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Tidelands and the Public Trust: An Application for South Carolina*

Bradford W. Wyche**

INTRODUCTION

Once regarded as "utterly worthless as property,"1 the tidelands2 of the coastal states—land located between the mean low and mean high water marks3—are now recognized widely as resources of immense public value.4 The Connecticut Superior Court documents this changed attitude in Rykar Industrial Corporation v. Gill:5

[W]e now know that salt marshes have a much greater value. As hydrologic sponges they absorb large quantities of water during severe tides, thus containing the spread of flood waters. As balance wheels in the ecosystem, they sop up excess nutrients for later release when the nutrient supply is low. As sedimentary catch ba-

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1. State v. Pacific Guano Co., 22 S.C. 50, 66 (1884). See also Chisolm v. Caines, 67 F. 285, 291 (D. S.C. 1894) ("[T]hese mud shoals . . . are not aids to, but obstructions to, navigation . . . "). Such attitudes, coupled with the development of the nation's coastal zone to accommodate population and industrial growth, led to widespread destruction of the tidelands. From 1922 to 1954, more than one-quarter of the country's tidal marsh was destroyed by filling, digging, draining, and other construction. S. REP. No. 733, 92nd Cong., 2nd Sess. 2 (1972) (quoting THE INSTITUTE OF ECOLOGY, MAN IN THE LIVING ENVIRONMENT 244 (Workshop on Global Ecological Problems Report, 1971)).
2. Salt marsh, marshland, tidal marsh, estuarine land, foreshore, and intertidal zone are other terms commonly used to describe this area. An estuary may be defined as "a semi-enclosed coastal body of water which has a free connection with the open sea." E. ODUM, FUNDAMENTALS OF ECOLOGY 352 (3d ed. 1971). Strictly speaking, estuarine lands include both the tidelands and submerged lands.
3. The United States Supreme Court has approved the generally accepted definition of mean high water mark as "the average height of all the high waters over . . . a period of 18.6 years." Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10, 26-27 (1935), rehearing denied, 296 U.S. 664 (1935). See generally Maloney & Ausness, The Use and Legal Significance of the Mean High Water Mark in Coastal Boundary Mapping, 53 N.C. L. REV. 185 (1974).
sins, they serve as natural depositories for accumulations of sediment brought in by the tide, thus keeping the channels free for navigation. As nurseries, they supply nutrients to shell-fish, crustaceans and other marine life. As natural refuges they act as habitats for wild life and as a way station for migratory waterfowl. For all these reasons, it is obvious that the state has a great stake in the preservation of tidal marshland.

Because these lands are of such great importance, courts have generally applied the public trust doctrine to tidelands. Under the doctrine, tidelands, as well as lands underlying navigable, non-tidal waters, are held in trust for the benefit of the public. The owner is deemed to hold his title—the *jus privatum*—subject to the paramount rights of the public in the lands—the *jus publicum*. Courts have relied on this doctrine to enjoin a private tidelands owner from using his property in a manner injurious to the public and to rescind a legislative grant of state-owned tidelands to a private person solely for private purposes. Used in this manner, the public trust doctrine has proven to be an effective judicial tool for affording protection against the abuse and destruction of the remaining tidal areas.

The protection of the tidelands is of national importance because the tidelands occupy a large portion of the nation’s coastal zone and perform vital functions in the coastal ecosystem. Yet the public trust doctrine is a tool largely used by state courts to protect lands located in the particular state. Consequently, a specific analysis of the applicability of the doctrine and the attendant legal issues in one state will not only help to elucidate the law in that state, but will also indicate many of the issues that will be found in other jurisdictions.

Protection of the tidelands is of particular interest in South Carolina. Nearly a half-million acres of tidelands lie along the South Carolina coast;

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6. *Id.* at 20,228.
submerged twice daily by the tides, this vast area constitutes twenty-six percent of the total tidelands acreage on the Atlantic coast. The size of the area and its ecological and recreational importance would seem to require the most stringent protection possible.

Whether those tidelands are held in trust for the public benefit in South Carolina, however, is open to question. In State v. Hardee, Justice Bussey of the South Carolina Supreme Court concurred with the result reached in the majority decision, but concluded in a separate opinion that only submerged lands are held in the public trust. According to Justice Bussey, the tidelands are merely "vacant lands subject to grant and private ownership as any other vacant lands." Several commentators also support this position.

The main purpose of this Article is to re-examine the conclusions drawn by Justice Bussey and others. By analyzing the common law, South Carolina statutory and case law, and the law in other jurisdictions, this Article seeks to demonstrate that a tidelands trust does exist in the state. An important preliminary question concerns the ownership of the tidelands.

I

WHO OWNS THE TIDELANDS?

A. Geographic Components of the Coastal Zone

The coastal zone of an American state can be divided, in order of emergence from the ocean bed, into the following geographic components: (1) outer continental shelf lands; (2) submerged lands; (3) tidelands; and (4) fast land. Outer continental shelf lands refer to that area located seaward of the state’s jurisdictional limit to the edge of the continental shelf. Under

13. Submerged lands are only those lands below the mean low water mark, whereas tidelands are those lands between the mean high water and mean low water marks. See Figure 1, and text accompanying note 17 infra.
14. 259 S.C. at 550, 193 S.E.2d at 504.
17. See Figure 1.
19. Under the Convention of the Continental Shelf, done Apr. 29, 1958, 15 U.S.T. 471,
the Outer Continental Shelf Lands Act, this area is subject to the jurisdiction and control of the federal government.

The term "submerged lands" refers to the area located between the mean low water mark and the state's jurisdictional limit. The Submerged Lands Act of 1953 reversed the effect of the holding of the United States Supreme Court in the so-called "Tidelands Oil Cases" and assigned to the respective states (or to their lawfully entitled grantees) title to both the submerged lands and tidelands, subject to the authority of the federal government to regulate and control these areas "for the constitutional purposes of commerce, navigation, national defense, and international affairs."

It is important to recognize that the "Tidelands Oil Cases" did not consider the question of ownership of those lands above the mean low water mark. Following the Revolutionary War, the original states succeeded to all the rights and interests of the British Crown in the tidelands; lands not previously claimed by the original states were held by the federal government in trust for the future states. Consequently, it has long been settled that the ownership of these lands is an issue to be determined solely by reference to state law. In the subsequent sections, following a review of the English common law, the important tidelands ownership cases in South Carolina are analyzed in an effort to discern the applicable state law.

T.I.A.S. No. 5578, 499 U.N.T.S. 311, the edge of the continental shelf is that point which corresponds to a depth of 200 meters "or beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources" of the ocean floor. Id. art. 1.

B. The Rule at Common Law

Although South Carolina state judges are not necessarily bound by decisions of the English courts, there is a presumption that the common law remains in force in South Carolina unless it has been repealed or modified by statute. For this reason, it is important to consider the development of the English common law concerning the ownership of tidelands and submerged lands.

Under the feudal system that prevailed in England after the Norman Conquest, the Crown held title to all lands in the kingdom, including the tidelands, as private property to be used for its own benefit. The king was able to grant large tracts of land to particular subjects in exchange for promises of support and allegiance. Because the tidelands were considered as "a parcel of the manor," it was presumed that grants of land bordered by tidal streams or the sea extended to the mean low water mark.

As grants from the Crown increased in number, most of the English coast eventually fell under private control—a situation that led to widespread public and commercial inconvenience. Concerned by this development, Elizabeth I, in 1569, commissioned Thomas Digges to devise a method whereby the Crown could regain control over the tidelands. Digges, an ingenious lawyer, responded with the so-called prima facie theory, under which it was presumed that grants of property abutting tidal waters did not operate to convey the tidelands unless there were specific words evincing such an intent in the deed. Because the early grants of coastal land generally were imprecise and incomplete, the theory, if accepted, would have returned most of the country's tidelands to the Crown. The Queen adopted Digges' proposal, but the English courts refused for some time to accept it. However, with the publication in 1787 of Lord Matthew Hale's treatise, De Jure Maris, the prima facie theory became a firmly established rule of the English common law. Lord Hale restated Digges' thesis in the following manner:

The shore is that ground that is between the ordinary highwater and low-water mark. This doth prima facie and of common right belong

26. For a comprehensive historical analysis, see Rice, Estuarine Land of North Carolina: Legal Aspect of Ownership, Use and Control, 46 N.C. L. Rev. 779, 781-85 (1968); Smith & Sammons, Public Rights in Georgia's Tidelands, 9 Ga. L. Rev. 79, 81-89 (1974); The Public Trust in Tidal Areas, supra note 8; Deveney, supra note 8, at 41-52.
28. Smith & Sammons, supra note 26, at 82. Not until after the signing of the Magna Charta, in 1215, were any rights in tidal areas asserted on behalf of the public. Id. at 83.
29. Id. at 82.
30. Id. at 84. In the Queen's view, the multitude of private property holdings along the coast threatened England's maritime power. Id.
31. Id. at 85.
32. Stone, supra note 7, at 190.
to the king, both in the shore of the sea and the shore of the arms of
the sea.\textsuperscript{33}

The courts immediately accepted the doctrine,\textsuperscript{34} and today it remains a
fundamental principle of the English law of tidelands.\textsuperscript{35}

C. The Rule in South Carolina

1. Presumption in Favor of the State

In 1663, Charles II granted to the Lord Proprietors the lands that
presently comprise the states of North Carolina and South Carolina "to-
gether with all and singular ports, harbors, bays, rivers, isles, and islets
. . . situate or being within the bounds or limits last before mentioned . . .
the fishings of all sorts of fish, whales, sturgeons, and all other royal fish in
the sea, bays, islets and rivers . . . together with the royalty of the sea upon
the coast."\textsuperscript{36} Under this charter, the Lord Proprietors administered the
affairs of South Carolina until 1719.\textsuperscript{37} In 1712, an act was passed specifi-
cally stating that the English common law applied with full force and effect
in South Carolina.\textsuperscript{38} With the overthrow of South Carolina's proprietary
government in 1719, the Crown—acting through its royal governors—
assumed control of South Carolina and the other American colonies until
1776. After the Revolution, the state of South Carolina succeeded to all the
territorial rights of the British Crown and became the owner in fee of all
ungranted land within its borders.\textsuperscript{39}

During the period of colonial rule, the Lord Proprietors and royal
governors granted extensive tracts of low country land to private persons in
South Carolina;\textsuperscript{40} after the Revolution, the state assumed and exercised this

\textsuperscript{33} M. Hale, De Jure Maris (1787), \textit{quoted in} Stone, \textit{supra} note 7, at 191 n.54. Note that this rule of construction does not apply to a grant of land abutting non-tidal waters, in which case it is presumed that the grantee's title extends to the center of the stream bed. See text accompanying note 45 infra.

