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Navigability--Its Meaning and Application in South Carolina

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NAVIGABILITY—ITS MEANING AND APPLICATION IN SOUTH CAROLINA

I. Introduction

Most of us are familiar, to some degree at least, with the concept of federal navigability. Streams possessing this characteristic are subject to various controls by the national government for the public welfare.

Somewhat less familiar is the meaning and applicability of the term in a state law context. In order to explore this topic, South Carolina case and statutory law have been surveyed; and, although South Carolina is by no means typical, it is probably representative of the thirteen original states—at least in their early development.

Three fairly distinct subcategories of navigability have been found to exist in this state, each with different definitions and implications. These are discussed in Section IV and are common law or technical navigability, navigability in fact, and statutory navigability.

II. Historical Prospective—Public Rights In Certain Waters

The right of the public in the freedom to use certain waters has been traced back at least to Justinian.[1] The Emperor had declared that the seas are common to all; but when he said "all," he meant "all Romans." Later, with the help of a few wars, it became settled that international waters were, indeed, "free for navigation . . . and for fishing and other public purposes for which there is any substantial demand,"[2] and the rights of sovereigns over waters were reduced to territorial limits.

Territorial waters, of course, includes, for maritime nations, inland waters and sea waters out to some limit. The limit varies considerably depending on the country and the purpose for which the delimitation is made.[3] While the competition of private, state, and federal interests, as well as foreign interests, in off-shore waters is particularly intriguing, this discussion is limited to fresh and tidal watercourses.

1. 1 Waters and Water Rights 184 (R. Clark ed. 1967).
2. *Id.* at 187.
3. For a discussion of territorial waters *see* Bishop, International Law, Cases and Materials 481-501 (2d. ed. 1962); 1 Waters and Water Rights 188-90 (R. Clark ed. 1967).

The common law of public interests in waters was, of course, inherited by this country from England. During the time that law was under development, the primary interest of the public in waterways was for transportation.[4] The same was true in this country and "[i]t is, therefore scarcely surprising that commercial navigability has been the great line of demarcation for a variety of legal purposes where inland waters are concerned."[5]

III. NAVIGABILITY IN THE UNITED STATES

Upon achieving their independence, the original states succeeded to the rights which the prior sovereign had in waters as well as other property. Thus, the control over streams used by the public as well as ownership in the beds of such streams vested in the sovereign states.[6] While the states exercised control over their navigable waters, the ultimate authority was granted to the Federal Government by the commerce clause of the Constitution.[7] Even so, the actual ownership of the streams remains in the states.[8]

The general rule, then, is that the states both own and control the navigable streams within their borders, subject to exercise of the superior right of control in the United States.[9] State and federal concepts of navigability may not agree, but when federal interests are at stake, the federal test will govern. That test was laid down in an 1870 case, *The Daniel Ball*:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are, or may be, conducted in the customary modes of trade or travel on water. And they constitute navigable waters of the United States, within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition, by themselves, or by uniting with other waters, a continued highway over which commerce is or may

4. 1 WATERS AND WATER RIGHTS 203 (R. Clark ed. 1967).
5. *Id.*
6. 3 AMERICAN LAW OF PROPERTY 249 (A. Casner ed. 1952); 1 WATERS AND WATER RIGHTS 206 (R. Clark ed. 1967).
7. U.S. CONST. art. 1 § 8.
8. Martin v. Waddell, 41 U.S. 367 (1842).
9. 3 AMERICAN LAW OF PROPERTY 245 (A. Casner ed. 1952); 1 WATERS AND WATER RIGHTS 207 (R. Clark ed. 1967).

