil under navigable streams must be in the state. The state may reserve its rights to phosphates, control of navigation and fishery, roads and bridges, development of ports, etc., and remove itself from the field of title and ownership of the soil where not necessary to protect the public interest.

The Congress of the United States has deemed it sufficient to protect the interests of the national public, that easements for navigation, national defense and commerce be reserved and by passing the *Submerged Lands Act* has removed many questions from marshlands titles which formerly existed by reason of the rulings of the U. S. Supreme Court in the so-called Tidelands Oil Cases.

Although the *dictum* of *Cape Romaine* was quoted in the *Rice Hope* case, the following statement from the latter case

342. See note 201, *supra*.

is in line with the action of the Federal Government in removing itself from the field of titles to tidelands except for certain specific servitudes and reservations, and shows a recognition of the servitude concept as opposed to the title concept:

> . . . we do not deem it necessary or proper upon this appeal to determine under what circumstances or by what method, if any, title might be acquired by private owners, because any such ownership would be, in our opinion, subject to the dominant power of the government (State and Federal) to control and regulate navigable waters.[343]

In view of the blanket nature of the ruling in the *Rice Hope* case, and the claim of ownershin in both the plaintiff landowner and the authority, it is debatable whether it was not necessary either to go to the methods by which private ownership of marshlands or rice lands might be acquired, or else to lay some reassurance to private ownership whose titles were possibly involved under the blanket ruling. The public under those *dicta* was the beneficiary of a trust suddenly broadened from lands below low water mark to lands below high water mark. As to private ownership of marshlands and ricelands, it would appear to have been proper not only that the Court decide how title might be acquired by private persons but also how any unnecessary clouds on title might be removed.

It was not necessary to decide in the *Cape Romaine* case that titles to all marshlands be unsettled by declaring all marshlands to be soil under navigable streams and thereby impressed with a newly discovered trust for the public. Nor was it necessary to decide the *Rice Hope* case in such manner as to unsettle the titles to all ricelands subject to tidal flow by repeating the *Cape Romaine dictum.* Certainly it seems unfair that one owning marshlands or lowlands abutting fresh waters should have preferential treatment over his low-country neighbor whose lowlands happen to abut upon tidal streams, all because of distinctions at common law which our Court has heretofore regarded as artificial. The present concept of navigability, free-floating, unfettered and without authority of any decision prior to *Cape Romaine,* should be bound down to a definite limit by clear definiton.

343. 216 S. C. 500, 530, 59 S. E. 2d 132, 145 (1950).

It is also utterly inconsistent to maintain and assert the right of the state or previous sovereign to grant tide lands in the eighteenth and nineteenth centuries,[344] and then turn around in the twentieth and declare that the grantee of those solemn grants did not receive anything but a scrap of paper because the lands granted are tidelands.

Several suggestions have been made which may prove helpful, including a board to be created by the legislature to examine claims to marshlands,[345] an act permitting the state to be sued, or an act authorizing the Budget and Control Board to sell the state's interest under certain conditions.[346]

No right has been more consistently demanded, maintained and exalted in English and American law than the freedom to own land under rules which are not changed from time to time to suit the whims of the sovereign, whether King or state. Marshlands are real estate submerged by salt water twice a day, and the rules relating thereto should not be changed in the twentieth century in such a manner as to throw doubt upon what was legally done or decided in the eighteenth

344. See notes 22-28 *supra* and accompanying text.

345. "There is no board or agency set up by the Legislature to examine into the justness of such claims (of marshland titles) that we know of. This question of the rights of the State in its marshlands and the right to convey or confirm the title to them is of great importance to the State and should be settled. Apparently, the Supreme Court should pass on these matters . . . "

"We realize that legislative findings of fact are generally binding and that all acts passed by the Legislature are presumed to be constitutional. Due to the great demand for marshland and the vast increase in value in the last few years, the law should be made crystal clear . . . " Opinion Atty. General, March 27, 1959, in 1959 House Journal pages 731-732.

346. "While the Legislature has the right to confirm title to real property, this apparently means only that the Legislature may make firm an already existing claim or grant. It cannot sell or give away the property of the State without just compensation to the State. Furthermore, the Legislature cannot adjudicate claims respecting title to property as this is a judicial function. 16 C. J. S. *Constitutional Law* § 118 (1956).

"One possible reason why this marshland question has not been settled is the fact that the State cannot be sued without its consent. Lowry v. Thompson, 25 S. C. 416 (1886). It would appear proper for the Legislature to consent to suits against the State to settle these marshland questions, but that is a matter for the Legislature.

"It is our opinion that the Legislature could lawfully pass an act giving the Budget and Control Board, or other body, the right to sell the marshes belonging to the State for fair value, after due advertising, with a provision for hearing any objections by adjoining landowners, the Army Engineers, or any resources agency. This is done in other southern states and protects the right of owners of beach cottages and such property. Of course, the *Cape Romaine* case may prevent this but we believe that a proper judicial interpretation of that case would clarify the matter and permit such sales."

Opinion Atty. General, April 10, 1959, quoted in 1959 House Journal, 860 at 861-862, with veto message from Governor.

and nineteenth centuries. Certainty of property law is a necessity, and the rules relating to property and private ownership of marshlands should be certain and clear.

It is one thing to require that soil under navigable waters be held subject to the public use. It is quite another to extend the trust, as a matter of law, to marshlands, and thereby to deny the right of ownership to persons having possession and claiming under solemn grants carrying the great seal of the state as public testimony of their validity.

Free men have grown accustomed to respect the past acts of their governments. It is not any helpful contribution to that respect, to subsequently interpret these grants as granting absolutely nothing by way of title, simply because the soil of the lands granted happens to be marsh lands.