\textsuperscript{34} \textit{See, e.g.,} Attorney-General v. Burridge, 147 Eng. Rep. 335, 342 (Ex. 1822) ("It is a doctrine of ancient establishment, that the shore between the high and low-water marks belongs prima facie to the King . . . ").

\textsuperscript{35} In reviewing the English common law, the United States Supreme Court stated:
It is equally well settled that a grant from the sovereign of land bounded by the sea, or by any navigable tide water, does not pass any title below high-water mark, unless either the language of the grant or long usage under it, clearly indicates that such was the intention.
Shively v. Bowlby, 152 U.S. 1, 13 (1894).

\textsuperscript{36} Rice, \textit{supra} note 26, at 784.

\textsuperscript{37} The Carolinas were governed as a single colonial unit until 1711, and thereafter were governed as separate colonies.

\textsuperscript{38} Sec. 5, 2 S.C. Stats. 401, 413-14 (Cooper ed. 1837), \textit{cited in} C. Leavell, Legal Aspects of Ownership and Use of Estuarine Areas In Georgia and South Carolina 42 n.187 (Institute of Government, University of Georgia 1971).


\textsuperscript{40} Statutes expressly validate titles to land derived from proprietary grants, S.C. Code § 27-11-20 (1976), as well as titles claimed under actual possession for five years prior to July 4, 1776. \textit{Id.} § 27-11-70.
power. Whether these grants conveyed title to lands below the mean high water mark is an important issue that has confronted the South Carolina Supreme Court on several occasions.

The first case in which the state court addressed this issue was *State v. Pinckney*. Both the state and defendants claimed ownership of nearly 6,000 acres of phosphate-rich tidelands abutting Morgan Island in Beaufort County. Adhering to the "well-established common law rule," the court held that the tax sale certificate, on which defendants relied, conveyed title only "down to ordinary high-water mark, excluding all the marsh below that line, and subject to the daily ebb and flow of the tides." Therefore, the state owned the tidelands and was entitled to recover damages for the minerals removed from the area by defendants.

In *Cape Romain Land & Improvement Company v. Georgia Carolina Canning Company*, the leading tidelands case in South Carolina, the plaintiff sought damages and an injunction restraining the defendants from gathering oysters between the mean high and mean low water marks in certain tidal streams on an approximately 34,000-acre tract claimed by the plaintiff. Defendants contended that they had a valid lease from the State Board of Fisheries and were entitled to collect oysters from the streams in question. Plaintiff claimed ownership of the entire tract by virtue of seven original grants from the state to plaintiff's predecessors in title.

The court announced that the following rule applied to the construction of these grants:

> When a body of land is bounded by a non-navigable stream, the general rule is that the boundary line is the middle of the stream, whereas, in the case of a tidal navigable stream, the boundary line is high-water mark, in the absence of more specific language showing that it was intended to go below high-water mark, and the portion of land between high- and low-water mark remains in the state in trust for the benefit of the public interest.

41. 22 S.C. 484 (1884). *State v. Pacific Guano Co.*, 22 S.C. 50 (1884), decided in the same year, involved the ownership of submerged lands, that is, lands below the mean low water mark in certain tidal channels. There the court upheld the state's claim to these lands, except for the beds of two streams which were found to be non-navigable. See text accompanying notes 54-56 infra.

42. 22 S.C. at 507.

43. *Id.* The court did find that 120 acres of tidelands belonged to defendants on the basis of a prior grant from the state to one of their predecessors in title. *Id.* at 498-99.

44. 148 S.C. 428, 146 S.E. 434 (1928).

One of the original grants through which plaintiff claimed title purported "to convey a plantation or tract of land containing fifteen islands * * * containing 16,992 Acres," bounded by Atlantic Ocean, Bull's Bay, and creeks and marshes." The other six grants contained similar language. Despite the specific notation of acreage and reference to "creeks and marshes" in the grants, the court found that the absence of the talisman phrase "to low water mark" was fatal to plaintiff's claim. Title to the tidelands remained in the state, and defendants were lawfully authorized under the state lease to enter and work thereon.

The striking fact in Cape Romain is that all but 6.2 acres of the 34,000-acre tract were located below the mean high water mark. The dissent, while recognizing the general applicability of a rule of presumption in favor of the state, concluded that since virtually all of the land was situated below the mean high water mark, the state must have intended to grant something, namely the tidelands.

In State v. Hardee and the two recent cases of State v. Griffith and State v. Yelsen Land Company, the court reaffirmed Cape Romain and found the language of the original grants relied on by respondents in each case to be insufficient to signify an intent to convey title beyond the mean high water mark. In Yelsen Land Company, for example, the grant conveyed an island "bounded to the North by a small inlet passing between the said island and Morris's Island, to the South by an inlet called the Folly Inlet, to the East by the Atlantic Ocean, and to the West by a sound or Creek passing between the said Middle Bay Island and the other island aforesaid." The court held that this description was inadequate to rebut the presumption that the state owns all lands below the mean high water mark. As in Cape Romain, the absence of a specific reference to the "low water mark" as the boundary of the tract granted was fatal to respondents' claim of title.

On the other hand, in Lane v. McEachern, the claimant succeeded in proving title to an area of tidelands in spite of the fact that the original grant made no reference to the low water mark. In that case, however, the state had stipulated that the entire tract in dispute was located below the mean high water mark. The court held that such an admission conclusively showed that title extended to the low water mark; otherwise, the grant would have conveyed nothing.

46. 148 S.C. at 440, 146 S.E. at 438 (Cothran, J., dissenting).
51. Id. at 81, 216 S.E.2d at 878.
52. 251 S.C. 272, 162 S.E.2d 174 (1968) (per curiam).
53. See also Conch Creek Corp. v. Guess, 263 S.C. 211, 209 S.E.2d 560 (1974), where the state admitted on demurrer that the entire tract was below the mean high water mark. The
Consequently, Cape Romain and its progeny—Hardee, Griffith, and Yelsen Land Company—still stand for the proposition that as long as only a small fraction of the tract in question is located above the mean high water mark, title to lands below this mark remains in the state, unless the claimant: (1) is able to produce an unbroken chain of title back to an original grant from the Lord Proprietors, the Crown, or the state; and (2) is able to point out specific language in the grant evincing an intent to convey to the mean low water mark. It appears that such an intent can be demonstrated only if the original grant actually contains the words "to low water mark."

2. The Navigability Question

At common law, the prima facie rule favoring state ownership of tidelands applied whenever the tract in question was bordered by tidal waters; the navigability of these waters was immaterial since all tidal streams were deemed navigable. Several South Carolina cases suggest, however, that application of the prima facie rule in this state may depend on the navigability in fact of the streams bordering the tract. In State v. Pacific Guano Company, after overturning the common law doctrine that tidal streams are navigable per se in favor of a test of navigability in fact, the court held that the beds of two non-navigable, tidal streams belonged to the riparian owner vis-a-vis the state. In Heyward v. Farmers' Mining Company, the court stated, on remand, that "if the plaintiff can trace title back to a grant from the State to land covered by tidal though not navigable waters, the State would be estopped by its grant." In Cape Romain, the rule of construction adopted by the court literally means that the boundary line of a tract bounded by a non-navigable tidal stream would extend to the center of the stream, even though the original grant expressed no such intention. Thus, the rule could be interpreted as requiring the state to show both tidal character and navigability of the border stream in order to assert its presumed title to the tidelands and submerged lands in and adjacent to the stream.

There are, however, frequent pronouncements to the contrary by the court that suggest that the common law prima facie rule has not been altered in South Carolina. In Pacific Guano, after holding that the beds of the non-

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54. Horlbeck, supra note 15, at 335. See also text accompanying notes 93-95 infra.
55. 22 S.C. 50 (1884).
56. Id. at 79.
57. 42 S.C. 138, 19 S.E. 963 (1894).
58. Id. at 156-57, 19 S.E. at 973.
59. This rule, quoted in text accompanying note 45 supra, was also recited by the court in State v. Hardee, 259 S.C. 535, 539, 193 S.E.2d 497, 499 (1972).
navigable streams belonged to the riparian, the court explicitly reaffirmed "the [prima facie] rule of the common law as to boundaries on arms of the sea." In State v. Pinckney, the court cited the common law rule with approval: "If the boundary be a navigable stream, that is, one in which the tide ebbs and flows, the land extends only to the water's edge, or to the high-water mark." In Cape Romain itself, the court quoted the following passage from the United States Supreme Court's decision in Hardin v. Jordan: "With regard to grants of the government for lands bordering tide water, it has been distinctly settled that they only extend to high-water mark . . . ." The court in Cape Romain also referred to the affirmation of the common law rule by Justice McGowan in Pacific Guano. Most recently, in Yelsen Land Company, the court stated that the presumption in favor of the state is raised whenever "arms of the Atlantic Ocean which are subject to the ebb and flow of the tides" are named as boundaries in the original grant. The fact that navigability was not mentioned suggests that only the tidal character of the border stream was considered significant.