> be, carried on with other States or foreign countries, in the customary modes in which such commerce is conducted by water.[10]

This test, as refined and interpreted, is still the federal rule.[11]

In *The Daniel Ball*,[12] the Supreme Court rejected the common law rule existing at the time of independence. In England, as well as in civil law countries, only tidewaters, those waters where the tide ebbs and flows, were considered navigable.[13] Most states, following in the federal footsteps, rejected the common law rule and even assumed title of both tidal and non-tidal stream beds susceptible of actual navigation.[14]

There are exceptions, however, to the "overwhelming majority rule of state ownership of lands beneath navigable waters,"[15] and, as we shall see, South Carolina finds itself in the minority. In the minority states, it was considered that property rights vested at the time of succession to sovereignty and that the state took title only to tidal-navigable streams while riparian owners took title to all stream beds, both navigable and non-navigable, if non-tidal.[16] Even in the minority states, however, the private ownership of the bed will not affect the rights of the public to use navigable waters.

IV. NAVIGABILITY IN SOUTH CAROLINA

The issue of navigability has arisen in a number of civil and criminal actions in this state, and all the cases in which it became a substantial issue are collected here. In order to observe the historical development, the cases are presented chronologically under more or less natural grouping into which they fall.

A. Title to Non-Tidal Stream Beds.

In *Cates v. Wadlington*,[17] suit was brought on a bond for the sale price of land conveyed by the plaintiff to the defendant. The defendant sought an adjustment of the amount due since a portion of the acreage conveyed included part of the Enoree

10. The Daniel Ball, 77 U.S. 557, 563 (1870).
11. 1 WATERS AND WATER RIGHTS 206 (R. Clark ed. 1967).
12. 77 U.S. 557 (1870).
13. 3 AMERICAN LAW OF PROPERTY 251 (A. Casner ed. 1952); 1 WATERS AND WATER RIGHTS 208 (R. Clark ed. 1967).
14. 3 AMERICAN LAW OF PROPERTY 252 (A. Casner ed. 1952); 1 WATERS AND WATER RIGHTS 207-08 (R. Clark ed. 1967).
15. 1 WATERS AND WATER RIGHTS 208 (R. Clark ed. 1967).
16. 3 AMERICAN LAW OF PROPERTY 252 (A. Casner ed. 1952).
17. 1 McCord 580 (S.C. 1822).

River, which could not, it was contended, be conveyed since it was capable of navigation. The trial court ruled that streams were proper subjects of grant even if capable of being made navigable until the state actually made them so. On appeal, the supreme court avoided the navigability issue by holding that the grantor conveyed whatever interest he had in the bed and that was what the grantee got and should pay for. The court did, by way of dictum, go on to discuss the navigability-property issues. While not necessarily dipositive of the property question, the court felt that the English rule of ebb and flow did not govern navigability in this state. The seeds of the minority rule were planted when the court found that, if the river were only capable of being made navigable, ownership of the bed might not be impaired if it were subsequently declared and made navigable. As to an actual rule of navigability, the closest that the court came was to suggest a rule of non-navigability:

> And although we cannot define by technical terms what constitutes a navigable river in this state, yet I presume we may venture to say that cannot be considered a navigable river, the natural obstructions of which prevent the passage of boats of any description whatever.[18]

In the next case, *Boatwright v. Bookman*,[19] an 1839 case, the court again avoided several navigability issues which were raised at trial. The plaintiff sued some commissioners, charged with the maintenance of fish sluices, for destroying the plaintiff's fish traps in the Congaree River. The commissioners contended that they were authorized to assure the free passage of fish in this navigable stream. The plaintiff, however, maintained that the side of the stream he used was not used or useful for fish or boat sluices and was, therefore, outside the jurisdiction of the commissioners. The question was thus raised whether a stream may be navigable in the middle and non-navigable toward the edge. The trial court bought that theory and held that even though the Congaree was navigable, the part the plaintiff had obstructed "was not to be considered a highway for the purpose of navigation . . . ."[20] On appeal, the court avoided this interesting proposition by merely holding that the

18. *Id.* at 582-83.
19. Rice 447 (S.C. 1839).
20. *Id.* at 448.

river being public, the public may trap it so long as navigation is not, as here, obstructed.

