South Carolina Law Review

Volume 23 | Issue 1 Article 3

1971

The Law Pertaining to Estuarine Lands in South Carolina

William A. Clineburg
University of South Carolina School of Law

John E. Krahmer
University of South Carolina School of Law

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

 Part of the Law Commons

Recommended Citation

Clineburg, William A. and Krahmer, John E. (1971) "The Law Pertaining to Estuarine Lands in South Carolina," *South Carolina Law Review*: Vol. 23 : Iss. 1 , Article 3.
Available at: https://scholarcommons.sc.edu/sclr/vol23/iss1/3

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact digres@mailbox.sc.edu.

THE LAW PERTAINING TO ESTUARINE LANDS IN SOUTH CAROLINA*

WILLIAM A. CLINEBURG**
JOHN E. KRAHMER***

I. DESCRIPTION AND USE OF ESTUARINE AREAS

A. Description

To anyone not a long-time inhabitant of coastal areas, the very words, "estuary" and "estuarine," have a peculiar ring; and the meaning is doubly obscure. "Marsh" or "tideland" is more comfortable and, in popular terms, more understandable. However, regardless of the particular name one chooses to use, the basic meaning remains the same—an area bordering the sea and subject to the ebb and flow of the daily tides. In other words, one of those places on the earth's surface where, if you stood in the same place for 24 hours, your feet would be wet half the time and dry the other half. David A. Rice has stated the definition in this way:

> Estuarine areas are those coastal complexes where fresh water from the land meets the salt water of the sea with a daily tidal flux.[1]

In the horizontal physical extent, estuaries can vary from zero inches or feet (as, for instance, where the sea meets a vertical wall of rock) to several yards or even miles across the land. The extent, of course, is dictated by the rise and fall of the shore, the strength of the gravitational pull of the moon, and (to a lesser degree) the pull of sun.[2]

* This paper was prepared for the Belle W. Baruch Foundation by whose permission the article is here printed.

** 1916-1969. A.B., Nebraska State College, 1954; LL.B., cum laude, Nebraska University School of Law; Sterling Fellow, Yale University School of Law; private practice, Washington, D.C. and Chicago, Ill.; Visiting Assistant Professor of Law, University of South Carolina; Associate Professor of Law, University of South Carolina, 1966-1969.

*** A.B., J.D., University of Iowa; LL.M., Harvard University; Associate Professor of Law, University of South Carolina.

1. Rice, *Estuarine Lands of North Carolina: Legal Aspects of Ownership, Use and Control* 1 (1968 Study Report on Estuarine Lands published by the University of North Carolina Institute of Government at Chapel Hill, North Carolina, hereinafter cited as "Rice").

2. High tide occurs at a place of observation at intervals of 12 hours 25 minutes, and low tide at times halfway between them. These are occasions when the ocean level at the place is the highest and lowest, respectively, for that particular cycle.

Published by Scholar Commons, 1971

In the State of South Carolina, there are approximately 1,088,968 acres from the mean high water mark to the three mile State boundary.[3] Approximately 660,808 acres lie landward from the mean low water mark (estuarine areas) and 428,160 acres lie seaward.[4] That is, an area slightly less than the size of Rhode Island is twice daily covered and uncovered by water.

B. Use

1. Fishing

As would be expected, the continual salt water submergence of estuarine land makes it unfit for ordinary farming in the usual sense of crop growing and tillage. However, some "crops" —such as oysters, fish, shrimp, and crabs—can be raised or generated in estuarine areas. It has been estimated that 98% of all coastal fisheries depend on estuaries for replenishment of popular forms of edible sea life.[5]

In economic terms, the value of estuarine lands to the citizens of South Carolina who are engaged in fishing as a full-time occupation has been estimated from a low of $11,000,000 to a high of $132,000,000.[6] This does not include the value of fish taken by recreational sports fishermen which, if included, would double the dollar and cents value.[7]

2. Residential Development

A substantial portion of the estuarine lands of South Carolina can be utilized, with a minimum of dredging and filling, as residential property. Such dredging, however, destroys the value of marshland for spawning purposes and, if sufficiently extensive, can inflict permanent harm on the fishing industry, harm that is particularly direct in regard to the lessees of oyster beds. In addition, dredging by individual landowners can cause adverse effects on adjacent property owners by deposits of mud,

---

The *spring tide* occurs when the moon is new or full. Because the moon and sun are then attracting from the same or opposite directions, lunar and solar tides reinforce each other; the high tide is highest and the low tide is lowest for the month. The *neap tide* occurs when the moon is at either quarter phase. Then the moon and sun are 90° apart in the sky, so that one set of tides is partly neutralized by the other.