Therefore, despite the court's frequently careless use of the terms "tidal" and "navigable," it appears that the common law prima facie rule has not been altered in South Carolina. For the purpose of resolving boundary disputes in tidal areas, the court seems to consider the two terms synonymous. The common law rule is a preferable rule, because it facilitates the interpretation of grants and determination of boundaries, obviates the necessity of determining navigability, and protects the public interest in all tidelands rather than just those located along "navigable" streams. Whatever relevance the concept of navigable waters may have in other contexts, it should play no role in the resolution of tideland ownership disputes in South Carolina.

3. Section 22 of the South Carolina Coastal Zone Management Act of 1977

In 1977, the South Carolina General Assembly enacted the South

60. 22 S.C. at 79-80. This apparent inconsistency perhaps can be explained by the fact that the two streams found to be non-navigable did not border the tract, but rather flowed through it. In Farmers' Mining, the watercourse on which the alleged acts of trespass occurred also was not a border stream.
61. 22 S.C. at 507.
63. Id. at 381, quoted in 148 S.C. at 435, 146 S.E. at 437.
64. 148 S.C. at 434, 146 S.E. at 436.
65. 265 S.C. at 81-82, 216 S.E.2d at 878.
66. The court has never considered a case in which a tidal stream bordering the tract in question was deemed non-navigable.
67. It should be noted that under the Farmers' Mining test for navigable waters and S.C. Code § 49-1-10 (1976) (as interpreted by the State Attorney General), it is probable that even the smallest tidal inlet would qualify as a navigable stream, thereby mooting this entire question. See text accompanying notes 90-110 infra.
Carolina Coastal Zone Management Act. The Act creates a new state agency, the Coastal Council, and empowers it to regulate certain uses in specified areas of the coastal zone. Of particular interest here is Section 22 of the Act, added by the legislature primarily to avoid a gubernatorial veto of the Act.

Under this section, any claimant may bring suit against the state to establish an interest in or title to a tract of tidelands. Unfortunately, the imprecise language of the section makes it impossible to determine exactly which areas are subject to such suits. For the purposes of Section 22, "tidelands" are defined as all lands, except beaches, in the eight coastal counties "between the mean high-water mark and the mean low-water mark of navigable waters, without regard to the degree of salinity of such waters." The legislature presumably intended to bring within this definition all lands below the mean high and mean low water marks that are subject to tidal influences. However, the use of the broad term—"navigable waters"—leaves this interpretation open to question. Because the Act does not define "navigable waters," it is necessary to rely on South Carolina law which, as we shall see, provides no clear answers. Under a narrow interpretation of navigable waters, a substantial portion of the state's tidelands would be beyond the purview of Section 22.

Of much greater significance is Section 22(C). In effect, this subsection confirms the rule in Cape Romain that the state comes into court with a heavy presumption of ownership. Nothing in Section 22 or the rest of the Act alters or in any respect affects this presumption. Therefore, a Section 22 claimant still will be required to trace an unbroken chain of title back to the sovereign and to point out specific language in the original grant evincing an intent to convey to the mean low water mark. Although Section 22(B) authorizes trial by jury, the majority of cases will be heard only by the courts, since the claimants will be unable, as a matter of law, to prove the existence of these elements; most of the original grants do not contain the required language, i.e., "low water mark." Thus, even though the existence of Section 22 may lead to an increase in the number of cases challenging title to these lands, South Carolina's title to the tidelands will remain secure.

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70. Governor Edwards vetoed both coastal zone management bills passed by the South Carolina General Assembly in 1976, principally because they contained no provision aimed at protecting the rights of private claimants to the tidelands. See Mason, "Ownership" Tangles Tidelands Issue, GREENVILLE (S.C.) NEWS, Feb. 16, 1977, at 1-A, col. 1.

71. S.C. CODE § 48-39-220(A) (Supp. 1977). The exclusion of salinity as a criterion makes it possible for claimants to non-tidal areas to use this section.

72. See text accompanying notes 90-110 infra.

73. See S.C. CODE § 48-39-190 (Supp. 1977) ("Nothing in this act shall affect the status of the title of the State or any person to any land below the mean high water mark.")
D. Adverse Possession of Tidelands

In 1870, the legislature abolished by statute the doctrine of *nullum tempus occurrit regi*\(^7\) and subjected the state to a twenty-year statute of limitations "in respect to any real property or the issues or profits there-of."\(^7\) In South Carolina, no private claimant to tidelands has ever successfully invoked this provision. In the early cases—*Pacific Guano, Pinckney,* and *Farmers' Mining*—it was held inapplicable since the requisite period of time had not run. In *Cape Romain,* the court sustained the circuit judge's finding of insufficient proof of adverse possession.\(^7\) In *Yelsen Land Company,* the claimants predicated their plea of adverse possession solely on a presumption of possession springing from an alleged grant from the state. The court rejected the plea on grounds that the claimants had failed to establish their title to the tidelands, since the grant did not convey any land beyond the mean high water mark.\(^7\)

Whether there is a realistic possibility of acquiring title to tidelands in South Carolina through adverse possession is doubtful.\(^7\) Proving the requisite acts of such possession—open, notorious, hostile, and continuous use for twenty years of land immersed daily by the tides—would be difficult, if not impossible.\(^7\) Moreover, if the lands are held in trust for public purposes, it may be that no plea of adverse possession will succeed.\(^8\)

### II

ARE THE TIDELANDS HELD IN TRUST IN SOUTH CAROLINA?

Once the title to the tidelands has been ascertained, the next question is whether the owner of the lands—either the state or an individual—holds such property in trust for the benefit of the public. Opponents of the tidelands trust theory contend that only the submerged lands are subject to the *jus publicum.* However, to refute that contention, this section ex-

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\(^7\) *S.C. Code* § 15-3-310 (1976). Oddly enough, the court has never construed this provision.
\(^7\) 148 S.C. at 438, 146 S.E. at 438.
\(^7\) 265 S.C. at 83-84, 216 S.E.2d at 879. If appellants had based their claim only on the plea of adverse possession and not on the grant, they probably would have lost. *See Annotation, Adverse Possession—Public Property, 55 A.L.R. 2d 554, 587* (stating that the general rule is that title to tidelands cannot be acquired by adverse possession or prescription).
\(^7\) It should be noted, however, that the South Carolina Constitution allows the legislature to confirm title to state lands in individuals claiming through adverse possession. *S.C. Const.* art. 3, § 31.
\(^7\) *See C. Leavell, supra* note 38, at 71, 108 n.306; *Logan & Williams, supra* note 15, at 675-76 (discussing specific acts constituting adverse possession).
\(^7\) *In State v. Hardee,* the state analogized tidelands to public highways, against which adverse possession does not run. Brief for Respondent at 14, *State v. Hardee, 259 S.C. 535, 193 S.E.2d 497* (1972). *Cf. Outlaw v. Mosie, 222 S.C. 24, 71 S.E.2d 509* (1952) (noting that property dedicated to public use cannot be acquired by adverse possession, but suggesting that adverse possession might nevertheless be successful where the equities are overwhelmingly on the side of the one who held adversely).
amines four sources of law which demonstrate that a tidelands trust in South Carolina does exist. These sources are: (1) the common law; (2) the state constitution; (3) case law; and (4) statutory law.

A. The Rule at Common Law

The roots of the modern public trust doctrine extend back to the Roman law concept of *res communes*, which recognized that "the air, running water, the sea, and consequently the seashore" were common to all people and thus not subject to any type of private control. After the decline of the Roman Empire, this concept fell into disuse; as discussed previously, local lords in England subsequently acquired exclusive rights to most of the English coast. Although adoption of the Magna Charta signaled the advent of a gradual return to the recognition of public rights in tidal areas, not until the publication in 1787 of Lord Hale's treatise, *De Jure Maris*, was broad based protection of the public interest finally achieved. Lord Hale advanced the argument that the private title to lands below the mean high water mark, the *jus privatum*, was held subject to the paramount rights of the public in this area, the *jus publicum*. Like the *prima facie* doctrine applicable to the construction of grants from the sovereign, this thesis also became a firmly established rule of the English common law.

The corpus of this public trust included all lands below the mean high water mark—not only the submerged lands. As the United States Supreme Court noted in *Shively v. Bowlby*:

In England, from the time of Lord Hale, it has been treated as settled that title in the soil of the sea, or of the arms of the sea, below *ordinary high water mark*, is in the king, except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage . . . and that this title, *jus privatum*, whether in the king or in a subject, is held subject to the public right of navigation and fishing.

The purpose of the trust was to protect England's position as a maritime power and to preserve the common rights of navigation and fishing in tidal waters. The doctrine prevented the Crown or an individual from using, managing, or disposing of trust property in a manner which would infringe upon the *jus publicum*. A grantee of such property was subjected to the same limitations as those imposed on his grantor.