In *Jackson v. Lewis*,[21] the South Carolina Supreme Court was again asked, and again refused to decide whether there could be private ownership in the bed of a navigable stream and whether a stream could be navigable in part and non-navigable at the edge. This case was also similar to the *Boatwright*[22] facts. The plaintiff had a "fishing stand" located between an island and the west bank of the Catawba River, a portion "never used for boating." He also claimed title to the land on both banks. The defendant also claimed both banks and destroyed the fishing stand. The trial court felt that it was immaterial whether the part of the river in question was navigable or not and let the case go to the jury, reserving the question of whether there could be ownership of the bed, *i.e.*, the fishing stand. The jury found for the plaintiff since he had better title to the banks. In refusing to answer the question reserved to it, the supreme court held that, if the plaintiff's grant extended to the bed of the stream, he had exclusive fishing rights and, if it did not, he had the public right to fish under *Boatwright*; and in neither event could the defendant interfere.[23]

In *Noble v. Cunningham*[24] the court decided that a deed listing the Little River as a boundary conveyed the title to one-half the bed, since the river was non-navigable; and the grantee was required to pay for the underwater acreage.

McCullough v. Wall[25] was another fishing stand case in the same part of the Catawba River as was the one in *Jackson v. Lewis*.[26] In upholding a five dollar verdict for trespass by the defendant, the court at great length reviewed the navigability-property problem without appreciably clarifying it.

The narrow question before the court was whether the plaintiff had valid title to a rock in the river trespassed upon by the defendant. The plaintiff's claim stemmed from his alleged title in one bank. The defendant, of course, claimed that the river was navigable which negated any title to rocks or the bed of the river and gave him the right to fish, as a member of the public, from any place in the river, rock or otherwise.

21. Cheves 259 (S.C. 1840).
22. Boatwright v. Bookman, Rice 447 (S.C. 1839).
23. Jackson v. Lewis, Chevis 259 (S.C. 1840).
24. McMul. Eq. 289 (S.C. 1841).
25. 4 Rich. 68 (S.C. 1850).
26. Chevis 259 (S.C. 1840).

The thrust of the defendant's argument was that the legislature, beginning in 1795, had declared that the river "be made navigable" and that it had been. Without necessarily agreeing that it had, the court found that the plaintiff's right to the bed accrued under a grant of 1772 and that the jury had found as a fact that the river was not then navigable and so any legislation as to improving navigation would be ineffective to alter title to the bed.

By way of an alternative holding, the court placed South Carolina in the minority position discussed above. The statements in *Cates v. Wadlington*[27] to the contrary notwithstanding, "no authoritative decision has yet been made in this State which changed the common law on the subject."[28]

> By the common law, only those rivers were deemed navigable in which the tide ebbs and flows: and "grants of land bounded on rivers . . . above tide water, carry the exclusive right and title of the grantee to the centre of the stream . . . and the public, in cases where the river is navigable for boats and rafts, have an easement therein, or a right of passage as a public highway."[29]

But lest it be thought that this settled the question completely, it should be noted that the court also said:

> 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 to it by the common law.[30]

Perhaps the clearest assertion of the common law rule was stated by the Chancellor in reviewing an equity decision again denying a purchaser of land adjustment of price for acreage below an alleged navigable stream. In *Shands v. Triplet*[31] it was observed:

> It is assumed in the ground of appeal, that the soil covered by waters of a navigable river belongs to the

27. 1 McCord 580 (S.C. 1822).
28. McCullough v. Wall, 4 Rich 68 (S.C. 1850).
29. *Id.* at 88.
30. *Id.* (emphasis added).
31. 5 Rich. Eq. 76 (S.C. 1852).