BAKER, ASTRONOMY §§ 5.25-.26 (7th ed. 1959).

3. Latimer, Tidelands, Submerged Lands and Navigable Waters of South Carolina 16 (Unpublished memorandum prepared for the State Attorney General's Office 1967. Hereinafter cited as "Latimer").

4. *Id.*

5. *Id.* at 13.

6. *Id.* at 13-14.

7. *Id.*

silt, or sand, or by causing geologic changes in the erosion characteristics of wave action. There is no statutory law protecting the rights of adjoining landowners against deleterious consequences resulting from construction executed by waterfront neighbors.

3. Phosphate Deposits

In a still-continuing process—the origins of which date back to prehistoric times—those species of sealife that are most clearly dependent on estuaries for existence leave a permanent record of their life on the coastline in the form of phosphate rock deposits made up of the skeletal remains of the shoreline inhabitants. Oysters are, perhaps, the best example of this process.

Phosphate rock, occurring most commonly as calcium phosphate ($Ca_3(PO_4)_2$), can be mined with dredging equipment and used commercially for a wide variety of purposes, the most common use being the manufacture of fertilizers.[8] By chemical reduction, calcium phosphate can also produce elementary phosphorus, a widely used chemical in its own right.[9] At present, the precise extent of phosphate deposits in South Carolina is unknown, but it appears extensive enough to be commercially valuable. The State Budget and Control Board is the agency charged with the responsibility of issuing leases for phosphate mining, and some leases have been issued.[10]

4. General Value to the State

An editorial which appeared in the November 6, 1966, edition of *The Charleston News and Courier*, succinctly describes both the general value of the South Carolina marshlands and the problems which the State must face in achieving the optimum development of this natural resource:

> "Once valued chiefly by fiddler crabs and oyster catchers, the tidelands of South Carolina now represent big money. A dispute over ownership until recently was of interest only to lawyers. Now it is of significance to South Carolinians in general.
>
> Thirty years ago the State Supreme Court declared much of the area covered and uncovered each day by the tides to be public property. Lower courts have re-

8. SIENKO & PLANE, CHEMISTRY 384-85 (2d ed. 1961).
9. *Id.* at 503-08.
10. Latimer, *supra* note 3, at 15.

peatedly acted to prevent unlawful invasion by profiteers. The matter nevertheless continues to be in dispute.

The speed with which pile drivers and modern earth moving equipment convert marshland into building lots threatens to make the argument academic. Developers on pursuit of big profits boldly contest what appears to be a gray area of the law. Landfill projects often are completed, we are informed, before the courts can act to halt them.

The debate over who owns the marshlands is too important to be settled by claim jumpers. In addition to possessing value as recreational and sightseeing areas, tidelands are breeding grounds for marine life of vast economic importance.

Until the courts have ruled otherwise, state officials have a duty to supply effective protection for marshlands. This includes using its policemen to bar trespassers and whatever other means are necessary to evict squatters."

C. General Observations

Although it is beyond the scope of this report to present detailed information on the possible uses of estuarine areas, the foregoing may help the reader who is unfamiliar with coastal areas to better visualize the physical characteristics and the importance of marshlands to the State of South Carolina.

II. THE HISTORICAL DEVELOPMENT OF THE LAW OF ESTUARINE OWNERSHIP

A. Under English Common Law

At early common law, with foundations firmly rooted in a feudal concept of land ownership, the King was taken to hold title to all English lands, including tidelands, and his title was of a personal proprietary nature.[11] Ownership of this type carried with it the ability to grant exclusive rights or privileges to a subject in such lands. The grant of manorial holdings to favored subjects of the Crown is an example of the exercise of this power.

This rather clear arrangement (The King owns it privately and in full; he can give it away—or sell it—to anyone he

11. Rice, *supra* note 1, at 4.

wishes.) was, however, complicated even in the early common law by an important additional rule applied in those cases of coastline manorial grants. Although the King could grant rights in tidelands, a grant of a manor on high ground (above the ordinary ebb and flow of the tide) would not carry with it any rights to adjacent lands beneath tidal waters *unless the grant specifically stated that such rights were included therein or proof of customary usage consistent with such rights could be adduced by the subject who claimed tideland ownership.*[12]

This rule might be designated a "mere" rule of construction used, for some unknown reason, only in construing grants of high lands bordering on tidal waters, especially since the same rule was not only *not used* in land grants which bordered non-tidal waters, but a completely antithetical rule was applied in those cases. A Crown grant of land adjacent to non-tidal waters automatically carried with it title to the land beneath those waters, unless the grant *specifically excluded* that land as being outside the extent of the grant.[13]

