

19103

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Case No. 2007-CP-10-2053

Yelsen Land Co., Inc.,

Appellant

v

The State of South Carolina
and The State Ports Authority,

Respondents,

RECORD ON APPEAL
VOLUME 2 OF 2 (Pages 500-556)

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Certificate of Counsel

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SUPREME COURT

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CONCLUSION

The Court below cites in the Final Decree and Judgment for Divorce that it had a considerable exposure to the parties and the attending difficulties experienced by them during the pendency of the action. The Court below not only relied on a record of the case, but also its familiarity with the litigants in reaching the result granting the Respondent, *inter alia*, a divorce absolute on February 28, 1974. This Court is asked on appeal to reverse the Final Decree and Judgment for Divorce and grant the Appellant custody of the minor dependent child. This is the relief which the Appellant sought below and was considered by the Court below during the entire proceedings. A reversal of the Decree in the face of this record and the actions of two dedicated Judges would be a fundamental error and do violence to the evidence in this case.

Respectfully submitted,

/s/ HANS F PAUL,
PAUL & BELK,
North Charleston, S C,
Attorneys for Respondent.

September 9, 1974

The State of South Carolina 6927

IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

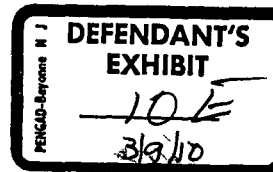
HONORABLE E HARRY AGNEW Judge

YELSEN LAND COMPANY, INC., ~~a corporation~~ and
DAJON REALTY Company, ~~a corporation~~ Appellants
against

THE STATE OF SOUTH CAROLINA Respondent

TRANSCRIPT OF RECORD

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STATEMENT

The summons and Complaint in this action were filed May 23, 1969, together with the Answer and Counterclaim. A Reply to the Answer and Counter Claim was filed on June 26, 1969.

The Complaint alleged that the State of South Carolina is the owner of all tidelands, submerged lands, and lands adjacent to Morris Island in Charleston Harbor, South Carolina, and that the Defendants Yelsen Land Company, Inc., a Corporation, and Dajon Realty Company, a Corporation, assert title to and ownership of the tidelands, submerged lands and waters. The City of Charleston and Southern National Bank as Trustee, was the holder of a mortgage on the area claimed by Dajon Realty Company, and J Preston Richardson holds a mortgage on the area claimed by Yelsen Land Company Inc. The line of demarcation between these two areas cannot be ascertained.

The property which is the subject of this action is known as Morris Island in Charleston Harbor. The Defendant, Yelsen, claims the southwestern portion and the Defendant Dajon, claims the northern portion.

The Defendants counterclaimed for damages alleged to have been suffered to their real property. However, the evidence showed that only Dajon would have a claim and then not in tort but on an action of an inverse condemnation procedure. The State denies this claim in its Reply.

Yelsen claimed approximately 562 acres of high and low lands more or less through a deed of 1965 from the United States of America to J Preston Richardson. The

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United States of America had acquired under five Statutes at Large 147 passed in 1790, an area described as Middle Bay 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

6 Dajon introduced into evidence a deed from the State to John M Maillard dated August 3 1818 of 236 acres of highlands and 102 acres of marsh Dajon could not connect its title to this conveyance Dajon did trace its title to a conveyance of 824 acres on February 6, 1884 from J A Leland Master in Equity to G W McCormick

7 The case was tried to a jury on April 2nd 3rd and 4th 1972 and resulted in a general verdict for the State. Defendants moved for judgment notwithstanding the verdict and in the alternative a new trial The motion was marked heard and was subsequently argued after the Court had adjourned The Order was passed on December 3, 1973 denying the Defendants motions Defendants served timely notice of intention to appeal on December 13 1973 It is from the verdict of the jury and from this Order of the Presiding Judge, E Harry Agnew that the Appellants appeal Due and proper acknowledgment of Appellants notice of intention to appeal was made by the Respondents on December 13th, 1973

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COMPLAINT

Plaintiff complaining of Defendant alleges

1 All of the tidelands, submerged lands and waters which are the subject of this action are situate in the County of Charleston, State of South Carolina and are adjacent to Morris Island which is in Charleston Harbor at Charleston, S C

2 The State of South Carolina has title to the tidelands (i.e. the area between the mean high water mark and the mean low water mark) the submerged lands (i.e. the area below the mean low water mark) and the waters within the State of South Carolina

3 The State of South Carolina is the owner of all tidelands submerged lands and waters adjacent to Morris Island in Charleston Harbor South Carolina

4 The Defendants Yelsen Land Company Inc and Dajon Realty Company disregarding the rights of the Plaintiff and of its citizens are asserting title to and ownership of the tidelands submerged lands, and marshes adjacent to Morris Island in the harbor of Charleston South Carolina The two Defendants have overlapping claims in the same area, and they are all the claimants in this area They have objected to the Plaintiff's using this area in the public interest

5 The area which is the subject of this suit is described

ALL that area of tidelands submerged lands and waters which is adjacent to Morris Island in the harbor of Charleston, S C butting and bounding to the

13 Northeast and East on the waters of Charleston Harbor and the waters of the Atlantic Ocean, to the Southeast on the Atlantic Ocean and the highlands of Folly Island to the West on the highlands of James Island, to the West on the highlands of James Island and to the Northwest on the marshes lying between James Island and Fort Sumter. All of which fully appears by reference to the map attached hereto as a part hereof and marked EXHIBIT A the area involved being shown within the red lines.

14 6 Section 28-742 (4) Code of Laws of South Carolina defines the word "bottom". "bottom" includes all the tidelands of the State covered by water when at the stage of ordinary high tide. Section 28-754 provides that the waters and bottoms of the bays, rivers, creeks and marshes shall continue to remain as a common for the people of the State for the taking of fish.

15 7 Plaintiff has no adequate remedy at law and therefore brings this action in equity for the benefit of all its citizens for whose benefit Plaintiff holds these bottom, tidelands, submerged lands and waters in trust. Plaintiff is entitled to a decree confirming title to this area in the Plaintiff and enjoining and restraining Defendants and all who claim by, through or under them from encroaching further on this property.

16 WHEREFORE Plaintiff prays judgment against Defendants as follows:

1 Confirming title to the area in Plaintiff and excluding Defendants therefrom.

2 Enjoining the Defendants, their agents and servants, from trespassing upon or attempting to change the area involved from its natural state.

3 For the costs and disbursements of this action.

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Attorney General for South Carolina
EDWARD B. LATIMER
Assistant Attorney General for South Carolina,

FRANK H. BAILEY,
EDWARD D. BUCKLEY,
Attorneys at Law

Attorneys for Plaintiff

Columbia S.C.
January 9, 1969

ANSWER AND COUNTER CLAIM

Defendants Yelsen Land Company Inc., and Dajon Realty Company, answering the Complaint herein and by way of Counterclaim allege:

FOR A FIRST DEFENSE

1 They deny every allegation of the Complaint not herein admitted.

2 They admit so much of paragraph four (4) of the Complaint as alleges they assert title to and ownership of Morris Island and those tidelands, submerged lands and marshes adjacent to Morris Island in the harbor of Charleston, South Carolina, they also admit that their

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claims cover all of the area which is the subject of this
 21 action, they do not have sufficient knowledge or information to deny or admit that the Defendants J Preston Richardson and the Citizens and Southern National Bank of South Carolina as Trustee, now have certain mortgage liens upon said property as stated in paragraph four (4) of the Complaint herein and therefore deny the same. The Defendants above named admit so much of said paragraph (namely paragraph four (4) of said Complaint) as alleges that they object to the Plaintiff using or trespass-
 22 ing upon subject property in any manner and deny that Plaintiff has the right to use this area for any purpose. The Defendants above named deny the remaining allegations of said paragraph four (4)