> State, and not to the riparian proprietors. The term navigable is equivocal. By the common law, rivers are regarded as navigable only to such extent as the tide flows and ebbs; and the property in the beds of rivers navigable in this sense, is undoubtedly in the State. But in our statutes, and in popular speech, navigable rivers mean those which may be navigated by ships or boats; and as to rivers of this class above tide water, it is not to be conceded that the State remains owner of the beds after granting the lands on both sides.[32]

The court recognized that the common law could be altered, of course, in the public interest but was inclined to think that the courts would not do so and that "it would be inexpedient even for the Legislature to divest the proprietors of lands, bounding on rivers above tide-water, of their rights to the soil covered by the waters of the rivers."[33]

Unfortunately, the court went on to ruin any holding that might be derived from the case by stating: "If the foregoing views should be utterly unsound, still the appellant is not entitled to his motion"[34]; and holding for affirmance on other equitable grounds.

The final case in this series seems to establish the rule firmly in this state that the beds of non-tidal streams navigable in fact are subject to private ownership. In *State v. Columbia*[35] the city sought to impose a tax upon the bridge across the Congaree River. The bridge owner contended that the city's boundary was the river and that, since the bridge was, therefore, outside the city, it could not validly impose the tax. It was shown that the original layout of the city was a square which would include a good part of the river and the bridge unless the city could not own the river bed.

The court held that the public has a navigation easement in streams which are navigable in fact, yet where the streams are not technically navigable (meaning ebb and flow), the public right does not deprive the riparian of title to the center of the stream.[36]

B. The Statutory Right to Navigate.

We have seen a line of cases developing what may be con-

32. *Id.* at 77-78.
33. *Id.* at 79.
34. *Id.* at 80.
35. 27 S.C. 137, 3 S.E. 55 (1887).
36. *Id.* at 146.

sidered two "common law" concepts of navigability. True common law navigability seems to be restricted to tidal waters and in the section following this one, we will examine further, the interest of the state in those waters. "Navigability in fact" seems to be a separate common law concept giving the public the right to navigate and otherwise use the stream. In addition, we now examine situations in which the legislature created the right to navigate certain streams.

At the beginning of the nineteenth century, in this state, there began a large increase in the lumber business. As a result dams were built across streams for powering saw mills and the logs were floated down to the mills. The legislature, interested in developing the industry, foresaw the problem that new mill-dams might cut off the old ones from their supply of logs. In order to prevent that result, the legislature *declared* certain streams navigable and provided that their obstruction could be abated as a nuisance.

The first of the cases applying this rule was *State v. Thompson.*[37] The legislature had authorized the Pacolet River "to be made navigable" by a private corporation. The defendant was indicted for damming the stream and defended on the ground that, since the legislature directed that the Pacolet be "made navigable," it had declared that it was not then navigable so that the indictment would be improper. This conviction was affirmed, however, because the court found that the stream was navigable in fact and

> the appropriation by the Legislature to facilitate navigation ought not to extinguish the common law character of a river as a public highway for navigation; else we might not have, perhaps, a single such river in the State. I could conceive that the Broad river might have been such a stream, even in the hunter age, provided it was capable for and was navigated by the canoes of the day. And if the advancement of the age induced the Legislature to apply means that should render it capable of sustaining steam-boats or pole-boats, it did not appear that the stream would lose its primary dignity on that account.[38]

The next two cases arose under an 1825 Act of the Legislature providing:

37. 2 Strob. 12 (S.C. 1847).
38. *Id.* at 15.

> No person shall erect any mill dam, or other obstruction, across any stream *used* for the purposes of navigation by boats, flats or rafts of lumber or timber, without sufficient locks, slopes or canals, to admit free navigation of such streams . . . .[39]

In *State v. Cullum*[40] the defendant had been indicted for obstructing such a stream. His defense was that the Act of 1825 only affected streams then "used for purposes of navigation" and that this stream was not cleared for rafting lumber until 1830. The supreme court affirmed the conviction holding that the clearing of obstructions made the stream navigable under the Act and that "[t]he term 'used' is a participle, and may have a past, present and future meaning . . ."[41] and "refers to the use of it which should give it a public character" at the time of the defendant's act.[42]