The precise reason for these differing rules applied to the construction of land grants depending on whether the land was adjacent to tidal or non-tidal waters is unclear. One can theorize, of course, that there existed a felt need, imperfectly verbalized, to distinguish tidal from non-tidal lands because of the rather greater importance of tidelands and coastal areas to the then-existing structure of English life. Perhaps the fact that England was an island largely dependent on a sea-related economy rather than a self-sustaining continent, helps justify the distinction. In any case, the "mere" rule of construction once applied to grants of land bordering tidal waters became, after Magna Carta, a rule of substance—and a firm rule at that —which made the granting of tidelands not only difficult, but actually impossible, for the King.[14]

The vehicle for this accomplishment was in reality quite simple. Instead of continuing as a method of grant interpretation, the rule was looked upon as establishing that tidelands existed as a separate type of property, one held by the King in trust for the people and incapable of being transferred to a

12. Sir Henry Constable's Case, 5 Co. Rep. 106a, 77 Eng. Rep. 218 (1601).
13. Rice, *supra* note 1, at 4.
14. *Id.* at 5 and cases there cited. Although the change occurred *after* Magna Carta, it was not necessarily *because of* Magna Carta. *See generally* the arguments contained in 1 WATERS AND WATER RIGHTS §§ 35-36 (Clark ed. 1967).

private individual.[15] Rights granted prior to the shift of tidelands from a "King as absolute owner" category (jus privatum) to a "King as trustee" category (jus publicum) were not affected but could be shown as derived from ancient grants.[16] Only Parliament, after the change was completed, had power to grant *jus publicum* lands to private persons.[17] This power derived from Parliament's role as the representative of the English people, the beneficiaries of the *jus publicum* trust lands.

By moving tidelands from the private to the public sector, the need for a precise definition of the geographic extent of the trust lands became apparent—and important. Professor Rice states the situation in these terms [footnotes have been omitted]:

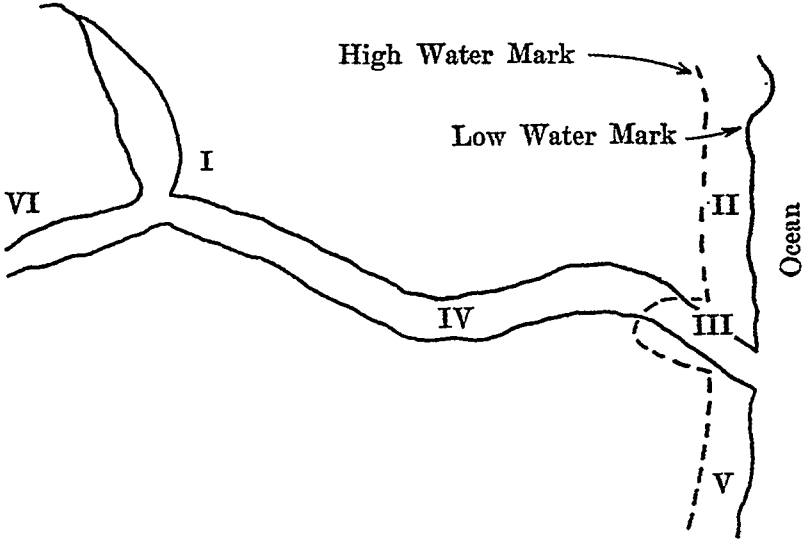
> The problem of determining whether a conveyance of high land also conveyed some part of the shore or tideland was always of some moment in England since, even before the refinement of the common law principles relating to ownership of the tidelands, there was a need to ascertain the extent of the King's grants. However, the need for resolving this question became more acute following the introduction of the division of the King's title into two separate categories since the law was then dealing with a conflict between private and public rights rather than a private controversy between the King and his subject over the terms of their private contract.
>
> In 1601, *Sir Henry Constable's Case* held that a Crown grant of land upon the seacoast was, under the general rule, a conveyance of only those lands above the high water mark. This rule applied to lands situated on the seacoast and royal rivers which, according to the 1604 decision in *The Royal Fishery of the Banne*, included "[e]very navigable river, so high as the sea flows and ebbs in it . . . ." The high water mark itself was determined by "the line of the medium high tide between the springs and the neaps" on the theory that the land below that line was "not capable of ordinary cultivation or occupation" while the land above the line was "for the most part dry and maniorable." . . .
>
> The common law of England distinguished between *jus privatum* and *jus publicum* lands on the basis of whether or not the waters covering the land were tidal