82. M. Hale, *supra* note 33.
83. Smith & Sammons, *supra* note 26, at 85-86.
84. 152 U.S. 1 (1894).
85. Id. at 13 (emphasis added) (citations omitted). *See also* Hardin v. Jordan, 140 U.S. 371, 381-82 (1891) (land below the high water mark, belonging to the state, is to be held in trust for the public).
By the mid-1700s, Parliament had effectively revoked the Crown's ability to alienate \textit{jus publicum} lands. Thereafter, only Parliament, as representative of the English people, could convey lands held in trust for the public.\textsuperscript{88} In short, lands below the high water mark were subject to strict limitations on alienation and use.

\textbf{B. The State Constitution: Tidelands as Navigable Waters}

The South Carolina Constitution provides that “all navigable waters shall forever remain public highways free to the citizens of the State and the United States.”\textsuperscript{89} In effect, the owner of lands beneath such waters is required to hold this area in trust for the public.\textsuperscript{90} It is possible to argue that: (1) tidewaters constitute navigable waters of South Carolina; and therefore, (2) the lands thereunder are subject to the public trust doctrine.

Insofar as state law is concerned, it is well-settled that a state is not bound by the federal courts' concepts of navigable waters and may mold its own definition of the term.\textsuperscript{91} Unfortunately, the definition of "navigable waters" is unclear in South Carolina.\textsuperscript{92}

In the United States, some courts have assumed incorrectly that at common law only those streams subject to the ebb and flow of the tide were deemed navigable.\textsuperscript{93} This "rule" was considered unworkable in a country as large as the United States, where hundreds of miles of clearly "navigable" waterways were unaffected by the tides. Consequently, in \textit{The Daniel Ball},\textsuperscript{94} the United States Supreme Court rejected a strict tidal test approach in favor of a test of navigability in fact:

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.\textsuperscript{95}

In \textit{Pacific Guano}, the South Carolina circuit court relied on \textit{The Daniel Ball} and found that two of the tidal streams in question were not navigable:

\begin{itemize}
\item \textsuperscript{88} Sax, \textit{supra} note 8, at 476; Deveney, \textit{supra} note 8, at 50.
\item \textsuperscript{89} S.C. Const. art. 14, § 4 (1976).
\item \textsuperscript{90} See State v. Columbia Water Power Co., 82 S.C. 181, 193, 63 S.E. 884, 890 (1908) ("The State, as a sovereign, holds the property right of unobstructed navigation of the navigable waters of the State in trust for the people of the State and of the United States.").
\item \textsuperscript{91} Heyward v. Farmers' Mining Co., 42 S.C. 138, 152, 19 S.E. 963, 971 (1894). Of course, whenever federal interests are at stake, the federal definition will govern.
\item \textsuperscript{92} See generally D. Means, \textit{supra} note 45; Note, \textit{Navigability—Its Meaning and Application in South Carolina}, 23 S.C. L. Rev. 28 (1971).
\item \textsuperscript{93} Actually, the English courts often upheld the right to navigate on non-tidal streams. See Rice, \textit{supra} note 26, at 783-84; C. Leavell, \textit{supra} note 38, at 8, 82 n.31.
\item \textsuperscript{94} 77 U.S. 557 (1870). See also United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921).
\item \textsuperscript{95} 77 U.S. at 563.
\end{itemize}
Big creek [sic] and Chisolm's creek [sic] are 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 in the private estate of the owners of the island and make no connection with thoroughfares of travel or trade, and are none themselves.96

On appeal, the state supreme court considered the case an action at law and refused to review this finding of fact, thereby implicitly affirming the conclusion that the determination of navigability was not tied inseparably to the effect of the tide. In this manner, Pacific Guano introduced the navigability in fact doctrine into South Carolina law.

In Farmers' Mining, the lower court relied specifically on the circuit judge's opinion in Pacific Guano:

Shingle Creek is, in my view, just what Big Creek and Chisolm's Creek were. . . . Shingle Creek flows up with the tide into the private estate of the plaintiff, which is a mere marsh, and loses itself in that marsh; it has never been used as a highway for commerce of any sort, and there seems to be no prospect of its ever being so used; it makes no connections with any other highways.97

As in Pacific Guano, the South Carolina Supreme Court refused to review this finding of fact. However, the court remanded the case because the test of navigability employed by the circuit judge was erroneous. The court emphasized that the test of navigability is not whether the stream had ever been used as a highway for commerce, but rather whether the stream had the capacity to be so used.98

A federal court sitting in South Carolina adopted a test of navigability inconsistent with the standard enunciated in Farmers' Mining. In Chisolm v. Caines,99 the federal court held that in order to be deemed navigable waters of the state, a stream must constitute a highway over which the public may travel "from one place, where they have a right to be, to another, in which they have the same right."100 The court concluded that "a waterway into a man's land, surrounded on all sides by his land, whatever its capacity, cannot be said to be a highway, and so open to public for its use of trade, travel, or commerce."101 This "public highway test" represents a clear rejection of the test of navigability laid down in Farmers' Mining.102

96. 22 S.C. at 57.
97. 42 S.C. at 151, 19 S.E. at 967.
98. Id. at 151, 19 S.E. at 971-72.
100. Id. at 292.
101. Id. at 294.
102. See also Manigault v. S.M. Ward & Co., 123 F. 707 (D. S.C. 1903) (the court reaffirmed the test it set forth in Chisolm). Presumably, the federal court felt justified under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), in exercising its independent judgment on the question of navigability. Today, however, under the doctrine of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1937), the Farmers' Mining test should control, since the issue involved—whether the
In *State ex rel. Lyon v. Columbia Water Power Company*, a case involving the right of respondent to obstruct an artificial canal in the city of Columbia, the South Carolina Supreme Court implicitly combined the *Chisolm* "public highway" test with the *Farmers' Mining* "navigable capacity" standard. The court expressly reserved opinion as to whether pleasure boating alone would be sufficient to prove navigability.

Absent a reconciliation of these cases, the legislative definition of navigable waters of South Carolina should be noted:

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.

Oddly enough, this provision, enacted in 1853, was not mentioned in *Pacific Guano* or in *Farmers' Mining*. The State Attorney General reads this provision as indicative of legislative intent to adopt a broad standard of navigability based merely on the ability of a stream to float any type of watercraft. Therefore, "a stream is navigable in fact if a person can float any vessel, of any size or construction, for any purpose whatsoever (pleasure or commerce), at any state of tide (or water level), and for any length of stream, regardless of the ease or difficulty of propulsion."

The "navigable capacity" test of *Farmers' Mining* and this statutory provision (as interpreted by the Attorney General) suggest that all lands below the mean high water mark are covered by navigable waters of South Carolina. Consequently, these lands must be held in trust for the benefit of the public.

Certainly one would be able to navigate a canoe through most of the marshes at high tide, albeit with some difficulty. On the other hand, under "the public highway test," as set forth in *Chisolm* (and perhaps adopted in *Columbia Water Power*), a substantial portion of the state's state or a private individual holds title to lands beneath the waters of the state, as determined by "navigability" of the waters—is solely an issue of substantive law and no overriding federal interest is present.

103. 82 S.C. 181, 63 S.E. 884 (1909).
104. *See id.* at 188, 63 S.E. at 888 ("[T]he canal has a public entrance at Gervais Street and a public terminus at the lock on Broad River and is capable of navigation up to the lock.").
105. *Id.* at 189, 63 S.E. at 888.
107. The omission prompted one commentator to suggest that a separate test of tidal navigability (as enunciated in *Farmers' Mining*) may exist in South Carolina for purposes of determining public and private rights in tidal areas. C. Leavell, *supra* note 38, at 63.
109. *Id.* at 2.
110. *But see* S.C. CODE § 10-9-130 (1976) (granting the State Budget and Control Board the authority to issue leases and licenses for the removal of phosphatic deposits "from all the navigable streams, waters and marshes belonging to the State and also from such of the creeks, not navigable, lying therein"—indicating that not all tidewaters should be considered navigable) (emphasis added).
tidelands would not be deemed to underlie navigable waters of South Carolina. Until the matter receives further attention from the state supreme court, it will simply be impossible to determine which test applies in South Carolina.

C. Case Law

Those who contend that only submerged lands are held in trust for the public in South Carolina rely on a series of cases in which the state supreme court has sustained, directly or indirectly, the state's ability to convey tidelands to municipal or private grantees. The underlying assumption is that the alienability of land disproves the existence of a public trust. These cases, however, are not dispositive of the question, for it is well settled that lands subject to the jus publicum can be alienated to private parties. The crucial point is that the grantee of such lands takes subject to the same trusteeship which had been imposed on the grantor.

Moreover, in all of the alienability cases relied on by the opponents of a tidelands trust doctrine, consideration of the jus publicum doctrine either was superfluous to the resolution of the dispute, or was not raised by counsel. The following cases typify those decisions which belong to the former category. Gadsden v. West Shore Investment Company involved the tracing of a chain of title to a tract of marshlands. The court held only that plaintiff's tax title to the tract was presumed to be good, and did not justify defendant's refusal to comply with a contract to purchase the property. In Beaufort County v. Jasper County, the issue was simply whether tidelands constituted land for the purpose of determining whether Beaufort County met the requirement in the South Carolina Constitution that each


113. Sax, supra note 8, at 486.

114. See Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (holding that a member of the public had standing to assert and exercise public trust rights over a tract of privately owned tidelands). See also Stone, supra note 7, at 197 ("The generally recognized rule is that these lands [below the mean high water mark] are subject to a public trust, or subject to the jus publicum, and that any conveyance by the state is subject to the same burden. A grantee of the state cannot obtain a better title or freer right than his grantor had.").