FOR A SECOND DEFENSE

1 The answering Defendants, namely Yelsen Land Company Inc and Dajon Realty Company, allege that
 23 they are the lawful owners in fee of all of Morris Island, located in the harbor of Charleston, State of South Carolina including the tidelands submerged lands, and marshes adjacent thereto by reason of their predecessors in title having acquired same by grants by the State of South Carolina in and to the subject real estate their title stemming from an act of the South Carolina Legislature dated January 20 1790 as is evidenced in printed Volume 5, as shown on pages 147 148 and 149 on file in the State
 24 Library, State Capitol Columbia South Carolina, where in the State of South Carolina ceded to the United States of America a portion of the real estate involved in this action As to the remainder of the real estate involved

Appeal from Charleston County

herein, the State of South Carolina by its deed dated August 3, 1818 recorded in Grant Book M No 6 Vol 25
 27 Page 49 Secretary of States office, Columbia, South Carolina, conveyed the same to the above named Defendants predecessors in title By reason of such acts and deeds, the Plaintiff is without right to trespass upon use, or in any manner interfere with the peaceful enjoyment of the Defendants namely Yelsen Land Company, Inc and Dajon Realty Company, in and to such properties and
 26 estate

2 The answering Defendants above named deny that they are disregarding the rights of Plaintiff, and hereby allege that they hold ownership in fee to the subject lands by deeds executed by the State of South Carolina as heretofore alleged, and that, therefore the Plaintiff herein is estopped from claiming any interest in the whole
 27 or any part of subject property

FOR A THIRD DEFENSE AND BY WAY OF COUNTER CLAIM

1 For a third defense and by way of counterclaim, the answering Defendants allege that the Plaintiff has and is trespassing on the property in question and that Plaintiff apparently intends to continue said trespass that the
 28 Plaintiff by its pleadings has made this an equity action and, therefore, Defendants are entitled to seek equity to have the trespass barred and ceased

FOR A FOURTH DEFENSE AND BY WAY OF
COUNTER CLAIM

29

1 The answering Defendants plead Sections 10 121 and Sections 10 129 of the South Carolina Code of Laws, 1962, as a bar to this action

30

2 The Plaintiff State of South Carolina, has trespassed upon and is permitting others to trespass by attempting to grant right to others and especially to the Corps of Engineers of the United States of America and its agents, who have and are now trespassing upon Morris Island and its adjacent tidelands submerged lands and marshes

31

3 That such trespass now in progress and threatened to be continued includes the deposit upon Defendants premises (including highlands, as well as tidelands submerged lands and marshes) of material commonly known as spoilage being dredged from the channel of Charleston Harbor, the digging of a large drainage ditch and the erection of a dyke around a substantial portion of Morris Island, blocking Defendants right of ingress and egress to and from their property preventing their access to the beaches and waters surrounding the island, and destroying the use of the property for development of large portions of the island for residential and other purposes, all to the loss and damage of these Defendants in the sum of Two Hundred Fifty Thousand (\$250 000 00) Dollars

32

4 That such trespass and use of Defendants land by the Plaintiff constitutes an unlawful taking of Defendants property without just compensation and without due process of law, in violation of the Constitution of the State

of South Carolina and of the Constitution of the United States

33

5 Defendants have no adequate remedy at law to prevent further trespass by Plaintiff, or by those persons purporting to act under lease or permission granted by Plaintiff, and therefore, Defendants are entitled to a decree of this Court confirming their title to the premises in question and enjoining and restraining Plaintiff and all others acting by, through or under them from trespassing further upon their property

34

WHEREFORE the Defendants Yelsen Land Company Inc and Dajon Realty Company, pray judgment against the Plaintiff

(a) Confirming Defendants title to the premises in question,

(b) For a judgment in the sum of Two Hundred Fifty Thousand (\$250 000 00) Dollars actual damages,

35

(c) For reasonable attorneys fees for the defense of this action,

(d) For such other and further relief as the Court may deem just and proper

SLOAN AND GARDNER,
By EDWIN P GARDNER,
Attorneys at Law
603 Security Federal Bldg,
Columbia, South Carolina

36

Columbia S C
April 7th, 1969

Yelsen Land Company Inc, et al v The State of S C

REPLY TO COUNTER CLAIM OF YELSEN LAND
37 COMPANY, INC AND DAJON REALTY COMPANY

Plaintiff replying to Answer and Counterclaims alleges

REPLYING TO FIRST DEFENSE

1 That, paragraph 1 of the First Defense states conclusions of law and requires no answer

2 That answering paragraph 2 of the First Defense, the Plaintiff admits that it has granted to the Corps of Engineers of the United States the right to use certain of the Plaintiff's property in the vicinity of Morris Island, in Charleston Harbor South Carolina The Plaintiff denies the remaining allegations of paragraph 2

REPLYING TO SECOND DEFENSE

3 That, answering paragraph 1 of the Second Defense, the Plaintiff denies that there is any trespass in progress and denies that it is interfering with any right of the Defendants whatsoever The Plaintiff denies the remaining allegations of paragraph 1

4 That the Plaintiff denies each and every allegation of the Second Defense not specifically admitted

REPLYING TO THIRD DEFENSE AND
COUNTER CLAIM

40 5 That the Plaintiff denies that it is trespassing on any property of the Defendants The Plaintiff denies each and every allegation of the Third Defense and Counterclaim in full

Appeal from Charleston County

REPLYING TO THE FOURTH DEFENSE AND
COUNTER CLAIM

41

6 That the Plaintiff denies paragraphs 4 and 5 of the Second Counterclaim The Plaintiff denies that Morris Island itself is suitable for residential or any other purposes The Plaintiff specifically denies that the Defendants have been damaged in the amount of Two Hundred Thousand (\$250,000 00) Dollars or in any amount whatsoever

7 That the Plaintiff denies each and every allegation of the Fourth Defense and Counterclaim not specifically admitted 42

WHEREFORE, Plaintiff prays judgment against Defendants as follows

1 Confirming title to the area in Plaintiff and excluding Defendants therefrom

2 Enjoining the Defendants their agents and servants, from trespassing upon or attempting to change the area involved from its natural state 43

3 For the costs and disbursements of this action

4 That the Counterclaims be dismissed

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FRANK H BAILEY,
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44

Attorneys for the Plaintiff

Columbia, South Carolina

21 May, 1969

TRANSCRIPT OF RECORD

45 DR JAMES A TIMMERMAN

Q Alright now taking into account that an agency of the State did take a portion of these tidelands area to be diked for the use of the Corps of Engineers how does that fit into the projects of the Wildlife Resources Department relating to marine resources?

MR HOWE Your Honor we object to this sort of questioning

16 MR URICCHIO This has absolutely nothing to do with the title of this property, as to who owns it, and that's the only issue in this case

MR LATIMER Well

JUDGE AGNEW What would be the relevancy?

MR LATIMER It would be the general value of these areas lying in their natural state to the State of South Carolina based on the statutory law putting that area in the custody of the Marine Resources Division

MR URICCHIO Your Honor, if the State of South Carolina doesn't own it regardless of the value to the State of South Carolina if they want to buy it we might be willing to sell it to them if that's what he is getting at But, I can't understand for the purpose of this law suit--there is nothing alleged in the complaint about this. We are trying the title, as to who owns this property and not the value to the State Now, if he wants to testify as to the value in dollars of the land that they are taking from us well let him to that but otherwise we object to this type of testimony

JUDGE AGNEW Restate your question, Mr Latimer 49

MR LATIMER I'll drop that question and rephrase it in this manner

Q Is that area in its natural state valuable to the citizens of South Carolina?