15. Rice, *supra* note 1, at 5.
16. *Id.*
17. *Id.*

> or non-tidal rather than by deciding if the waters were navigable or non-navigable. This is made entirely clear from the language employed by the court in *The Royal Fishery of the Banne*; it is even more apparent when that decision is viewed against subsequent English cases in which the common right of navigation in non-tidal waters was upheld. Thus, although the early decisions in the United States, most notably *Palmer v. Mulligan* in which Chancellor Kent wrote the opinion for the court, declared that *The Royal Fishery of the Banne* defined navigable waters in terms of the ebb and flow of the tide, it can be fairly stated that this has probably never been the English rule.[18]

It is significant to note that—in terms of ownership alone—the common law used only the tidal-nontidal test and *not* the navigable-nonnavigable test occasionally employed by later courts. The point becomes important as the two concepts slowly overlap and create confusion in later cases, as illustrated by Rice's remarks about *Palmer v. Mulligan*,[19] *supra*, and as seen in various South Carolina cases, notably *Cates v. Wadlington*[20] and *McCullough v. Wall*.[21]

The situation in England, then, shortly before the settlement of America, can be summarized by the following diagram:



18. Rice, *supra* note 1, at 6-7.
19. 3 Caines 307, 2 Am. Dec. 270 (N.Y. 1805).
20. 1 McCord 580 (S.C. 1822).
21. 4 Rich. 68, 53 Am. Dec. 715 (S.C. 1850).

CLASS I LAND: Highlands or fast lands: could be conveyed by grant from the King.

CLASS II LAND: Estuarine lands; could be conveyed only by Act of Parliament. A King's grant of Class I Land bordering Class II Land *would not* convey Class II Land, regardless of the words used.

CLASS III LANDS: Tidal, Navigable waters. Treated like Class II Land.

CLASS IV LAND: Navigable, non-tidal waters. Treated like Class I Land. Class I Land bordering Class IV Land would carry to the thread of the stream.

CLASS V LAND: Non-navigable tidal waters. Same as Class II & III.

CLASS VI LAND: Non-navigable, non-tidal waters. Same as Class IV.

B. The Colonial Period

1. Background of the Period

Although, as Rice points out,[22] settlement of that portion of North America which included the present States of North and South Carolina was first attempted by Sir Walter Raleigh under Crown letters patent of 1584, the disappearance of the Roanoke colony in 1590[23] and Raleigh's subsequent conviction of treason in 1603[24] spelled the end of this first attempt. Under charters obtained by the London Company in 1606 and 1608, portions of North Carolina were granted and settled,[25] but it was not until 1663—after the turbulent years following the reign of Charles I—that a grant was made which resulted in the settlement of South Carolina.[26] Between 1663 and 1711, the Lord Proprietors governed a single area which included both Carolinas as one unit,[27] selling land and occasionally throwing sops to the settlers in an attempt to maintain the lucrative concession. Even religious toleration was permitted so the Proprietors could maintain an advantageous market price.[28]

In 1711, to simplify the business of governing the colony, the Proprietors divided their grant lands into North and South

22. Rice, *supra* note 1, at 8.
23. BEARD & BEARD, HISTORY OF THE UNITED STATES 16-17 (Rev. ed. 1929).
24. BOWEN, THE LION AND THE THRONE, 190 (1957) (*citing* 2 Howell St. Trials 2).
25. Rice, *supra* note 1, at 9.
26. Beard & Beard, *supra* note 23, at 32.
27. *Id.* at 33.
28. *Id.*

Carolina, hoping, perhaps, to meet some of the colonists' demands for a greater voice in governmental affairs.[29] However, the division was not successful and the situation had deteriorated so far by 1729 that the Proprietors sold the lands back to the Crown, reserving "to all and every person . . . all such right, title and interest . . . as any of them now have . . . .",[30] thus protecting those who had settled lands granted by the Proprietors.