115. 99 S.C. 172, 82 S.E. 1052 (1914).

county contain at least 500 square miles of land. *Nathans v. Steinmeyer* was an action to foreclose a mortgage on certain tidelands. The mortgagor's defense was based on an alleged lack of consideration for the mortgage due to paramount title in the city of Charleston. The court rejected this defense, since defendant had not been actually evicted from the tract. The opinion in *Jones v. Board of Fisheries* decided only a jurisdictional issue in upholding appellant's right to trial by jury on his claim to a tract of tidelands. In none of these cases was it necessary for the court to consider whether the lands in question were held in trust for the public benefit in order to dispose of the matters at issue. The cases do not disprove the existence of such a trust.

Those cases where the *jus publicum* issue was not raised by counsel include *Haesloop v. City Council of Charleston* and *Ehrhardt v. City of Charleston*. In *Haesloop*, a citizen of Charleston sought to enjoin the city from donating a tract of tidelands and submerged lands to individuals for the purpose of constructing a tourist hotel thereon. In the act chartering the city of Charleston, the South Carolina General Assembly provided, *inter alia*, that all "vacant low water lots fronting any of the streets" could be "leased, sold, improved on or otherwise disposed of, as to the said city council shall appear most conducive to the welfare and advantage of the said city, and the inhabitants thereof." In 1873, the legislature granted to the city of Charleston the state’s fee simple title to the tract in question. The principal issue before the court was the city’s compliance with the terms of its charter in donating the property, *i.e.*, whether use of the land as a tourist hotel would be "conducive to the welfare and advantage of the said city, and the inhabitants thereof." Noting the economic benefits of constructing and operating the hotel, the court sustained the city's conveyance.

It is important to note that in *Haesloop* the plaintiff, who simply wanted the property sold rather than donated, never questioned whether the legislature's original conveyance to the city constituted a breach of any trust obligations it might have owed to the public. The court observed:

It has not been suggested that there were any such rights of navigation or of piscary, or other public rights, involved in the disposal of those low-water lots as would in any wise limit the state’s absolute power of alienation. The Legislature would seem to have been fully clothed with power to convey, as was done, the fee simple title in this land to the City Council of Charleston.

The case of *Ehrhardt v. City of Charleston* presented similar facts. Again, the court did not explicitly consider whether the tract in question was

117. 57 S.C. 386, 35 S.E. 733 (1900).
118. 161 S.C. 309, 159 S.E. 651 (1949).
119. 123 S.C. 272, 115 S.E. 596 (1923).
120. 215 S.C. 390, 55 S.E.2d 344 (1949).
121. 123 S.C. at 276-77, 115 S.E. at 598.
122. *Id.* at 278, 115 S.E. at 598.
subject to the public trust doctrine. Consequently, these cases do not support the position that South Carolina tidelands are not held in trust for the benefit of the public.

On the other hand, the position that all lands below the mean high water mark in South Carolina are subject to the public trust doctrine rests on much firmer ground. This contention finds ample support not only in the common law, but in nearly all other states, in decisions of the United States Supreme Court, and in numerous statements of the South Carolina Supreme Court. The statement of greatest significance in South Carolina tidelands law is Justice Carter's announcement in *Cape Romain*:

The title to land below the 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.

This single sentence has attracted a storm of controversy among attorneys, judges, and citizens in South Carolina. Proponents of a limited trust doctrine argue that the statement is dictum, that the court has recognized on several occasions the ability of the state to sell tidelands, and that the court's reference to land below the high water mark "on" tidal navigable streams, rather than "in" such streams, was the result of clerical error. With respect to the first two contentions, the *Cape Romain* critics are correct, but as discussed previously, alienability of land does not disprove the existence of a trust. The "in-on" theory assumes that use of the preposition "in" would have defined the corpus of the trust as only the narrow beds and banks

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123. "The notion implicit in the public trust doctrine which would require that municipal grantees take the property impressed with the same trust as the state where tidal areas were concerned was simply not considered [in Ehrhardt]." C. Leavell, supra note 38, at 59.

124. See text accompanying notes 81-83 supra.

125. See, e.g., Harrison County v. Guice, 140 So.2d 838, 842 (Miss. 1962); People v. California Fish Co., 166 Cal. 576, 584, 138 P. 75, 82 (1913); Hayes v. Bowman, 91 So.2d 795, 799 (Fla. 1957); Doemel v. Jantz, 180 Wis. 225, 225, 193 N.W. 393, 397 (1923); Cook v. Dabney, 70 Or. 529, 139 P. 721, 722 (1914); Jackvony v. Powel, 67 R.I. 218, 226-27, 21 A.2d 554, 557-58 (1941); City of Galveston v. Mann, 135 Tex. 319, 330, 143 S.W.2d 1028, 1033 (1940); Arnold v. Mundy, 6 N.J.L. 1, 76-78 (1821); Tucci v. Salzhauer, 336 N.Y.S.2d 721, 723, 40 A.2d 712, 713 (1972), aff'd, 352 N.Y.S.2d 198, 33 N.Y.2d 854, 307 N.E.2d 256 (1973).

Some state courts have even extended the corpus of the public trust to areas beyond the mean high water mark. See, e.g., Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972) (beaches); Just v. Marinette County, 56 Wis. 2d 7, 16-17, 201 N.W.2d 761, 767-68 (1972) (shorelands); International Paper Co. v. State Highway Dep't, 271 So.2d 395 (Miss. 1972) (accreted lands).


*Lands under tidewaters* are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation, and fishery. *Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right.*

Shively v. Bowlby, 152 U.S. 1, 57 (1894) (emphasis added).

127. 148 S.C. at 438, 146 S.E. at 438.

128. The court later qualified this flat prohibition against the sale of tidelands. See text accompanying notes 148-158 infra.
of tidal navigable channels, thereby excluding the adjacent marshlands located "on" the stream. Whatever merit this proposition may have, it is now academic in light of the court's explicit reaffirmation of the Cape Romain language in two subsequent decisions—Rice Hope Plantation v. South Carolina Public Service Authority and State v. Hardee. In neither case did the court take the opportunity to change the language used in Cape Romain. Moreover, in Hardee, the court described the Cape Romain statement as the rule which had been "reaffirmed in the Rice Hope Plantation case." It is now clear that the court considers both the tidelands and the submerged lands as property subject to the public trust.

It must be pointed out that no case has ever reached the South Carolina Supreme Court in which the use or management of a tidelands tract was challenged as violative of the jus publicum. The only issue directly before the court in Cape Romain and Hardee was the ownership of the tidelands. Therefore, that part of the opinion concerning the limitations to which the state, as owner of these lands, would be subjected was superfluous to the holdings in both cases. In Rice Hope, the court held that the state could divert water from the streams of the state without having to pay compensation to riparian proprietors. Whether there existed a trusteeship in lands below the mean high water mark was not at issue. Strictly speaking, the statement in Cape Romain that lands below the high water mark are to be held in trust for public purposes was dictum in that case as well. Yet, the fact that the statements in those cases were dicta does not mean that no trust exists. The rule of Cape Romain is dictum only because the court has never had the opportunity to hold that all lands below the mean high water mark are held in trust for public purposes. The alienability cases relied on by the opponents of a tidelands trust doctrine have little persuasive value in this matter, especially when weighed against the strength of the Cape Romain dictum and the authority of other case law. Should an appropriate case reach the court, it can be expected that a binding recognition of the tidelands trust in South Carolina would be forthcoming.

Perhaps in the bygone era when almost everyone perceived tidelands as "vacant lands" that were "utterly worthless as property" and

129. The area "in" the stream might thus be restricted to that part of a stream or creek that is covered by water at high tide in every tidal cycle, i.e., that part of the stream covered by water at the minimum high water mark, as opposed to the mean high water mark. See, e.g., A. Baldwin, supra note 15, at Fig. 2.
131. 259 S.C. at 541, 193 S.E.2d at 500.
132. Id. at 542, 193 S.E.2d at 500.
133. This dearth of cases is probably the result of a combination of factors: (1) the relatively recent recognition of tidelands as an invaluable public resource; (2) the difficulty private landowners face in proving title to tidelands; and (3) the State Attorney General's vigorous promotion of the public trust doctrine in South Carolina.
constituted "obstructions to navigation,"136 a court may have been justified in excluding this area from the corpus of a public trust. Today, however, in light of the overwhelming scientific evidence that tidelands are of critical ecological and economic importance, it would be extremely short-sighted to suggest that the public interest pertains only to the submerged lands. An excellent example of changed judicial attitudes is the decision in Zabel v. Tabb,137 where the Secretary of the Army, acting pursuant to the Rivers and Harbors Act of 1899,138 denied a federal permit to fill eleven acres of tidelands, entirely on the basis of the project's adverse environmental impact. The district court held that the Secretary had authority under the statute to consider only navigational impact in reviewing permit applications. The Fifth Circuit reversed the district court:

The establishment was entitled, if not required, to consider ecological factors and, being persuaded by them, to deny what might have been granted routinely five, ten, or fifteen years ago before man's explosive increase made all, including Congress, aware of civilization's potential destruction from breathing its own polluted air and drinking its own infected water and the immeasurable loss from a silent-spring-like disturbance of nature's economy.139

D. Statutory Provisions

The South Carolina General Assembly has enacted several provisions which indicate that the tidelands of the state are held in trust for public purposes. A synopsis of the most important of these provisions of the South Carolina Code follows.