MR URICCHIO Your Honor, we object to that Regardless of whether it's valuable to the citizens of South Carolina, it depends on who owns it It's valuable to us, that's why we are in Court here today We wouldn't be spending two days in court if we didn't think it to be valuable to us Value has nothing to do with it as to the title of the property 50

JUDGE AGNEW I overruled your objection You may answer the question

Q In general what would be its value in its natural state to the citizens of South Carolina? 51

A Well, the value as far as the State of South Carolina is concerned, the natural resources is of extreme value It's very difficult to assess a value on dollars per acre but what I am trying to emphasize here is that the marine resources areas such as the marsh land it depends upon through whose eyes you are looking at it whether you are looking at it through the developer or through the State's eyes If this area is left in its natural habitat it can serve future generations We are talking about perhaps maybe about two hundred dollars per year as far as its value to commercial fishery is concerned, but this is something that would be indefinite as far as it serving my children and 52

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my children's children But as far as a developer is concerned, if this area is developed here it could serve an economic purpose there too

MR URICCHIO How Your Honor, how would he know that We object to that It's not responsive to the question and move to strike it Your Honor and ask the jury to disregard it

JUDGE AGNEW Yes sir you may disregard that last statement

(Tr pg 77 L 22 25 pgs 78 79 and 80, L 1 14)

TESTIMONY OF WILLIAM H VAUGHAN

Direct Examination by Mr Buckley

Q Mr Vaughan, what is your occupation?

A I am an attorney

MR URICCHIO Your Honor, we will stipulate that Mr Vaughan is an eminent attorney in Charleston County, has been practicing a long time and is an expert in real estate matters and licensed to practice law in the State of South Carolina and the United States District Court for the District of South Carolina, Fourth Circuit Court of Appeals and heavens knows what else We will stipulate as to his qualifications

JUDGE AGNEW Alright

MR BUCKLEY We will accept his stipulation

Q Mr Vaughan in the course of your practice of law do you examine titles to real property?

Appeal from Charleston County

A Yes, I have

Q And have you ever had occasion in your practice to examine the title to the marsh which lies just to the west of what we know as Morris Island?

A Yes, I did, in the summer of 1967

Q And what was the—who was your client on that occasion?

A The South Carolina State Ports Authority

Q And what was the reason for your examining title to that marsh land?

A The United States Corps of Engineers needed a spoil disposal area and had requested the State Ports Authority, as the agent for the State, to acquire this for the U.S. Corps of Engineers

Q And did you make an examination of the title to the marsh lands in that area?

A Yes, I did

Q And what were your findings?

A Well, I found that this area was in use by the State The Wildlife Commission was using it and leasing this area for oysters and other such matters at that time There was also a title—the initial area we were looking for involved an island off Black or Block Island We found a private title to that and later the configuration of the spoil area was changed so as to exclude Block Island

Q Now, would you be kind enough to go to the map and point out what is known as Black or Block Island, that is on the aerial photo Plaintiff's Exhibit 3?

A I believe its this area that looks sort of like the
61 foot of a chicken or something like that over here which
is trees

Q Would you point out the area of the marsh on
which you examined title?

A Well, it begins generally here where Inlet Creek
is and runs down to about the creeks running through the
middle and on out toward Morris Island That's just a
very general description of it

Q And how far south did your title examination carry
you?

A Well, we examined clear down here to Black Is
land Creek initially because at one time this area was
planned to be a spoil area too

Q Now of that area, what part of that area did you
find to be owned by anyone other than the State of South
Carolina?

A Except for Block or Black Island, we found no
private ownership in this area

Q So that what was your conclusion as to the title
to the marsh lands adjacent to Morris Island?

A That this was owned by the State at the time

Q Will you take the stand, please? I show you this
plat which is Plaintiff's Exhibit Number 13 Did you
have occasion to study that plat in the course of your ex
64 mination?

A I can't say for certain I examined a number of
plats in the Office of the Corps of Engineers This looks
like one of those that I examined

Q Well, did you, in the course of your examination
of the marsh area make any examination of the title to
the high lands?

A Yes, sir

Q And what high lands did you examine the title to?

A There is a chain of title to Morris Island, so I ran
that title back to see whether there was any indication
there that this title extended into the area that the Ports
Authority was interested in

Q And what was your finding with respect to the
Morris Island?

A I could find no evidence that this title which was
then held in the name of Pettersen, I believe at the time
I examined it had extended into the marsh area with one
exception, that there had been an old title to Morris
Island which this chain did not connect to which had
indicated that a portion of marsh close to Cummings
Point had at one time been associated with Morris Island
had been conveyed with it, but that was excluded from
the spoil area

Q And that is not embraced within the spoil area?

A No, Sir

Tr pgs 139-143 L 9 incl

Q In your opinion does the record in that case in
anyway show whether or not the State of South Carolina
was making any claim to property in this area?

A Oh, yes, it indicates that they were claiming all
of the marsh lands, and certain other areas

Q In your opinion does the fact that the Plaintiff
69 Anton Pettersen consented to the dismissal of the State
of South Carolina from that suit indicate in anyway the
status of the title to the marsh lands behind Morris Island?

A That would indicate that in this suit he wasn't
talking about the marsh lands. He was talking about
something else, so the dismissal of these parties claiming
the marsh land would not affect what he was trying to
buy

70 Q So that in your opinion, then, this suit only in-
volved the high lands of Morris Island?

A Yes, that's the indication

Q Now in the course of your investigation of this
title, which was, I think some nine years later wasn't
it?

A Yes, 67

71 Q Did you have occasion to consult with anyone
from either Yelsen Land Company or Dajon Realty Com-
pany?

A Yes, I spoke with Mr Felkel, who I understood
was one of the officers of one or maybe both of those
corporations and I also spoke with Mr Goldberg, who I
understood at that time represented him

Q Who is Mr Goldberg?

72 A Mr Charles Goldberg. He is an attorney here
locally

Q And at that time he was representing those com-
panies?

A Yes, that was my understanding

Q And what was the nature of your conversations
with Mr Felkel? 73

A Well I had understood that he was about to ac-
quire this property from Mr Pettersen that he had a
contract or something of that nature. I wanted to know
whether he was claiming anything in the marsh land and,
if so, what was the basis for this claim

Q And what did he tell you about it?

A He said he was claiming but he said he referred 74
me to his attorney as to what was the basis of it

Q And did you discuss this claim with his attorney?

A Yes, I did

Q And what was the result of your discussion with
his attorney?

A He had no information beyond what I had from
the records 75

Q And you were satisfied that ?

MR URICCHIO Don't lead him too much, now, Mr
Buckley

Q What was your decision as to the status of the title
in the face of the claims of Mr Felkel?

A Well we found nothing to back it up. We offered
at this time to commence the condemnation if he felt
that he had some property, that we could commence con- 76
demnation and could litigate the question at that time and
he said he would prefer for us not to bring condemnation

Tr Pg 152, L 18 thru Pgs 153 and 154 L 20 incl

Yelsen Land Company Inc et al v The State of S.C.

CROSS EXAMINATION BY MR URICCHIO

77

Q And I recall it was your opinion that Mr Pettersen had a good and marketable title? In other words putting it in plain and simple language so that we all can understand, Mr Pettersen owned eight hundred and twenty acres somewhere on Morris Island?

A No, I wouldn't say that Morris Island is obviously changing drastically during that period of time and to say that it was now eight hundred and twenty acres I think he owned whatever was left of Morris Island

Tr Pg 160 L 8 thru 16

RE-DIRECT OF WILLIAM H VAUGHAN

By Mr Buckley

Q Mr Vaughan could you point out where that eight hundred and twenty-four acres is that they keep referring to in this instrument?