From 1729 to the formation of an independent republic in 1776, the Crown—acting through royal governors—administered the affairs of the established American colonies.[31]

2. The Legal Effects of Colonization

Although there are several legal aspects of this period which are interesting in and of themselves as studies in the best way to govern colonial areas (An Issac Walton oriented Machiavellian might collect this material and call it "The Compleat Lord Proprietor."), one matter of continuing and primary importance is the well-established rule that the Proprietors' title to grant lands could be no greater than that possessed by the King.[32] From this principle, it follows that "the Crown could give the Proprietors no greater powers to dispose of *jus publicum* lands than the Crown itself possessed."[33]

However, an important corollary to this doctrine is the extent to which colonies were bound by decisions of English courts. John M. Horlbeck, in his article on titles to South Carolina marshlands, describes the extent this way[34] [footnotes have been renumbered]:

> 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.[35] A presumption exists that no change in the common law was intended by any statute unless the language employed clearly indicates such intention.[36] But state courts, in construing the

29. *Id.*
30. Rice, *supra* note 1, at 13.
31. Beard & Beard, *supra* note 23, at 33.
32. Martin v. Waddell's Lessee, 41 U.S. (16 Pet.) 367, 413-14 (1942).
33. Rice, *supra* note 1, at 14.
34. Horlbeck, *Titles to Marshlands in South Carolina*, 14 S.C.L.Q. 288, 298 (1962).
35. 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).
36. 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).

> common law existing in the state, are not necessarily bound by decisions of courts of England.[37]

Although Horlbeck discusses the ability of *state* courts to review—and possibly reject—English cases, the comment is appropriate to the colonial period because it is through the decisions of state courts that acts of colonial governments are given present effect. With the state courts, then, not iron-clad bound by English cases, an important inquiry is whether the ebb and flow doctrine announced in *The Royal Fishery of the Banne*[38] and used to define estuarine areas as *jus publicam* lands in that case, and in England, was applicable to grants made by the Lord Proprietors in the Carolinas. This question is best answered by scrutinizing the decisions of the South Carolina Supreme Court in those cases when the Court was faced by this issue.

C. Estuarine Ownership Under State Law

1. 1777 to 1928

The first case to reach the South Carolina Supreme Court which presented an issue as to estuarine ownership was *State v. Pacific Guano Co.*, an 1884 decision.[39] The rather long passage of time since the revolution and the legal inactivity on questions of tideland ownership might seem peculiar at first glance, but the Court itself, apparently aware of the novelty (and importance) of these questions, pointed out what seems to be an entirely plausible explanation for the quiescence:

> Within a period comparatively recent, probably less than thirty years, the fortunate discovery was made that the beds and marshes of these marine channels contained large quantities of phosphatic rocks, making that valuable which before had been regarded utterly worthless as property.[40]

The case had been commenced in 1882 by an information filed by the state attorney general to recover damages from the defendant corporation for having removed large quantities of phosphate rock from the beds of various creeks situated in Beaufort County. As a part of the cause, the state, of course, claimed title to the creek beds. In defense, Pacific Guano Co. relied on a series of grants extending back to colonial times,

37. State v. Wilson, 162 S.C. 413, 161 S.E. 104 (1931).
38. Davis Rep. 55, 80 Eng. Rep. 540 (1605).
39. 22 S.C. 50 (1884).
40. *Id.* at 66.

and possession by the company's vendors of the lands in question under color of title for almost 100 years. Interestingly enough, the state did not claim the marshlands covered by the several grants, either at trial or on appeal, but focused the complaint solely on the creek beds, *i.e.*, the areas below low water mark that were permanently covered by water. The marshland ownership issue was, however, injected into the case—not by the state—but through the backdoor as an attempted defense. The Court stated the problem in this way:

> If we clearly understand the scope of the defense, it is not claimed that there ever has been an express grant for the beds in question. Such express grant for lands at all times under water, and as property regarded worthless, until the discovery of the phosphate deposits, was probably never desired or applied for; and if made, would not have been worth the cost of obtaining it, or even the paper on which it was written; but the claim is that the vendors of the defendants were for a very long time—some eighty years—in possession of the high lands of Chisolm's Island, under a plat which covered the whole island, through which most of these channels penetrate, and that possession of part with color of title to the whole island must be considered as giving title to the beds of these channels in one of two ways: either by construction of the grants of the high lands, that is to say, by force of the doctrine applicable to riparian proprietors, which, in certain cases, gives to the owner of the soil or both sides of a stream title to the bed of that stream; or, second, that such long possession of the high lands under such color of title authorizes and requires the presumption of a new grant from the state, expressly covering and giving title to the beds of these streams.[41]

Before considering these defenses, the Court embarked on a discussion of the English common law applicable to tidelands, accurately stating, "The fundamental idea was that the property in the sea and tide-waters, and in the soil and shore thereof, was in the sovereign."[42] However, the Court, relying on cases which had, themselves, only imperfectly understood the common-law situation, then went somewhat astray and introduced

41. *Id.* at 74-75.
42. *Id.* at 75.