1. Section 50-17-40

This section provides in essence that the tidelands and submerged lands within the state and the waters overlying them "shall continue and remain as a common for the people of the State for the taking of fish," unless conveyed by a legislative act or a state compact prior to 1924.140 By subjecting this section "to any future act that may be passed," the legislature reserves its power to authorize uses of tidelands and submerged lands which might conflict with "the taking of fish" from the area. This provision does not negate, but rather confirms, the existence of a public trust, since one of the requisites of such a trust is that only the legislature may modify the jus publicum, or delegate its authority to do so.141

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137. 430 F.2d 199 (5th Cir. 1970).
139. 430 F.2d at 201.
140. "Fish" is defined broadly to include finfish, shellfish (all immobile fish having shells, such as oysters and clams), crustaceans (all mobile fish having shells, such as crabs and shrimp), turtles, and terrapin. S.C. Code § 50-17-20 (1976).
141. See text accompanying note 158-186 infra. It should be noted that the State Budget and Control Board is authorized to grant easements and rights of way through and over
2. **Section 50-17-1250**

Declaring all state-owned tidelands to be oyster beds, this section provides that only a special grant by the General Assembly "shall be effective to convey any private ownership or control of any fishing or fisheries therein." Here again is an explicit recognition that tidelands are held by the state in a fiduciary capacity for the public benefit.

3. **Section 11-9-630**

This section generally authorizes the State Budget and Control Board, in its discretion, to sell and convey the real and personal property of the state that is not "in actual public use." However, the provision specifically prohibits the Board from selling "any property held in trust for a specific purpose by the State" as well as any phosphatic deposits owned by the state in tidal areas. Although there is no case addressing the issue, it is submitted that "property held in trust for a specific purpose" includes the tidelands and submerged lands owned by the state. A contrary conclusion limits the section's application to the few instances where the state seeks to sell those lands that it acquired by a grant specifying certain restricted purposes for which the land could be used.

4. **The South Carolina Coastal Zone Management Act of 1977**

The South Carolina Coastal Zone Management Act gives the new Coastal Council authority to regulate activities in the "critical areas," defined as tidelands, coastal waters, beaches, and primary ocean front sand dunes. In turn, "tidelands" are defined so as to include all land below the mean high water mark. By subjecting the tidelands to state land use control (the first such control in the state's history), the General Assembly has recognized the importance of the tidelands to the people of South Carolina.

**III**

**NATURE OF THE TIDELANDS TRUST IN SOUTH CAROLINA**

Having established the existence of a tidelands trust in South Carolina, tidelands and submerged lands for the construction and maintenance of power lines, pipelines, water and sewer lines, railroad facilities, roads, and highways. The Board may also issue licenses or leases for the removal of phosphatic deposits in tidelands and submerged lands owned by the state. In addition, the State Ports Authority may take and exclusively possess any state land in the counties of Beaufort, Charleston, and Georgetown for the purposes of harbor improvement and development.

Under the Act, "tidelands" also means those areas above the mean high water mark that are contiguous or adjacent to coastal waters, an integral part of the estuarine system, periodically inundated by saline waters, and capable of supporting the growth and reproduction of saline water vegetation. See Note, The South Carolina Coastal Zone Management Act of 1977, supra note 16.
the important task of determining its precise scope and limitations remains. Unfortunately, the rule of Cape Romain that "land below the high-water mark on tidal navigable streams . . . is in the state, not for the purpose of sale, but to be held in trust for public purposes" is not particularly helpful in determining the specific limitations imposed by the trust. The rule raises numerous questions. Are all tidelands held in trust? Can tidelands be sold? What are public purposes? In an attempt to define the elements of the tidelands trust in South Carolina, this section addresses these questions by looking at the approaches taken in other jurisdictions.

A. Scope of the Trust

When the court in Cape Romain stated that "land below the high-water mark on tidal navigable streams" is held in trust for public purposes, did the court mean to imply that land on tidal non-navigable streams is excluded from the trust? The question poses a problem similar to that discussed previously concerning navigability as a factor in applying the prima facie boundary rule. As in that case, the answer most probably is that navigability is irrelevant, for throughout its opinion in Cape Romain the court appears to equate "tidal" with "navigable."

Moreover, under the "navigable capacity" test of navigability examined previously, the matter would be academic since practically all tidal streams would constitute navigable waters of South Carolina. Finally, the purposes for which tidelands are held in trust today do not include merely navigation, but encompass a broad range of important public rights. It makes little sense to limit the trust corpus only to those lands which happen to abut navigable streams.

B. Alienability

1. Are Tidelands in South Carolina Subject to Sale?

Courts have adopted at least three different approaches with respect to the alienability of public trust lands. A minority of courts place an absolute restraint on alienation. Some courts uphold the alienation as a grant only of the jus privatum, subject to the jus publicum. Most courts allow a transfer of both the jus privatum and jus publicum provided the legislative grant meets certain standards.

144. See text accompanying note 127 supra.
145. See text accompanying notes 90-110 supra.
146. But see Horibeck, supra note 15, at 346-47.
147. See text accompanying notes 192-202 infra.
149. See, e.g., State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914); State ex rel. Cates v. West Tenn. Land Co., 127 Tenn. 575, 158 S.W. 746 (1913).
150. See, e.g., People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).
The rule of Cape Romain that lands below the mean high water mark are held in trust "not for the purpose of sale" would appear to place South Carolina in the minority position. Yet, on two subsequent occasions, the South Carolina Supreme Court qualified its statement in Cape Romain. In Rice Hope, the court noted:

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 or Federal) to control and regulate navigable water.

In State v. Hardee, a case decided after Rice Hope, the court indicated: "[T]he 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 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."

In several cases, the court adopted a stronger position, and assumed or sustained the ability of the state and private individuals to transfer title to tidelands. Moreover, the South Carolina General Assembly on numerous occasions has enacted legislation alienating certain state-owned tidelands to municipalities or private persons.

Final resolution of this question necessarily will have to await a case in which the alienability of tidelands is the central issue before the court. Until such time, one may state with reasonable certainty that in South Carolina the tidelands are subject to sale. The method of sale also seems clear given the fact that tidelands are held in trust for public purposes. Only the General Assembly, as representative of the public, has authority to convey these lands, subject to certain limitations discussed below.

152. See text accompanying note 127 supra.
153. 216 S.C. at 530, 59 S.E.2d at 145.
154. 259 S.C. at 541, 193 S.E.2d at 500 (quoting Clineburg & Krahmer, The Law Pertaining to Estuarine Lands in South Carolina, 23 S.C. L. REV. 7, 22-23 (1971)).
155. These cases are cited at note 112 supra.
157. Although previously of the belief that tidelands were "probably not" subject to sale by the legislature, 1956-57 Op. S.C. Att'y Gen. 291, 297, the State Attorney General now recognizes the legislature's ability to alienate these lands. Op. S.C. Att'y Gen. 4 (Nov. 9, 1970) (unreported). Cf. State v. Pacific Guano Co., 22 S.C. 50, 84 (1884) (recognizing the ability of the legislature to alienate submerged lands).
2. Limitations on the Legislature’s Ability to Alienate Tidelands

As trustee for the public, the legislature does not possess unlimited powers in its management and disposition of the state’s tidelands. In *Illinois Central Railroad Company v. Illinois*, the United States Supreme Court found that the public trust doctrine imposes certain limitations on the power of a legislature to alienate trust property. In 1869, Illinois conveyed to the Illinois Central Railroad, in fee simple, more than 1,000 acres of land underlying Lake Michigan—a grant comprising almost the entire commercial waterfront of the city of Chicago. Four years later, the legislature rescinded the grant. The court initially concluded that the state of Illinois held title to the submerged lands of Lake Michigan in the same manner in which a state holds title to lands under tidal waters. Justice Field then laid down the following guidelines for determining the propriety of a legislative transfer of lands held in public trust:

[I]t is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objection can be made to the grants. . . . But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbor or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public. . . . The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. . . . The State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.

Applying these standards, the Court held that the 1869 grant was in complete disregard of the public trust and therefore invalid.

It is important to note that *Illinois Central* does not place an absolute

159. 146 U.S. 387 (1892).
160. Id. at 435.
161. Id. at 452-53.
prohibition on the disposition of lands held in public trust. Rather, an alienation of such lands would be proper where the conveyance either promotes the interests of the public or does not impair substantially the public interest in the lands and waters remaining. Courts applying this principle rarely have confronted circumstances similar to those in Illinois Central and in general have sustained legislative grants of public trust lands.\(^{162}\)

However, no court has adopted the view that public trust property may be transferred to private persons solely for private purposes. The courts seek to insure that the tract conveyed "will be used to promote at least a quasi-public purpose."\(^{163}\) Thus, Illinois Central continues to reflect "the central substantive thought"\(^{164}\) in American public trust law:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.\(^{165}\)

This judicial skepticism is particularly well illustrated in the landmark case of Gould v. Greylock Reservation Commission.\(^{166}\) There, the Massachusetts legislature enacted a statute creating an authority to construct and operate a ski area on a public preserve. Subsequently, the authority entered into an arrangement with a private firm whereby the latter obtained a leasehold interest in nearly one-half of the reservation and agreed to build and manage the ski development. The Supreme Judicial Court of Massachusetts held that the lease and arrangement exceeded the statutory grant of power: "[W]e find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit."\(^{167}\)

Significantly, the court declined to invalidate the statute outright, but instead invoked a legal presumption that "the state does not ordinarily

\(^{162}\) See generally Nelson, State Disposition of Submerged Lands Versus Public Rights in Navigable Waters, 3 NAT. RESOURCES LAW. 491, 497-503 (1970); Sax, supra note 8, at 489, 542-44; Stone, supra note 7, at 196-202; Note, Conveyances of Sovereign Land Under the Public Trust Doctrine: When Are They in the Public Interest?, 24 U. FLA. L. REV. 285 (1972); Comment, The Mississippi Public Trust Doctrine: Public and Private Rights in the Coastal Zone, 46 Miss. L. J. 84 (1975); Berland, supra note 8; Olson, supra note 8.