79

A No, sir

Q Why can't you?

A We could never locate the basis for the eight hundred and twenty four acres There was a law suit involving this title back in 1880 and for some reason the record of that law suit has been lost and maybe that's where they got the eight hundred and twenty I don't know where the eight hundred and twenty acres came from because certainly in recent times there is no eight hundred and twenty acres

80

Appeal from Charleston County

Q And with reference to the marsh area adjacent to and to the west of Morris Island what was your finding as to the title to that?

81

A That it was owned and occupied by the State of South Carolina

Q Now, with reference to the high land, the beaches, what not, that which is above the ordinary high tide what was your finding on the title there?

A Well, such of that as is Morris Island would belong to Mr Pettersen as of the summer of 1967

82

Q And does this spoil area encroach upon that land that went to Mr Pettersen?

MR URICCHIO Your Honor, how could he know it unless he surveyed it? Mr Vaughan says he didn't survey it

Q Mr Vaughan, wasn't it part of your assignment to see that it didn't?

83

A Yes I checked the survey against the plats that we have and it did not encroach on it

Q So it was not the purpose of the State of South Carolina to encroach upon anyone's property?

A No, sir

MR URICCHIO Your Honor let's don't lead him, Mr Buckley

JUDGE AGNEW Yes Sir that's leading

84

Q Mr Vaughan, were you ever able to locate the piece of property in the deed of Mr J Preston Richardson which is referred to as Middle Marsh Island?

Yelsen Land Company Inc, et al v The State of S. C.

85 A No Sir I find no reference on any chart or plat anywhere of Middle Bay Island

Q And in your findings on the various plats and what ever that were available to you in the public records of Charleston County and I believe you may have also consulted the records of the United States Engineers Office?

A Yes we consulted the records of the U S Engineers office of the Archives in Columbia and of the local records here in Charleston

86 Q And I believe you may have even consulted records of the South Carolina Historical Society didn't you?

A Yes we went through some of those

Q Well did you ever find the lighthouse?

87 A Oh yes, there are a number of references to the lighthouse The old plats tended to show the lighthouse on the back side, or the Charleston side of the island.

Q And to your own knowledge where is the light house today?

A Well it's actually—I have seen that and it is at sea, or was in 1967

88 Q And do you have any conclusion to draw with reference to the five hundred acres that might have been around the lighthouse where it was in 1967?

A Well my guess

MR URICHHIO We object to his guessing Your Honor

Appeal from Charleston County

MR HOWE Unless he is the Lord I don't know how he could answer that question 89

Q Well, from your study of the plats, from your knowledge of Charleston Harbor and your opinion in your opinion where is the land around the lighthouse?

A I couldn't find it

Q You could not find it?

A I could not find that land I found no indication that it involved the marsh land that we were interested in 90

Tr Pg 167 L 14 thru, 168 169 170 L 12

RE DIRECT EXAMINATION BY MR BUCKLEY

Q In examining that title, how much of that photograph, Plaintiff's Exhibit 3, would you be willing to certify to a purchaser on the basis of that suit Mr Vaughan? 91

A May I step up there?

Q Yes and use the pointer if you would like, sir

A Well, certainly I would have to look at it more carefully, but Cummings Point and this high land along the beach here would be that, and this part out here close to the lighthouse and what appears to be some high land down here, but you would have to certify or determine what is high land 92

Q So you would only certify title to the high land?

A Yes, sir, that's correct

Yelsen Land Company Inc, et al v The State of S. C.

Q That which would be above the ordinary high
93 tide?

A Right

Q So that you don't know how many acres ?

MR URICCHIO That's leading, Mr Buckley He
is your witness

Q Well, do you know how many acres are actually
there?

94 A No, I don't

Q And would you give an unqualified opinion to the
eight hundred and twenty four acres?

A No

Q Would you mind referring to your notes a minute,
Mr Vaughan When you refer to Morris Island what
part of Plaintiff's Exhibit 3, the aerial photo are you talk-
95 ing about?

A I am talking about the high land which I just men-
tioned Cummings Point and the beach along the shore,
such of it as is high

Q What do you call the area lying to the west of the
area you just described?

A Well, there is no real name for it That's where
96 the spoil area is now This is former marsh land being
filled in

Q And would you mind looking at your notes, sir, and
I think you said you went to the Auditor's Office in 1967?

Appeal from Charleston County

A Yes

Q To see what the Auditor's records showed in rela-
tionship to Morris Island?

A Yes

Q Would you tell us what your findings were sir?

A Yes, the Auditor had a special section out there for
this general area and it showed Anton Pettersen, eight
hundred and twenty acres, Morris Island value two hun-
dred dollars tax twenty dollars and ten cents, and Anton
Pettersen, lighthouse reference point Morris Island four
point two three acres, value fifty and tax five dollars and
three cents And then another entry Anton Pettersen
point Morris Island Lighthouse three acres value thirty
dollars and tax three dollars and two cents Then J
Preston Richardson Morris Island, one lot value of one
hundred dollars, tax ten dollars and five cents And then
an indication that this had been conveyed to Yelsen Land
Corporation and then they gave the citation as to that
and the only entry for marsh was M M Truluck, eight
hundred acres marsh land value looks like two hundred
dollars and the tax twenty dollars and ten cents That
was the only marsh land entry in the area

Q In that area?

A Yes

Q Were you able to find out where the marsh land
was that Truluck was paying taxes on? 100

A Yes, that was Oak and Battery Islands

Q Oak and Battery Islands?

Yelsen Land Company, Inc, et al v The State of S. C.

A Yes

101

Q Where is Oak Island?

A I can't remember where it is right now. It's not in this general area.

Q It is not in this vicinity?

A No

Q And was that eight hundred and twenty-eight acres or whatever it was that was shown on there, did the Auditor's Office describe it as high land or marsh or how?

102

A No they described it as high land

Q They described it as high land?

A Yes

Q In 1967, when Mr. Pettersen owned it?

103 A That's right

Q And what did they describe when Mr. Richardson owned his property in 1967?

A That was described as high land. In other words, the way the Auditor sets it up, he either doesn't have any description, and that usually refers to high land or if it's marsh, he says marsh. The Truluck property was the only property in the area described as marsh.

104 Q Everything else was described as high land?

A Wasn't described at all, which is the standard way to describe the high land.

Tr Pg 178 L 24 thru, 179 thru 182 L 10

Appeal from Charleston County

Q Mr. Vaughan, the title of Mr. Pettersen was not traced back to that grant, was it?

105

A No, I couldn't trace it.

Tr Pg 185 L 9-12 incl

TESTIMONY OF EDWIN W. MEREDITH

Direct Examination by Mr. Buckley

Q What is your occupation?

A I am an engineer. I am the Chief of the Project Planning Branch at the present.

106

Q And by whom are you employed?

A The Army Corps of Engineers, Charleston District.

Q And do you hold any degrees?

A Yes, I have a Bachelor's Degree in Engineering from the University of Maryland.

Q How long have you worked in the engineering field?

107

A Approximately twenty-one years.

Q By whom have you been employed during that time?

A I have about ten years experience with the United States Geological Survey, the Water Resources Branch, and then ten years, going on eleven years, with the Army Corps of Engineers.

108

Q I ask you to look at the aerial photograph which is Plaintiffs Exhibit 3, to your left rear and I ask if you are familiar with that photograph?

A Yes, I am

109 Q Could you—are you familiar with the names of the creeks that are shown on that photograph?

A Not too well, unless I have a map before me

Q Well, I show you Plaintiff's Exhibit Number 2 Are you familiar with this map?