the navigable-nonnavigable standard as a second matter to be considered. Utilizing the general principle that English decisions are not necessary binding in this country, the Court decided that only those streams which were navigable in fact were navigable in law, notwithstanding the fact that the tide might happen to ebb and flow in a particular stream and citing with approval the language of Mr. Justice Field in *The Daniel Ball*, a United States Supreme Court case, where it was said:

> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test as in England, or any test at all, of the navigability of waters. There no waters are navigable, in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tidewater and navigable water signify substantially the same thing.[43]

Turning then to the facts of the case as found by the Circuit judge, the Court decided that two of the creeks, while tidal, were not navigable and, therefore, must "go out of the case. We cannot hold that the bed of a creek not navigable, although tidal, belongs to the state to the exclusion of the riparian proprietor."[44] But as to the other creeks found to be navigable and claimed by the defendant under the theory of the first defense, the Court said:

> Do they belong to the proprietors of the high lands upon the principle of riparian ownership? We think not. These are all channels in which the tide ebbs and flows, and as to such the well established rule is, that a grant of the shore gives title only to the high water mark, the mean between extreme high and low tides. Chancellor Kent says: "It is a settled principle of the English law that the right of owners of land bounded by the sea or on navigable rivers where the tide ebbs and flows, extends to high water mark; and the shore below common, but not extraordinary high water mark, belongs to the public."[45]

With this language the Court struck down the first defense. In addition, the opinion is careful to point out that, although certain grants from the state held by the defendants purported

43. 10 Wall. (77 U.S.) 557, 563 (1871).
44. State v. Pacific Guano, *supra* note 39, at 79.
45. *Id.* at 79-80.

to convey land to the low water mark, in light of the announced rule, a serious question of the state's authority to convey this land existed but, "whether the grants of 1869 [the grants in question] were issued by proper authority and are binding upon the state, is not before us for adjudication."[46]

As for the second defense, the Court found that with the doctrine of *nullum tempus occurrit regi*[47] existing in the state before 1870, and the passage of a 40 year adverse possession statute of limitation in that year, the defendants could not establish the second defense because only 14 years had elapsed instead of the required 40.[48]

In a further discussion of this second defense, in what is rather clearly dicta, the court intimates that a special act of the legislature would be required to transfer *jus publicum* tidelands and stream beds.[49] Whether or not this position is sound must wait for later discussion.

One other point about the *Pacific Guano* case should be noted. Some writers have tended to bypass this case in favor of an earlier decision, apparently because the earlier case is represented to be the only case to which the state was a party and in which the question of title to land between high and low water mark was expressly in issue.[50] The earlier case these writers refer to was *State v. The South Carolina Phosphate Company Ltd.* (alias, *The Oak Point Mines*) reported in the appendix to 22 S.C. at 593. This Case was a Circuit Court decision handed down in 1874 that found its way into the reports ten years later when, for some unknown reason, Justice McGowan (author of the *Pacific Guano* opinion) suggested to the Court Reporter that it be printed in the appendix to Volume 22. This suggestion to the Reporter was apparently an informal one made orally, perhaps because Justic McGowan had quoted a small part of the opinion in the main case and wished the principal case to be as complete as possible. Nowhere in the *Pacific Guano* opinion does the Court officially order the *Oak Point Mines* case reported as a binding precedent or adopt the lower

46. *Id.* at 81.
47. "Time does not run against the sovereign."
48. In 1870, the state enacted a 40 year statute of limitations for adverse possession cases, then amended the statute in 1873 to reduce the required period to 20 years. The statute is now codified as S.C. CODE ANN. § 10-121 *et seq.* (1962).
49. State v. Pacific Guano Co., *supra note* 39, at 83-84.
50. Logan & Williams, *Tidelands in South Carolina: A Study in the Law of Real Property*, 15 S.C.L. REV. 657, 663 (1963).

court opinion in that case as its own. Therefore, to base arguments on the *Oak Point Mines* opinion—beyond the precise limits of language in that case actually quoted in Supreme Court opinions—would seem to be a risky business.