State v. Hickson[43] was very similar with one crucial difference. Here, the defendant built his dam in 1830 *before* the stream had been cleared for rafting. His conviction was reversed by the supreme court which went on to say:

> At the time Hickson built his mill, it is very clear that Shaw's creek was not a stream used for navigation . . . . It has become so since, but that has been done by private enterprize, and neither Hickson or the Legislature have dedicated it to public use.[44]

The case seems to say that small non-navigable streams may be kept that way by the riparian proprietors merely by erecting a permanent obstruction, thus forestalling the development of navigation. The court did seem to indicate that this result might not be conclusive upon the Legislature as to "large fresh water streams, which by nature are navigable." It is difficult to determine whether the court considers the distinction to be the stream size or that the creek was made navigable by "private enterprise" and not nature or the Legislature. It is likely that the court considered that the opposite result would be to divest the owner of property rights valid when acquired.

A more modern case was *State v. Columbia Water Power Co.*[45] The State sought to enjoin the Water Company from ob-

39. VI Stat. 268 (S.C. 1825) (emphasis added).
40. 2 Spears 581 (S.C. 1844).
41. *Id.* at 585.
42. *Id.*
43. 5 Rich. 447 (S.C. 1852).
44. *Id.* at 451.
45. State v. Columbia Water Power Co., 82 S.C. 181, 63 S.E. 884 (1909).

structing the Columbia Canal by its water intake pipe located just above the surface. Since the issue was "whether in its present condition [the canal] is navigable," the court proceeded to examine that question by three approaches. Looking first to the Legislature, the court found it had intended that the canal be constructed for navigation purposes and for the purpose of supplying water to the city. In fact, it was not being used for navigation since a lock was inoperative at one end, but was being used by the Water Company for its other intended purpose—water supply. Nevertheless, the court concluded that the intended use for navigation was clear for purpose of preventing obstructions.

As to its navigability generally, the court provided what may be the clearest though strictest guidelines to that term.

> It is true, that according to the generally accepted definition, water is navigable when in its ordinary state it forms by itself or its connection with other waters a continued highway over which commerce is or may be carried in the customary mode in which such commerce is conducted by water . . . . Under the definition, a stream not naturally navigable but made so by artificial means is not navigable in a legal sense . . . . [However,] the canal is to be regarded as a part of . . . [the Broad and Congaree Rivers] and navigable, just as any other portion of them is navigable.[46]

The fact that ther was now no commerce on the canal was not controlling because

> [t]he navigability of water does not depend on actual use for navigation, but on its capacity for such use . . . . It is true that where the character of the water is in doubt, the fact that it has never been used for navigation after long settlement of the country might possibly be evidence tending to show that is was not susceptible of navigation; but it would be nothing more than evidence.[47]

In a third approach, the court found that, by the terms of the grants to the property of the canal, its continued use for navigation was required.[48]

46. *Id.* at 186, 63 S.E. at 887.
47. *Id.* at 187, 63 S.E. at 888.
48. *Adams v. Georgia-Carolina Power Co.*, 101 S.C. 170, 85 S.E. 312 (1914), was a later case in which the court refused to determine the ownership of a strip of land between the bank and the middle of the Savannah River. The court summarily found the river to be navigable.

The current legislative enactment defining navigability and requiring freedom from obstruction may be found in section 70-1 of the South Carolina Code of Laws which provides:

> All streams which have been rendered or can be rendered capable of being navigated by rafts of lumber or timber by the removal of accidental obstructions and all navigable watercourses and cuts are hereby declared navigable streams and such streams shall be common highways and forever free, as well to the inhabitants of this State as to citizens of the United States, without any tax or impost therefor, unless such tax or impost be expressly provided for by the General Assembly. If any person shall obstruct any such stream, otherwise than as in this Title provided, such person shall be guilty of a nuisance and such obstruction may be abated as other public nuisances are by law.[49]

C. Tidal-Navigable Waters.

Since it had been decided that the state interest in the beds of navigable streams was limited by the English rule of tidal waters, it is not surprising that in many of the cases involving tidal waters, the state is asserting its title to disputed marsh-type land.