A Yes, it's a USGS quadrangle

110 Q And could you take the creeks that are shown on that map and point them out on the aerial photograph, which is Plaintiff's Exhibit 3?

A Yes I could

Q Would you do that, please, and identify them for the benefit of the jury? Better still, would you letter them with this pencil?

A (The witness complied)

111 Q Would you now identify these creeks for the benefit of the jury, please?

112 A The south end of the island we have Lighthouse Creek and then we have coming off Lighthouse Creek, generally flowing southwestward, Block Island Creek Towards the northern end and on the back side of the island we have Bass Creek, which appears to be flowing in a northeasterly direction And, to the west of this we have Schooner Creek which also would flow to the northeast and we also marked Cummings Point

Q Could you also identify for us Black Island or Block Island?

A Block Island? I would have to take a look at the map to make sure where that is 111

Q You are not familiar with that island?

A I am not familiar with it

Q Would you identify this plat please?

A This is a print of a coast chart The survey for this coast chart was made by the U S Coast and Geodetic Service between the years of 1854 and 1858

Q And does that show what he know as Morris Island? 114

A Yes, it does

MR BUCKLEY I would like to introduce this in evidence

(Plat marked Plaintiff's Exhibit Number 8)

Q Would you step down, Mr Meredith, and could you indicate to the jury the area that is designated on this map as Morris Island? 115

A You see here Morris Island written across what appears to be the high land, this land

Q And can you identify on this map Lighthouse Creek?

A Lighthouse Creek is this creek here

Q Can you identify on this map Schooner Creek? 116

A Let's see, Schooner is—they have Lighthouse Creek, but it would be the same as Schooner

Yelsen Land Company, Inc., et al v The State of S C

Q But they have it up here as—in other words at that
117 time they called Schooner Creek Lighthouse Creek, also?

A Yes

Q Now, can you locate on this map Black Creek or
Block Creek?

A This is the creek that shows on the aerial photo
graph It's identified by name on the photograph

Q Now so that the record will show, would you take
118 a pen and put the letters—the letter A by the creek
which you first identified on the southern end as Light
house Creek?

A Lighthouse Creek (Marked it 'A')

Q And would you identify with the letter B that
part of the creek you identified on that map as what we
call now Schooner Creek?

119 A (The witness complied)

Q And would you identify as C' what we now call—
well I call it Black Creek?

A Block Island Creek (The witness complied)

Q Thank you sir You may resume your seat I have
placed before you another plat and would you identify
that, please?

120 A The top plat?

Q Yes

A This is another print of the same coast chart that
we have just seen, only on it we have the 1967 shore line

Appeal from Charleston County

marked The 67 shore line is the same shore line that was
taken from the aerial photograph that you see to my left 121

Q Which is Plaintiff's Exhibit 3?

A That's right

MR BUCKLEY I would like to offer this in evidence

MR URICCHIO No objection

(Plat marked Plaintiff's Exhibit Number 9)

Q Would you identify the marking that shows the
shore line for the benefit of the jury, that shows the 1967
shore line? 122

A The key to the shore line is shown here The orange
color is used to identify the 67 shore line

Q And can you identify for us where the lighthouse
as we know it today was located in 1914 or 15?

A The approximate location of the lighthouse in 1914
would be at this point here, identified in the key in red 123

Q You have another plat before you Mr Meredith
Would you identify that plat, please?

A This is a part of a coast chart that was done by the
United States Coast and Geodetic Survey in 1914

Q And what does that chart show?

A It shows the entrance to Charleston Harbor, in-
cluding Morris Island 124

Q Could you step down a minute sir? For the benefit
of the jury, would you point out what is known as what
we call Lighthouse Creek on this map?

Yelsen Land Company Inc et al v The State of S C

A Lighthouse Creek would be this creek here

125 Q And could you also point out what we call Schooner Creek?

A Schooner Creek here

Q And what is that called on this particular map?

A Lighthouse Creek

Q And is the Block Island or Black Island Creek shown on this map?

126 A That would be this creek

Q And where is the lighthouse shown on this particular map?

A The light house is right here

Q And I see some marks coming from generally, I guess that's east to west What are those markings on this map?

127 A I am not sure which marks you are referring to

Q These marks right here?

A If you are referring to the lines, this is the south jetty into the Charleston Harbor and the numbers refer to depths at that time The hydrographic survey was made in 1910 and 1857, so the depths shown there would have been measured during that period of time

128 Q What is this area that is shown in red with little hash marks?

A Someone has marked this chart to indicate a piece of land which the United States Government owns, approximately thirty four acres plus or minus

Appeal from Charleston County

MR BUCKLEY We offer this in evidence

(Plat marked Plaintiff's Exhibit Number 10)

129

Q You have another plat, Mr Meredith and could you identify that for us, please?

A Yes, this is a photostat of a 1933 hydrographic survey of the Charleston Harbor and Lighthouse Creek This was also done by the United States Coast and Geodetic Survey

Q And does this show the area involved around the Morris Island?

A Yes, a good part of it

MR BUCKLEY Would you mark that?

(Plat marked Plaintiff's Exhibit Number 11)

Q I ask you to identify this plat which I hand you, sir?

A This is a print that shows a piece of property we just referred to a moment ago, the thirty four acres plus or minus which is owned in deed by the United States Government It is at the back side of Cummings Point

131

(Plat marked Plaintiff's Exhibit Number 12)

Q You have a plat before you Would you identify that, Mr Meredith?

A I have a print here which is print number B-75055 over 1903 and it says its to accompany report dated December 8th, 1938 The print is one that shows shore line changes on Morris and the northern end of Folly

132

Island The high water shore lines shown on the map
 133 are those for 1849 to 54, which was the shore line that
 you saw on the chart which we referred to as the 1854
 chart The high water shore line that was surveyed 1857
 to 1858, high water shore line that was surveyed 1864
 the high water shore line which was surveyed in 1900
 that of 1921, 1933, 1955, and 1967

Q Now, what is the source of this information that
 is on that map?

134 A The source of the information is the Coast and
 Geodetic charts that we showed you a moment ago The
 United States Corps of Engineers Coastal Engineering
 Research Center takes these charts, makes sure that the
 scale is the same and they overlay them, project them
 and compare the shore lines in that manner

Q And from whose files have these particular plats or
 copies come?

135 A This copy, of course, came from our file, which the
 print is a part of a master that came from the Coastal
 Engineering Research Center

Q And what is the purpose of assembling the data,
 when it is originally assembled?

A The purpose for assembling this data was to de-
 termine the shore line changes along the coast of South
 Carolina and in particular along Morris and Folly Is-
 136 lands

Q And were these used for purposes of navigation?

A Well, now the basic data was gotten by the Coast
 and Geodetic Survey for the purpose of charting out

coast They maintain records of shore line changes or
 changes in the hydrographic portions of the coast 137

MR BUCKLEY I would like to have this marked
 Do you have any objection?

MR URICCHIO No, sir, no objection

(Plat marked Plaintiff's Exhibit Number 13)

MR BUCKLEY Mr Swartz, would you mark this
 please?

(Aerial Photo marked Plaintiff's Exhibit Number
 14) 138

Q I show you Plaintiff's Exhibit 14 and ask if you
 would identify this, please?

A This is a print of the 1967 photographs shown of
 Charleston Harbor and particularly it is a print of the
 Morris Island photographs The scale on this is one inch
 equals four hundred feet and the orange shown on the 139
 photograph is the shore line as taken from the U S
 Coast and Geodetic chart where the survey for that chart
 was made during the period 1854 and 1958 It is identi-
 fied on this photograph as the 1858 shore line

Q And is this aerial photograph the same as Plain-
 tiff's Exhibit 3, which is on the blackboard?