Following the *State v. Pacific Guano* case, there are some nine cases reported before 1928 which deal more or less directly with the questions of the extent of State ownership of tidelands and the ability of the State to grant these lands.[51] In some of these cases, the points are of minor importance, but in those cases in which the extent-of-ownership issue is important, the court consistently recognizes the common law "high-water mark" rule applied to tidal navigable streams.[52] As for the question concerning the ability of the State to grant tidelands, in those cases involving the issue, the point is either not reached[53] or the factual circumstances of the case make it appear that the general *jus publicum* rule is not appropriate in the particular case.[54] Thus, before 1928, it could be stated with some certainty that title to land between high and low water mark was in the State (with the navigable stream concept thrown in, of course), but whether or not the State could grant this land in the usual manner was a matter of serious doubt. In addition, the other method of obtaining private title to marshland that was attempted in the *Pacific Guano* case—adverse possession—was not available until 1870, and, as yet, no case has directly held an individual to have acquired good title against the State by this method.[55]

2. 1928 to 1951

In 1928, the Supreme Court handed down its opinion in *Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.*,[56] a case which since has generated what might be called

51. State v. Pinckney, 22 S.C. 484 (1884); Frampton v. Wheat, 27 S.C. 288, 3 S.E. 462 (1887); Heyward v. Farmer's Mining Co., 42 S.C. 138, 19 S.E. 963 (1894); Nathans v. Steinmeyer, 57 S.C. 386, 35 S.E. 733 (1900); West End Dev. Co. v. Thomas, 92 S.C. 229, 75 S.E. 450 (1912); Gadsden v. West Shore Inv. Co., 99 S.C. 172, 82 S.E. 1052 (1914); Haesloop v. City Council of Charleston, 123 S.C. 272, 115 S.E. 596 (1923); Town of Port Royal v. Charleston & S.C. Ry. Co., 136 S.C. 525, 134 S.E. 497 (1926); Cheves v. City Council of Charleston, 140 S. C. 423, 138 S.E. 867 (1927).

52. See, *e.g.*, State v. Pinckney, 22 S.C. 484 (1884); Heyward v. Farmer's Mining Co., 42 S.C. 138, 19 S.E. 963 (1894).

53. Heyward v. Farmer's Mining Co., 42 S.C. 138, 19 S.E. 963 (1894); Nathans v. Steinmeyer, 57 S.C. 386, 35 S.E. 733 (1900).

54. Gadsden v. West Shore Inv. Co., 99 S.C. 172, 82 S.E. 1052 (1914); Town of Port Royal v. Charleston & S.C. Ry. Co., 136 S.C. 525, 134 S.E. 497 (1926).

55. See the remarks of Logan & Williams, *supra* note 50, at 675-76.

56. 148 S.C. 428, 146 S.E. 434 (1928).

"spirited discussion" about tideland ownership. For example, it has been stated as a criticism of *Cape Romain* that "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 century."[57] Contrariwise, *Cape Romain* has also been said to be "in accord with a well-settled rule in this State, that title to land below high-water mark of tidal navigable streams is in the State."[58]

The case itself was an action by the plaintiff Land Co. to restrain the defendant canning companies from trespassing on lands claimed by the plaintiff and for damages for past acts of trespass. The defendants denied the allegations of the complaint and further claimed that they had been operating on the lands in question under a lease from the State Board of Fisheries that entitled them to engage in the several acts necessary for oyster cultivation between high and low water marks along the several streams in issue.

The case was heard by the lower court and judgment rendered for the defendants on the sole ground that the plaintiff had failed to prove title to the land between high and low water mark in the navigable streams in questions.

On appeal, by the plaintiff, the Court saw the sole question to be, "does the plaintiff have title to low water mark in the navigable streams named?"[59]

The several grants covering the plaintiff's claimed lands had all originated as grants from the State to various persons and ultimately been acquired by the plaintiff. The passage of title to the plaintiff through the various grant lines was apparently proper, and no question was raised in this regard. The fact that all the grants had originated with the State, was, however, an important element in the Court's reasoning because, to answer the primary question posed above, the Court, of necessity, had to determine the extent and character of the State's ownership in lands of the type involved in the case at hand. Only by answering this question could the Court decide whether a strict or liberal rule of construction should be applied to the grants held by the plaintiff and thus determine if title to the disputed lands had passed out of the State and vested in the plaintiff.

57. Horlbeck, *Titles to Marshlands in South Carolina, Part II,* 14 S.C.L.Q 335, 363-64 (1962).
58. 1935-36 OP. ATT'Y GEN. 258 (S.C.).
59. 148 S.C. 428, 433, 146 S.E. 434, 435 (1928).

The Court, then, to resolve this subsidiary, but essential question, held at the very beginning of the opinion that title to marshland was in the State as a trust for the benefit of the public. (Citing several cases, including *State v. Pacific Guano Co.*)

Having decided this point, the Court applied an extremely strict rule of construction to the grants in question (apparently derived from principles stated in the *Pacific Guano* case[60]) and found that none of the grants were sufficiently express to pass title from the State to the plaintiff below high water mark.