Some decisions have upheld a conveyance because the grant did not substantially impair the public interest in the remaining lands and waters. See, e.g., Droste v. Kerner, 34 III. 2d 495, 217 N.E.2d 73 (1966); State v. Public Service Comm., 275 Wis. 112, 81 N.W.2d 71 (1957); Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928). Other opinions have sustained grants serving the public interest. See, e.g., Treuting v. Bridge & Park Comm., 199 So.2d 627 (Miss. 1967); People v. City of Long Beach, 51 Cal. 2d 875, 338 P.2d 177 (1959).

\(^{163}\) Stone, supra note 7, at 196.

\(^{164}\) Sax, supra note 8, at 490.

\(^{165}\) Id. (emphasis in the original).


\(^{167}\) 350 Mass. at 426, 215 N.E.2d at 126.
intend to divert trust properties in such a manner as to lessen public uses."\textsuperscript{168} The presumption could not be rebutted except by express legislative enactment. The court felt that the legislature had not clearly manifested its desire to restrict the \textit{jus publicum} in the preserve.\textsuperscript{169} In effect, the court remanded the case to the legislature for clarification of its intent in passing the statute.

In \textit{People ex rel. Scott v. Chicago Park District},\textsuperscript{170} the submerged lands of Lake Michigan were again the focus of a suit involving the public trust doctrine. In this case, the Illinois Attorney General sought to set aside a legislative conveyance of 195 acres of the lake bed to U.S. Steel Corporation for the construction of an additional facility. The most interesting aspect of \textit{Chicago Park} is that the Illinois General Assembly, unlike its predecessor in \textit{Illinois Central}, had not withdrawn its approval of the conveyance, and unlike the legislature in \textit{Gould}, had made its intent to alter the \textit{jus publicum} unmistakably clear:

\begin{quote}
It is hereby declared that the grant of submerged land contained in this Act is made in aid of commerce and will create no impairment of the public interest in the lands and waters remaining, but will instead result in the conversion of otherwise useless and unproductive submerged land into an important commercial development to the benefit of the people of the State of Illinois.\textsuperscript{171}
\end{quote}

Notwithstanding this statement, the Supreme Court of Illinois, with three justices dissenting, invalidated the grant as violative of the public trust doctrine:

While the courts certainly should consider the General Assembly's declaration that given legislation is to serve a described purpose, this court recognized in \textit{People ex rel. City of Salem v. McMackin}, 53 Ill. 2d 347, 354, 291 N.E. 2d 807, 812, that the "self-serving recitation of a public purpose within a legislative enactment is not conclusive of the existence of such purpose."

In order to preserve meaning and vitality in the public trust doctrine, when a grant of submerged land beneath waters of Lake Michigan is proposed under the circumstances here, the public purpose to be served cannot be only incidental and remote. The claimed benefit here to the public through additional employment and economic improvement is too indirect, intangible and elusive to satisfy the requirement of a public purpose.\textsuperscript{172}

The court found that the primary purpose of the grant was to appropriate public trust property for the private use of the steel company. Consequently, the grant was void.

\begin{footnotes}
\item 168. Sax, \textit{supra} note 8, at 494.
\item 169. In a later case, the court stated: "In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forego the existing use." Robbins v. Dept of Public Works, 355 Mass. 328, 331, 244 N.E.2d 577, 580 (1969).
\item 170. 66 Ill. 2d 65, 360 N.E.2d 773 (1976).
\item 171. \textit{Id.} at -,-, 360 N.E.2d at 781 (quoting act granting title to company).
\item 172. \textit{Id.}
\end{footnotes}
Illinois Central, Gould, Chicago Park, and other decisions\textsuperscript{173} affirm the power of the courts to refuse to give effect to a legislative grant of property held in the public trust where the conveyance fails to promote a public purpose. At the same time, the amorphous nature of the "public purpose" standard has resulted in somewhat divergent results among the courts applying the public trust doctrine. Not all judges agree on what constitutes a public purpose,\textsuperscript{174} or when the legislature has violated the trust standards.

In \textit{State v. Public Service Commission},\textsuperscript{175} the Wisconsin Supreme Court solved this problem by formulating several criteria to apply when deciding whether the use of lands subject to the public trust doctrine serves a "public purpose." There, the court upheld a state-approved plan by the city of Madison to fill in four acres of a lake in order to provide a larger bathing beach and better parking facilities for the users of an adjacent park. In finding that the city's plan did not violate the public trust doctrine, the court relied upon five factors:\textsuperscript{176}

1. Public bodies will control the use of the area. 2. The area will be devoted to public purposes and open to the public. 3. The diminution of lake area will be very small when compared with the whole of Lake Wingra. 4. No one of the public uses of the lake as a lake will be destroyed or greatly impaired. 5. The disappointment of those members of the public who may desire to boat, fish, or swim in the area to be filled is negligible when compared with the greater convenience to be afforded those members of the public who use the city park.\textsuperscript{177}

In other words, the court based its decision on the retention of public control over the area, the negligible diminution of the resource area in dispute, the maintenance of the area for public use, the preservation of existing public uses, and the increase in overall convenience to the public at large. It is noteworthy that the court, in evaluating the diminution of the lake, compared the reduction in lake area to the single body of water involved, rather than to all the state's lake resources.\textsuperscript{178}

\textsuperscript{173} See, e.g., International Paper Co. v. State Highway Dept', 271 So.2d 395 (Miss. 1972), \textit{discussed in} Note, \textit{Conveyance of Tideland to Private Owner for Private Purpose Invalid}, 44 Miss. L.J. 322 (1973); County of Orange v. Heim, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973) (invalidating proposed land exchange agreement under which a private developer would have acquired title to two-thirds of the shoreline along a coastal bay).

\textsuperscript{174} In this regard, compare the opinion of the majority with that of Justice Hall in \textit{New Jersey Sports & Exposition Auth. v. McCrane}, 61 N.J. 1, 292 A.2d 545 (1972).

\textsuperscript{175} 275 Wis. 112, 81 N.W.2d 71 (1957), \textit{discussed in} Sax, \textit{supra} note 8, at 516-18.

\textsuperscript{176} Professor Sax writes that the statement of the five factors "comes as close as judicial statement has to a specific enumeration of a set of rules for implementation of the public trust doctrine." Sax, \textit{supra} note 8, at 517.

\textsuperscript{177} 275 Wis. at 118, 81 N.W.2d at 73-74. \textit{See also} City of Madison v. State, 1 Wis. 2d 252, 83 N.W.2d 674 (1957); Paepcke v. Pub. Bldg. Comm'n of Chicago, 46 Ill. 2d 330, 343-44, 263 N.E.2d 11, 19 (1970) (adhering to the Wisconsin approach).

\textsuperscript{178} Sax, \textit{supra} note 8, at 517-18.
indicates that, if the Wisconsin test is applied to cases involving tidelands, the particular resource used for comparison is the surrounding estuarine system, rather than the state's entire tidal resource.

Several examples demonstrate that the criteria adopted by the Wisconsin Supreme Court may prove useful in determining whether certain uses of tidal areas serve a "public purpose." In a case where tidelands are granted solely for the construction of a public fishing pier, a court easily could apply the Wisconsin test. The court might conclude that the grant: (1) promotes the well-established public right of fishing; (2) diminishes only negligibly the particular estuarine area; and (3) preserves other public uses. Based on these conclusions, the grant would be sustained under the test.\(^\text{179}\)

A closer question is involved, for example, in the most recent legislative grant of tidelands in South Carolina.\(^\text{180}\) The legislature granted to the city of Beaufort a tract of tidelands to be used for construction of a waterfront street with an adjoining parking area. That portion of the tract not used for this purpose could be leased by the city "in a manner to retain and protect the public interest therein."\(^\text{181}\) Any funds received from such leasing beyond that necessary to finance the bonds had to be remitted to the State Treasurer.\(^\text{182}\) In no event could the city sell or convey the tract.\(^\text{183}\)

Analysis of this grant under the Wisconsin approach is complicated by the fact that the number of acres of tidelands conveyed to the city is not specified in the act.\(^\text{184}\) Assuming for the moment that the area granted was "very small" in comparison to the total size of the adjoining estuary, a court would probably sustain this conveyance. The area is controlled by a public body (the city) and is devoted to public purposes (traveling and parking).\(^\text{185}\) The increased convenience to the public of an additional street and parking facilities possibly outweighs the loss of fishing and recreational rights in the filled area. Finally, the restrictions placed on the unused portion of the tidelands are designed to protect the public interest.

Assume, on the other hand, that the legislature conveys all of the tidelands on the northern end of a sea island for the construction of a private resort. Here the grant would fail to pass the Wisconsin test. A private party controls the tract, and filling in the area extinguishes the public's rights in a

\(^{179}\) Where the grant is silent as to what uses may be made of the tract, the grantee holds the property subject to the \textit{jus publicum}. Marks v. Whitney, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971). The result might be different if it were clear that significant environmental damage would result from the construction of the pier.


\(^{181}\) \textit{Id.} sec. 2, at 1074-75.

\(^{182}\) \textit{Id.} sec. 3, at 1075.

\(^{183}\) \textit{Id.} sec. 4, at 1075.