A Its the same photograph with few modifications 140

Q Alright, would you trace the 1858 shore line with
 your pointer please?

A (The witness complied)

Q Now, would you show me where the lighthouse is
141 on that?

A The lighthouse shows right here Just above the pointer

Tr Pg 98 I 21 thru, 99 thru 107 L 15

Q Mr Meredith have you made some calculations as to the amount of acres of Morris Island that has been claimed by the Atlantic Ocean?

142 A Yes, I have

Q And that covers what period, sir?

A I made two computations, one is for the period 1854 to 1955 and the other is for the period 1854 to 1967

Q Well, in the period of from 1854 to 1967, how many acres of Morris Island have disappeared?

A This deals only with the acreage lost on the front
143 beach and I computed nine hundred and eighty seven acres as being eroded away

Q And that's been on the Atlantic Ocean side?

A That's on the Atlantic Ocean side, that's correct

Q And would you repeat that figure?

A Nine hundred and eighty seven acres

144 Q And what were the figures from the period 1854 to 1955?

A The erosion on the Atlantic side was eight hundred and thirty seven acres

Q And during that same time were there any accretions to the high lands?

145

A Yes, there have been some accretions on the north end of Morris Island and the coast has fluctuated back and forth There has been a little bit of accretion on the south end, on Lighthouse Creek also

Q Well, would you show us where the point on Plaintiff's Exhibit 3, the aerial photo where the accretions were?

146

A Before I could show it I would have to have the shore line change map that was entered into evidence as an exhibit

Q I hand you Plaintiff's Exhibit Number 13?

A Now, you asked for the Lighthouse Creek accretion or the Cummings Point, or both?

Q Both, sir

147

A At Cummings Point at one time the shore line came across here This would be about 1854, so that this area out here is area that has accreted to the 1854 shore line This end of Cummings Point has receded back to about this line here and that's the shore line as of 1900 The end of the island terminated at this point So, all of this has accreted since 1900 At the south end, this little piece right in here, this buldge at the south end of Morris Island is accreted land In 1954, 1849 to 54 the shore line ran along this dark area if you can see it, very much as I have shown with my finger and all of this land since that period has accreted to the island

148

Q Mr Meredith are these figures that you gave before
149 the accretion, nine hundred and some odd acres, are those
gross or net?

A That would be a gross figure for the period that I
specified Now it doesn't take into consideration any of
the accretion I only measured the erosion between the
lines we have drawn on that map, on the front beach In
other words I didn't take into consideration this little
piece down here, this accretion

150 Q You did not take that accretion into consideration
in arriving at the nine hundred and some odd acres?

A That's right

Q And I ask you on the plat to the right of Plaintiff's
Exhibit 3 which is Plaintiff's Exhibit Number 14, entitled
Morris Island photo of 1967, orange line is 1958 shore line
Where is this nine hundred and some acres that has been
151 lost?

A It would be the acreage between this shore line
This is where the two shore lines come together

Q Would you draw that shore line with this green
pen, sir? It might be more visible

A (The witness complied)

Q Now sir, can you indicate the area where the nine
152 hundred and some acres may be?

A It would be approximately this area in here, from
this point where the shore lines intersect, a triangular
area in essence That's within the bounds of this mark

Q Thank you, sir Would you retake the stand,
please? 153

A Yes, sir

Tr Pg 185 L 21 25 Pgs 186 188 L 19

CROSS EXAMINATION OF ST ELMORE FELKEL

By Mr Buckley

Q Mr Felkel, your name is Saint Elmore Felkel?

A Yes, sir 154

Q Has ever anybody called you Saint?

A Yes, sir

Q What are you usually known by?

A Speedy

Q And how did you come by that name?

MR HOWE Your Honor, we object to that, as to 155
how he came by his nickname

A I was nicknamed that when I was fourteen years
old and I better quit there

Q But you are called Speedy isn't that right Mr
Felkel?

A That's correct, yes, sir

Q And you have been called Speedy ever since you 156
have been in Charleston County, is that correct?

A Yes

Tr Pg 253 L 16 25 & Pg 254 L 1-5

Q Mr Felkel do you remember May the 22d, 1957?

157

A Not in particular, no sir

Q I think Mr Arthur Howe was United States Attorney at that time and you were over in the court house across the street the United States District Court House?

A Yes, sir

Q And would you tell us what significance May the 22nd, 1957 has?

158

A At that time I was in the home building business and I was running a very fast operation, and when I say fast quite voluminous I accepted from one of my foreman a FHA report that I later filed with a Savings and Loan Association The report was not a hundred per cent true I plead--well, anyway, I did not--I accepted a two hundred and fifty dollar fine

159

Q Didn't you plead guilty in the United States District Court on May the 22d, 1957, to supplying false information?

A That I do not remember, sir

Q And weren't you sentenced to three years suspended?

A Absolutely not, sir

160

Q Which was later changed to a three hundred dollar fine or six months?

A Two hundred and fifty dollar fine, sir

Q And you don't recall pleading guilty in the United States District Court?

A I don't remember whether it was nolo

161

MR URICCHIO Nolo contendere

A I am not certain I think that's what it was but I am not certain, sir

Q And Mr Hugh Taylor was your codefendant I believe?

A That is correct, sir

Q And that was supplying false information under government loans, was it not?

162

A It was filing a false FHA inspection report

Q Right Now Mr Felkel, have you surveyed Morris Island?

A No, sir

Q I understood you to say you are a surveyor and engineer?

163

A Yes, sir

Q Yet you have not taken the time to survey this property that you are claiming?

A No, sir

Q You have run no surveys whatsoever?

A No, sir

164

Q And have you made any effort to ascertain the level of high tide on Morris Island?

A No, sir

Yelsen Land Company, Inc, et al v The State of S.C.

Q I believe you said you were claiming everything
165 within this circle that you put on this plat?

A That is correct, sir

Tr Pgs 255 & 256

Q And I believe you said you thought you got about
five hundred acres through the deed from the United
States of America?

A Yes, sir

166 Q And isn't most of that in the water today?

A A great part of that is underwater, yes, sir

Q And isn't a good part of this area up here, of the
original three hundred acres underwater today?

A There is a lot of that underwater, yes

Tr Pg 267 L 6 14 incl

167 Q So Captain Pettersen, I believe, bought this prop-
erty for nine thousand, nine hundred and ninety nine
dollars and ninety nine cents? Is that right?

A Fourteen years ago, yes, sir

Q And several years later Gadsden paid him ten
thousand dollars in cash and gave a mortgage for fifty
thousand dollars?

168 A Yes, sir

Q And captain Pettersen had that mortgage assigned
for collection to the Citizens and Southern National Bank?
Is that right?

Appeal from Charleston County

A He assigned it to his trust fund that he has over
there 169

Q At the Citizens and Southern National Bank?

A Yes, sir

Q So the Citizens and Southern National Bank hasn't
loaned any money on this island, has it?

A No, sir

Q And who owns Gadsden Insurance Agency 170

A Henry Yaschik

Q Henry Yaschik? And how much is owed on that
note and mortgage to the bank?

A Roughly fifty thousand dollars, sir

Q So that the principle has not been reduced at all
on that loan?

A No, sir, just the interest being paid 171

Tr Pg 282 L 5-25 Pg 283 L 1-3

Q That piece of paper comes from the Assessor's
Office, doesn't it?

A That's correct

Q And this purports to change your assessment for
1971? Right? 172

A Yes, sir

Q Yet this assessment notice is in 1972, isn't it?

A That's right

Yelsen Land Company Inc, et al v The State of S C

Q And it is dated February the 12th, 1972?

173

A That's right

Q Just shortly before this came up for trial?