One further remark was made by the Court in *Cape Romain* concerning marshlands and it is this remark which has caused much of the subsequently difficutly:

> 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.[61]

Some writers have contended that this statement is entirely dicta and should not be read to prevent private persons from obtaining title to marshlands.[62] The State Attorney General, in numerous opinions, has consistently expressed the view that the statement is a part of the holding of the case and precludes sale of marshlands except by an act of the legislature.[63]

In the opinion of the authors of this report, neither view represents an entirely accurate reading of *Cape Romain.* The writers believe that a careful examination of the case leads to the conclusion that the actual and necessary holding of *Cape Romain* is that tidelands are owned by the State in trust for the people, and that any grant which purports to convey such land

60. The rule of construction suggested in *Pacific Guano*, 22 S.C. 50, 86 (1884) was:

> In all grants from the government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor, reversing the rule as between individuals, on the ground that the grant is supposed to be made at the solicitation of the grantee, and the form and terms of the particular instrument of grant proposed by him and submitted to the government for its allowance. But this rule applies *a fortiori* to a case where such grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land, but also a portion of that public domain which the government held in a fiduciary relation, for general and public use.

61. 148 S.C. 428, 146 S.E. 434, 437 (1928).

62. See Horlbeck, *supra* note 57, at 353; Logan & Williams, *supra* note 50, at 667.

63. Perhaps the most complete of these opinions is that dated April 2, 1957 (1956-57 OP. ATT'Y GEN. 291).

will be very strictly construed; but this is not to say that such lands can never be sold as might be indicated by the language quoted above, but rather that the ability to sell and the method of sale remain open questions under *Cape Romain.*

It is also the opinion of the present writers that the holding of *Cape Romain* is fully in accord with the early case of *Pacific Guano* and that *Cape Romain* is quite consistent with that earlier opinion.

To contend, therefore, that *Cape Romain* overturned prior legal principles and introduced uncertainty into the law is a point not well-taken. Indeed, if anything, the case reaffirmed long-standing rules of the common law.

This view of the *Cape Romain* decision obtains support from remarks by the Court itself in the 1950 case of *Rice Hope Plantation v. South Carolina Public Service Authority*[64]:

> We adhere to our opinion in [*Cape Romain*] wherein it was said, "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." 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 . . . .[65]

3. 1952 to 1969

Following the decision in the *Rice Hope* case, the arena for interpretation and clarification of estuarine law seems to have shifted to the Attorney General's Office, and through that office to several state agencies concerned with protecting this valuable state property.

Perhaps the primary questions which the Attorney General has had to face are whether or not the State can sell the tidelands to private persons and whether private persons can obtain title through adverse possession. In a lengthy opinion dated April 2, 1957, the Attorney General summarized the situation in these words:

> All of this brings us back to the conclusion that the marsh lands, under the law as it now stands, are not subject to sale by the Budget and Control Board and probably not to general sale by the Legislature. The

64. 216 S.C. 500, 59 S.E.2d 132 (1950).
65. *Id.* at 530.

> Legislature by special acts can confirm titles to individual pieces of marsh claimed by adverse possession and may be able to sell tract by tract by special acts, but as to this, we would be very doubtful until the Supreme Court passes on the matter.[66]

Regardless of the final answer to these questions, the State, at the present time, owns substantial quantities of marshland and the practical problem of management is a pressing one. There are eight separate State Agencies now handling various aspects of estuarine management and exercising concurrent (and, in some instances perhaps, conflicting) jurisdiction.[67] In addition, neighboring states and several agencies of the Federal Government have duties of control affecting marshlands in South Carolina.[68]

Because of the value and importance of marshland to the State, it would seem to be advisable to study the possibility of establishing a single agency charged with at least the duties of co-ordinating the activities of the several existing state agencies, or perhaps re-organizing the present administrative structure of controls over marshland to obtain more efficient management.

66. *Supra*, note 63, at 297.
67. These agencies include: (1) South Carolina Wildlife Resources Dep't, (a) Div'n of Game, (b) Div'n of Boating, (c) Div'n of Commercial Fisheries; (2) South Carolina Forestry Comm'n, Div'n of State Parks; (3) South Carolina Highway Dep't; (4) South Carolina Ports Auth.; (5) South Carolina Public Service Auth.; (6) South Carolina Public Service Comm'n; (7) South Carolina Soil Conservation and Drainage Districts; and (8) South Carolina Pollution Control Auth.
68. These agencies include: Federal Power Comm'n; United States Navy; United States Army, Corps of Eng'rs; and United States Coast Guard.