\(^{184}\) The grant merely refers to a site plan of the area involved.

large segment of the island. A court faced with such abuse of the public trust could take one of two steps to preserve the *jus publicum*. The first option—the one followed in *Gould*—would be for the court to construe the grant as not authorizing those uses of the area the court considers contrary to the trust. Professor Sax favors this course of action because the court need not "perform the odious and judicially dangerous act of telling a legislature that it is not acting in the public interest."[^185]

However, the *Gould* approach of restricting the uses through strict interpretation of the grant is not available where the only reasonable interpretation of the grant is to allow the grantee's intended use. In these cases, the only option available to the court for protecting the public interest is to adopt the approach taken by the Illinois Supreme Court in *Chicago Park*—to invalidate the grant outright. In the case of land granted for use as a private resort, the legislature has flagrantly breached its fiduciary duty to the public by conveying a tract of valuable trust property to a private developer for private purposes. Under such circumstances, if the conveyance cannot be construed so as to avoid improper uses, a court should not hesitate to refuse to give effect to the grant.

### 3. Limitations on the Coastal Council's Authority to Permit Dredge and Fill Activities

South Carolina's new Coastal Zone Management Act gives the Coastal Council authority to issue permits for dredge and fill activities in the tidelands.[^187] However, the Act does not provide any precise standard to govern the Council's discretion in reviewing applications for such permits. The Act simply directs the Council to take into account a number of general considerations,[^188] and to issue a permit if it "finds that the application is not contrary to the policies specified in this act."[^189]

In its draft regulations under the Act, however, the Council recognizes the limitations imposed by the public trust doctrine on the use of the tidelands. The Council states flatly that permits to dredge and/or fill tidelands for the purpose of creating residential or commercial lots shall be denied.[^190] Moreover, the Council will consider dredge and fill permits in tidal areas only if: (1) the activity satisfies a public need; (2) the activity is water-dependent; and (3) there are no feasible alternatives.[^191] The role of the courts under both the Act and the tidelands trust doctrine should be to insure that the Council's actions are consistent with these regulations.

[^185]: Sax, *supra* note 8, at 494.
[^188]: *Id.* § 48-39-150(A).
[^189]: *Id.* § 48-39-150(B).
[^191]: See *id.* ch. 30-9(G)(2)(b). Filling destroys the tidelands involved and transfers ownership of the tract from the state to the permittee. As the Council recognizes, only under very limited circumstances should fill permits be issued.
C. Public Purposes for Which Tidelands are Held in Trust

The rule of Cape Romain provides that lands below the mean high water mark in South Carolina are held in trust for "public purposes," but it offers no indication as to the identity of these purposes. Unquestionably, these purposes include the rights of navigation and fishing that have been recognized and protected since the time of Lord Hale. 192

Today, the public interest in tidal areas encompasses a much broader range of social uses and needs. Each summer, millions of Americans visit the nation's coastal zone in pursuit of a myriad of recreational activities—swimming, sun bathing, surfing, fishing, boating, and simply relaxing. Full enjoyment of these various pursuits depends primarily on maintaining the quality and integrity of the beaches, tidelands, and submerged lands. For this reason, several courts have extended the public trust doctrine to embrace recreational use as an element of the jus publicum. For example, in Borough of Neptune City v. Borough of Avon-by-the-Sea, 193 the New Jersey Supreme Court stated:

We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit. 194

In Just v. Marinette County, 195 the Wisconsin Supreme Court held that the public trust doctrine embraces the right of the public to be free from the harmful effects of a polluted environment. 196 In Marks v. Whitney, 197 the California Supreme Court went even further:

The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode over another.

There is a growing public recognition that one of the most important public uses of tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural

192. Since water was the principal mode of transportation at this time, and fish provided an important source of food, the public trust doctrine originally developed as a means of safeguarding these interests.
195. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
196. Id. at 23-24, 201 N.W.2d at 771.
197. 6 Cal. 3d 551, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).
state so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life and which favorably affect the scenery and climate of the area.198

Where tidelands are held in private ownership, some courts may be less willing than the New Jersey and California supreme courts to broaden the scope of the *jus publicum*. Thus, in Massachusetts, where title of the littoral owner extends fully to the mean low water mark, the Supreme Judicial Court refused to follow *Neptune City* in subjecting tidelands owners to a recreational use easement.199 The court found "that the grant to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from [*Neptune City*]."200

However, in South Carolina, as well as in the majority of jurisdictions where the state is presumptively the owner of all the tidelands,201 there should be no objection to extending the *jus publicum* to include additional purposes. As custodian and trustee of the tidelands, the state should be deemed to hold and administer them in accordance with the changing needs of the public.

It is unlikely that a court would apply the language of *Marks* literally and hold that all uses of the tidelands henceforth are violative of the public trust doctrine. As we have seen, uses as intrusive as a public street and parking facilities may be consistent with the *jus publicum* and thus should be permitted. The significance of *Marks* lies rather in the court's recognition that the public interest in tidal areas has changed greatly in recent years. For example, in the early South Carolina cases—*Pacific Guano*, *Pinckney*, and *Farmers' Mining*—the dominant interest underlying the state's claim of title to the tidelands was its desire to procure revenues by leasing the area for mineral exploitation. Today, the state's dominant interest is one of protecting and preserving these lands for public use and enjoyment.

198. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796. Apparently, the South Carolina Attorney General agrees that preservation of the tidelands is a valid purpose for which tidelands are held in trust.

Some of the tidelands are hunted, some are fished for pleasure, some are fished commercially, some are boated for pleasure, some are boated commercially and some are in the wilderness state and seldom seen by man. Modern living has caught these areas between two conflicting theories (1) commercial exploitation and (2) wilderness and natural areas preserved for the public at large.

The tidelands area of the State of South Carolina lying along the Atlantic Ocean is a prime asset to the economy of the entire State of South Carolina, as well as one of the principal assets of the coastal counties, and as such should be protected and preserved.


200. *Id.* at 688, 313 N.E.2d at 567.

201. All coastal states except Delaware, Georgia, Maine, Massachusetts, New Hampshire, Pennsylvania, and Virginia recognize the mean high water mark as the usual boundary between public and privately-owned property. See Maloney & Ausness, *supra* note 3, at 200-02.
This is not to say that every square foot of the tidelands should remain sacrosanct. What the doctrine does mean is that the courts should view with considerable suspicion those activities that alter the essential character of the tidelands, or that impair or extinguish the public rights therein, and should prohibit such activities where necessary.\footnote{Cf. \textit{Just v. Marinette County}, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (holding that it is not an unreasonable exercise of the police power to prohibit an owner from using his property for a purpose for which it is unsuited in its natural state and which injures the rights of others).}

**CONCLUSION**

Who owns the tidelands? The state presumptively is the owner of all tidelands in South Carolina. A private claimant can rebut this presumption only by: (1) producing an unbroken chain of title back to an original grant from the sovereign; and (2) showing specific language in the original grant evincing an intent to convey the land to the mean low water mark. Only where the entire grant consists of tidelands can the grantee demonstrate the requisite intent of the legislature without resort to an express reference in the grant to the mean low water mark.

Although the matter is not wholly free from doubt, the better view is that the presumption in favor of the state does not depend on the navigability of the streams bordering the tract. While the number of tidelands ownership cases doubtless will increase as a result of the new South Carolina Coastal Zone Management Act, which authorizes suits to establish title to tidelands, this legislation in no way affects the state’s presumption of ownership. Thus it can be expected that the state’s title to the tidelands will remain secure.

Are tidelands held in trust for public purposes? In the \textit{Cape Romain}, \textit{Rice Hope}, and \textit{Hardee} cases, the South Carolina Supreme Court announced —albeit in dicta—that the tidelands of the state are held in trust for public purposes. The court’s position is consistent with common law principles, the majority view of other state courts, and numerous decisions of the United States Supreme Court. Additional support for a tidelands trust in South Carolina may be found in several statutory enactments of the General Assembly and in the theory that tidewaters constitute navigable waters of the state, which under the state constitution are subject to public trust protection. Those cases sustaining or assuming the ability of the legislature to alienate tidelands do not refute the rule of \textit{Cape Romain} that these lands are subject to the public trust. The great majority of jurisdictions recognizes the ability of the legislature to dispose of trust property. However, courts will hold the grantee subject to the \textit{jus publicum}.

What is the nature of the tidelands trust? Unfortunately, the South Carolina Supreme Court has never had the opportunity to define and to explain fully the scope, nature, and limitations of the tidelands trust in this state. Presumably, the trust encompasses all the tidelands rather than just
those which abut navigable waters. Although the state supreme court has not settled the issue, the probable rule in South Carolina is that the legislature has the authority to alienate the state's tidelands. However, under the doctrine of Illinois Central, a court has the power to invalidate a legislative grant of the tidelands where the conveyance fails to promote a public purpose. The Wisconsin approach offers the South Carolina courts a sound method for determining what constitutes a public purpose. Under this approach, the court examines the diminution of the resource and the extent to which the public retains control over the new use. Where the grant is silent as to the uses which can be made of the tract, the grantee holds his property subject to the jus publicum. Under the modern trend, the public purposes for which tidelands are held in trust include not only the traditional rights of navigation and fishing but also recreation, environmental protection, and preservation of the area in its natural state.

In closing, this Article cannot overemphasize the need for a sound and effective coastal zone management program—a program which must be legislatively formulated. No court system is equipped to undertake the day-to-day supervision essential to the operation of an effective coastal zone program. Neither in South Carolina nor in any other state can the public trust doctrine by itself achieve the complete protection of the tidelands area. However, the tidelands trust doctrine remains a viable judicial tool for safeguarding the interests and rights of the public in tidal areas. In appropriate cases, the courts may employ the doctrine in checking administrative abuses, in subjecting private owners of tidelands to the jus publicum, in requiring a clearer manifestation of legislative intent when public trust property is alienated, or in refusing to give effect to a legislative conveyance of tidelands. The tidelands trust provides the foundation on which South Carolina in particular and all states in general can construct a sound program of coastal zone management.