A I got some others that I haven't received yet in the county

Q And doesn't your assessments on Yelsen and Dajon, at least prior to these weren't they in three pieces?

174

A No, sir

Q Or in three parcels? Weren't they assessed as three parcels of property rather than two?

A I don't remember

Q And this assessed figure here is a great deal larger than the prior figure isn't it?

175 A Yes sir no one had any idea what the acreage was prior to this

Q And how did the assessor find out anything about the acreage over there?

MR URICCHIO Your Honor I don't know how in the world Mr Felkel can answer how the assessors done something He is not an assessor He has an assessor here and they can put him on the stand Your Honor, if he wants to do that I don't think Mr Felkel can answer that

176

MR BUCKLEY I think Mr Felkel may know

JUDGE AGNEW If he knows, he can answer

Appeal from Charleston County

A I was called to the Assessor's office in October or November, sometime last year, and the assessor went over with me what he had outlined as Morris Island and based on the plat

177

Q So you showed the assessor what you said you were claiming on Morris Island, didn't you?

A No, sir

Q You didn't?

A No

178

Q Well, how would the assessor know what you were claiming on Morris Island?

A The assessor had Block Island marked out and he asked me if I had any overlapping claim on Block Island and he came up with the acreage on Block Island, or the boundaries on Block Island and from that we arrived at Morris Island

Q Well, one of those tracts appeared for years from 1970 back in previous years as a hundred acres on the Auditor's books?

179

A Well I don't know, sir

Q And wasn't one of those appearing since 1957 or 58 as eight hundred and twenty-eight acres?

A I don't know, sir

Q And now how many acres do you have here total?

180

A Twenty seven hundred and seventy-two

Q So the auditor of his own volition simply changed it to twenty seven hundred and forty-two acres?

Yelsen Land Company Inc, et al v The State of S C

181 A That is what the aerial photo shows I have no
idea how many acres are out there I cannot testify to
that, sir

Q And you don't have any idea how much taxes you
have paid each year on the properties owned by Dajon
and the properties owned by Yelsen? You don't have any
idea what those figures are?

A I have no idea sir, no

182 Q But it was very very small, wasn't it? A very small
amount?

A I would be unable to answer sir

Tr Pg 286 L 20 thru Pg 289 L 11

TESTIMONY OF MRS PAULINE KOGER

Direct Examination by Mr Buckley

183 MR URICCHIO We will stipulate that Mrs Koger
is the Auditor for Charleston County And whatever she
says will be reflected in her books

MR BUCKLEY Thank you, sir

Q Mrs Koger I asked you to extract from your books
certain information concerning Morris Island and could
you tell us—I think you went back as far as the year 1947?

A Yes, sir

184 Q Could you tell us in whose name you found Morris
Island in 1947?

MR URICCHIO Now your Honor, this is not new
matter I think he is limited to new matter in this matter

Appeal from Charleston County

of reply and he could have put that in, in the case in chief
if he wanted to

185

JUDGE AGNEW Well, it may be in reply to testi-
mony of the defense witness You may proceed

Q In whose name was this property listed in the year
1947?

A Mr Julius Cogswell

Q And what did the books show as to the property
in 1947?

186

A It showed eight hundred and forty acres

Q Now, did it show any marsh?

A No, sir, it did not

Q Now, did the books in 1947 carry a separate desig-
nation for high land and of marsh

A Yes it did and for other properties in that same
book

187

Q Other properties showed the marshes separate from
the high land?

A That's right

Q Now, to come closer up to date, I think you also
looked in the year 1966?

A Yes, sir

Q And what did you find with reference to Morris
Island in 1966?

188

A In 1966 Morris Island was in the name of Anton
Pettersen It was three different tracts of land, eight

Yelsen Land Company Inc et al v The State of S C

point twenty acres at two hundred dollars assessed value,
189 four point twenty three acres assessed at fifty dollars,
and a three acre tract assessed at thirty dollars

Q And do you have total taxes paid on those three tracts?

A On the eight hundred and twenty acres it was nineteen dollars and sixty cents, the four point twenty-three acres four dollars and ninety cents, and the three acre tract two dollars and ninety four cents

190 Q Now do you have the figures for the year 1967?

A In 1967 it was still in Mr Pettersen's name and there was eight hundred and twenty acres at two hundred The taxes were twenty dollars and ten cents, four point twenty three acres at fifty, five dollars and three cents taxes, three acres at thirty dollars making a total of three dollars in taxes

191 Q What was the next year that you extracted?

A 1968 It was purchased in 67 by Dajon Realty Company and in 1968 it went into that name and the eight hundred and twenty acres was still assessed at two hundred dollars, taxes nineteen dollars and ninety cents four point twenty three acres at fifty dollars and ninety cents four point twenty three acres at fifty dollars, four dollars and ninety eight cents taxes three acres at thirty dollars, two dollars and ninety nine cents taxes

192 Q Now, let's skip up to the year 1970 What do your records show for the year 1970?

A In 1970 it was eight hundred and twenty acres at two hundred, taxes twenty nine dollars and sixty cents,

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four point twenty three acres at fifty dollars taxes seven dollars and forty cents three acres at thirty dollars, taxes 193 four dollars and forty four cents

Q Now, do you have the 1971 figures?

A Yes, sir, I do

Q And what are those, please?

A Well, in 1971, the Assessor's Office increased the acreage to two thousand, two hundred and ten point seventy acres assessed at twenty seven, fifty, two thousand 194 seven hundred and fifty dollars taxes four hundred and five dollars and sixty-three cents

Tr Pgs 294 L 12 thru 297 L 8

TESTIMONY OF LEON SEAY

Direct Examination by Mr Buckley

Q Mr Seay, what is your occupation?

A I am the Mapping Supervisor of the Charleston County Board of Assessment 195

Q And in that function did you have occasion to map Morris Island recently?

A Yes, sir, in September

Q And did you turn over to the Assessor's Office the information concerning acreage on Morris Island? 196

A Yes, sir

Q And where did you get the information concerning ownership?

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A From the deeds recorded in the R M C Office

197 Q Now, do you recall what those deeds showed?

A Well I have copies my I look?

Q Yes you may check your files, sir

A You mean as far as ownership or ?

Q Well acreage and ownership, for that matter

198 A Well, the deed from Gadsden Insurance to the Dajon Realty called for eight hundred and twenty acres, more or less from Morris Island and also two pieces or parcels and a portion of Morris Island Lighthouse Reservation which is close to Morris Island

Q Now did that deed show any marsh in it?

A It doesn't call for any marsh It just says eight hundred twenty acres, more or less

199 Q Now, when you went to map this, how much acreage did you find over there?

A Total wise?

Q Well how many acres did you find of high land over on Morris Island?

A Well I computed what I found on the photograph and I came up with about a hundred and ten acres total

200 Q And does that include Cummings Point?

A Yes, sir

Q And how many acres of marsh land did you find to the west of Morris Island?

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A Approximately twenty-one hundred acres

Q And how did you assign that acreage to the assessors in the auditor's office? 201

A Well, not having any real or very good description of the island or any plats, we had several maps which just had Morris Island written on them I didn't map this at the time, before, when we were first mapping the area on James Island because we did not have a real outline of the island so I called Mr Felkel and he came to the office

Q So that the figures you have is what Mr Felkel told you he was claiming? 202

MR URICCHIO Your Honor, just let him ask where he got them from I object to him leading him

A No, sir I had put together the aerial photographs similar to what you have here and Mr Felkel sort of outlined what he figured or what he thought that Morris Island should be or what he claimed 203

Q And that includes how many acres?

A Well, the twenty-one hundred acres of marsh land and a hundred and ten acres of high land

Q And that's the way it is now ?