In *State v. Pinckney*[50] the state sought recovery of land between the high and low-water marks of a tidal body of water. The court found the correct common law rule to be that

> [t]he space between the high and low water mark of the border of the sea is called the "shore," and belongs by the common law to the sovereign, *unless acquired by grant* from the sovereign . . . .[51]

Disregarding the early statement to the contrary, the court held that the common law was unchanged by any authoritative decision affecting title to the land.

49. S.C. CODE ANN. § 70-1 (1962). See also, S.C. CONST. art 1, § 28. But a waterway need not be navigable in order to be unobstructable as a public highway. In *Heyward v. Chisolm*, 11 Rich. 253 (S.C. 1858), a ditch containing 18 inches of water at high and none at low tide had been used for small boats for over 40 years by the public. It was found that the ditch could not be closed to the boats by the owner, though not navigable, because it had been dedicated to the public as a highway. Thus all navigable waterways may be public highways but all public highways over water need not be navigable.

50. 22 S.C. 484 (1884).

51. *Id.* at 507, *quoting from* 3 WASHBURN, REAL PROPERTY 632 (emphasis added).

State v. Pacific Guano Co.[52] arose under a statute designed to "protect the rights and interests of the state in the phosphate rocks and phosphatic deposits in the navigable streams and waters of the state . . . ."[53] Damages and an injunction were sought from the out-of-state corporate defendant. The question of interest arose as to streams which were tidal but not navigable in fact. This case is cited for the proposition that "the presence of a tide creates merely a rebuttable presumption of navigability"[54]; however, a close reading of the case reveals no such presumption. The court, on appeal, did take an unusual approach to the question. The circuit court had ruled:

> Chisolm's creek and Big creek were not navigable streams. Although the tide ebbs and flows through them, yet the conditions necessary to sustain trade or commerce of any kind do not exist . . . . [T]hey lose themselves in the marshes with which they are surrounded. They are entirely within the private estate of the owners of the island and make no connection with thoroughfares of travel or trade and are none themselves.[55]

After observing that "the fundamental idea [of the common law] was that the property in the sea and tide-waters, and in the soil and shore thereof, was in the sovereign,"[56] the court went on to sustain the opinion below as a factual question not reviewable on appeal.

> [T]he Circuit judge, notwithstanding the positive rule of the common law as to the navigability of all tidal streams, held that even tidal channels are navigable in law only when they are navigable in fact . . . and we cannot say that this was error of law . . . . These were pure findings of fact by the Circuit judge . . . .[57]
>
> We cannot hold that the bed of a creek not navigable, although tidal, belongs to the state to the exclusion of the riparian proprietor.[58]

Thus, the court took the unusual tack of allowing the circuit judge to displace the common law by declaring that it was a factual finding not subject to review in a law case.

52. 22 S.C. 50 (1884).
53. XVI Stat. 615 (S.C. 1878).
54. 3 AMERICAN LAW OF PROPERTY 253 (A. Casner ed. 1952).
55. State v. Pacific Guano, 22 S.C. 50, 68 (1884).
56. *Id.* at 75.
57. *Id.* at 77.
58. *Id.* at 79.

Interestingly, the next case some ten years later was also a law case heard by the circuit court as trier of fact. In *Heyward v. Farmers' Mining Co.*,[59] a trespass action, the trial court, using the very language used by the trial court in *Pacific Guano*,[60] found as a fact that certain streams were not navigable and was reversed on appeal. The ruling is neatly summed up by the headnote editor:

> Therefore, where the trial judge ruled that a tidal creek was not a navigable stream of the State, because it ran up into a private estate and lost itself in the surrounding marsh, because it had never been used as a highway for commerce, and there seemed to be no prospect of its ever being so used, and because it makes no connection with other highways, he erred in all of these rulings.[61]

The court considered all these conditions irrelevant to the true test—navigable capacity; "to be navigable, a stream should have sufficient depth and width to float useful commerce...."[62] As a result the plaintiff could not have title to the tidal lands, and his trespass action failed.

Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co.[63] was another trespass action to determine whether the plaintiff or the defendant had the right to harvest oysters on a large tract of land between the high and low-water mark of a tidal navigable stream.

The contest was between one who held title under a grant from the state and one who held under a lease by a state commission. The court found for the lessee stating: "The title to land below high-water mark on tidal navigable streams, under the well-settled rule, [citing nothing] is in the State, not for the purpose of sale, but to be held in trust for public purposes."[64] Dissenting, Justice Cothran thought it was too much to swallow for a state grant of land, purporting to convey over 34,000 acres, to convey effectively only 6.2 acres and further thought that only the land below low-water mark was to be held in trust for

59. 42 S.C. 138, 19 S.E. 64 (1894).
60. State v. Pacific Guano, 22 S.C. 50 (1884).
61. Heyward v. Farmers Mining Co., 42 S.C. 138, 19 S.E. 64 (1894) (headnote 8).
62. *Id.* at 150.
63. 148 S.C. 428, 146 S.E. 434 (1926).
64. *Id.*

the public and that this land was held in a more proprietary function.[65]

If there is justification in the majority view, it may be extracted from the last case in this series, *Early v. South Carolina Public Service Authority*.[66] The plaintiff sought compensation in an inverse condemnation proceeding for damages brought about by the backing of salt water into the otherwise fresh water river. The court, in setting the rights and limits of the state held:

> The right of the sovereign, in the exercise of the navigation servitude, to take or damage or destroy private property without obligation to compensate therefor extends to the bed of the navigable stream, *i.e.* to mean high water mark on either bank—and no farther; for damage beyond that boundary the constitution requires just compensation.[67]

Thus, the reservation of the title between high and low-water in the state allows the freedom and flexibility necessary, in some cases, to exercise the navigation servitude without the requirement of compensation.

V. CONCLUSION

In summarizing the law of navigability in South Carolina, one is tempted to repeat the oft-quoted words of Chancellor Wardlaw: "The term navigable is equivocal."[68] Perhaps, at least we could say that the central factor is "navigability in fact" which only refers to the natural capacity of a stream to be useful to commerce. It might be thought that the legislature could have aided the simplification and clarification of the concept by defining the term, yet we have seen instances in which the declaration of the legislature was unavailing either in declaring navigable a stream which had been non-navigable in fact[69] or in negating the navigability of a stream navigable in fact.[70] It may even be doubtful that a legislative enactment intended to displace the common law on this subject would be

65. *Id.* at 444-45 (dissenting opinion). The emphasized language in *Pinckney v. State, supra* note 45, would seem to support this position.
66. 228 S.C. 392, 90 S.E.2d 472 (1955).
67. *Id.* at 407.
68. Shands v. Triplet, 5 Rich. Eq. 76, 77-78 (S.C. 1852).
69. State v. Hickson, 5 Rich. 447 (S.C. 1852); McCullough v. Wall, 4 Rich. 68 (S.C. 1850).
70. State v. Pacific Guano Co., 22 S.C. 50 (1884).

effective in the face of vested property rights. And finally, we have seen the most easily administered rule of navigability—technical or tidal navigability—modified by the superimposition of navigability in fact.[71] This, too, may have resulted in the vesting of rights and it would probably be difficult to restore the state's rights in tidal-non-navigable lands.

Court-made navigability may be a useful concept; it at least seems to be a permanent fixture, but it is certainly equivocal.

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71. Early v. South Carolina Public Serv. Auth., 228 S.C. 392, 90 S.E. 2d 472 (1955).