A That's the way we carried it

Tr Pg 303 L 19 thru Pg 306 L 3

Q And what do you carry on the books now under Yelsen? 204

A Well, it's a hundred and eight acres of marsh and four hundred and fifty-three and a half acres of sub-

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merged, but I think on the books this would probably be
 205 added together as a total of five hundred and sixty one and
 a half, it looks like, if my addition is correct That's right,
 five hundred and sixty-one and a half

Q And I think you said most of that is under the
 water?

A Most of that is under the water

Tr Pg 306 L 24 thru 307 L 7

206 APPELLANT'S REQUEST TO CHARGE NO 1

I charge you that the test of navigability of a stream is
 not whether the stream is subject to the ebb and flow of
 the tide but is navigable in fact

APPELLANT'S REQUEST TO CHARGE NO 2

I charge you that a navigable tidewater includes any
 inlet where the tide regularly ebbs and flows, used for
 207 navigation or capable of having at mean low tide freighted
 boats in the regular course of trade, although there is not
 a public terminus at both ends of the inlet

PLAINTIFF'S REQUEST

1

Tideland is defined as the area between the high
 water mark and the low water mark of tidal navigable
 streams It is a principle derived from the English
 208 common law and firmly established in the United States
 that the title to the soil under navigable waters is in the
 sovereign except as far as private rights in it have been
 acquired by express grant During the time when terri-

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tory now comprising one of the states was a colony of
 Great Britain, the title to land under navigable waters 209
 or tide waters within such colony was held by the crown
 in trust for the people of the realm

PLAINTIFF'S REQUEST

2

By high water mark is meant the line on the shore
 which is reached by the limit of the flux of the usual
 tide, that is, the high mark made on the shore as the 210
 tide, ebbs and flows twice in each lunar day, and not the
 point reached at new or full moon nor when there is an
 intervening disturbance such as a storm or earthquake

*Cape Romain Land & Improvement Co vs Georgia-
 Carolina Canning Co*, 148 S C 428, 146, S E 434 (1928)

PLAINTIFF'S REQUEST

3

The State of South Carolina comes into court with a 211
 presumption of title whenever the question as to owner-
 ship of tidelands arises It is incumbent upon the indivi-
 dual claiming real property to trace his title, in an ab-
 stract of title, in an unbroken chain to a grant from the
 sovereign

PLAINTIFF'S REQUEST

4

A grant by a sovereign to the tidelands must be in
 definite and express terms The grant is strictly con-
 strued against the grantee 212

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PLAINTIFFS REQUEST

5

213

The case of *Cape Romain Land & Imp Co v Georgia-Carolina Can Co* 148 S C 428 146, S E 434, (1928), held, to wit

214

In the case of *Shively v Bowlby, supra*, Mr Justice Gray, as the organ of the court, makes this reference to the rule in South Carolina In South Carolina, the rules of the common law, by which the title in the land under tide waters is in the State, and a grant of land bounded by such waters posses no title below high water mark, appear to be still in force—citing *State v Pacific Guano Co*, 22 S C 50 *State v Pinckney*, 22 S C 484 In the case of *Hardin v Jordan, supra*, in discussing the rule, the court uses this language With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore and lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties be longing thereto and held in trust for the public purposes of navigation and fishery *** In the case of *State v Pacific Guano Co*, *supra*, Mr Justice McGowan, in his opinion

215

as the organ of the court gives this statement of the rule The doctrines of the common law as to the seashore and the soil lying under tidewaters and navigable streams were peculiar The fundamental idea was that the property in the sea and tidewaters and in the soil and shore thereof,

216

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was in the sovereign *** These are all channels in which the tide ebbs and flows, and as to such the well established rule is that a grant of such should give title only to high water mark In the case of *Morris v United States, supra*, the writer of the opinion in that case refers to the reasoning of the opinion in the case of *State v Pinckney, supra*, with approval'

PLAINTIFFS REQUEST

6

The title to navigable waters and tidelands of South Carolina is in the State subject to the public use The title is held by the state as representative of the public, and in trust for them, a part of its prerogative rights, and not as private property

Cape Romain Land & Improvement Co vs Georgia-Canning Co, 148 S C 428, 146 S E 434 (1928)

PLAINTIFFS REQUEST

7

In the absence of specific words contained in a Grant State of South Carolina holds title to the high water mark in all navigable waters

State vs Pinckney, 22 S C 484 (1884)

Cape Romain Land & Improvement Co vs Georgia-Canning Co, 148 S C 428, 146 S E 434 (1928)

PLAINTIFFS REQUEST

8

Rice Hope Plantation v S C Public Service Authority, 59 S E 2d 132, 216 S C 500, (1950), held, to wit

219

220

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We adhere to our opinion in the case of *Cape Romain*
 21 *Land and Improvement Co v Georgia Carolina Canning*
Co 148 S C 428 146 S E 434 438, supra, wherein it
 was said The title to land below high water mark on
 tidal navigable streams under the well-settled rule, is in
 the state not for the purpose of sale, but to be held in
 trust for public purposes But we do not deem it neces-
 sary or proper upon this appeal to determine under what
 22 circumstances and by what method, if any, title might be
 acquired by private owners because any such ownership
 would be, in our opinion, subject to the dominant power
 of the government (State and Federal) to control and
 regulate navigable waters

PLAINTIFFS REQUEST

9

The general principle is that laches is not imputable to
 the government This maxim is founded, not in the no-
 23 tion of extra ordinary prerogative, but upon a great public
 policy There can be no estoppel against the State Public
 policy, to prevent loss to the State through the negligence
 of public officers, forbids the application of the doctrine
 of estoppel to the State, growing out of the conduct and
 representations of its officers 72 A L R 1270 The pay-
 ment of taxes is not evidence of title

PLAINTIFF'S REQUEST

10

224

I charge you that our Supreme Court has held that the
 required language in the grant must include the words
 to low water mark"

Appeal from Charleston County

PLAINTIFFS REQUEST

11

225

Adverse possession does not run against public land
 dedicated to and used by the public for streets and high
 ways Tidelands are held in trust for the people and are
 water highways Statutory law provides that the tidelands
 and submerged lands shall continue to remain as a com-
 mon for the people of the State for the taking of fish and
 other public purposes

PLAINTIFFS REQUEST

12

226

The Statute of Limitations did not run against the
 State of South Carolina

PLAINTIFFS REQUEST

13

The payment of taxes is not evidence of either posses-
 sion or title

227

Gadsden vs West Shore Investment Company, 90 S C
 172 82 S E 1052 (1914)

McBeth vs Donnelly, Dudley 177

Gregg vs Moore, 226 S C 366 85 S E 2d 279 (1954)

PLAINTIFFS REQUEST

14

228

Article 1, Section 28, of the South Carolina Constitution
 provides that all navigable waters of the State of South
 Carolina shall be open to the public

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PLAINTIFFS REQUEST

15

When the only territory under consideration lies on or borders on tidal navigable streams the question of navigability does not arise

PLAINTIFFS REQUEST

16

The rights of the public in navigable waters extend to all parts of such waters Ordinarily, the right of actual navigation is coextensive with the actual water line, expanding and contracting therewith as it fluctuates between the high and low water marks When the volume of a stream swells in the time of high water, its surface remains the surface of the highway, and the riparian owner must do nothing that will interfere with the use of the highway or any part of it up to the line of high water

State ex rel Lyon v Columbia Water Power Co, 82 S C 181 63 S E 884 22 L R A (NS) 435, 70 A L R 274

PLAINTIFFS REQUEST

17

The 1962 S C Code of Laws Section 70-1 states that all waters which have been rendered or can be rendered capable of being navigated by rafts or lumber or timber by the removal of accidental obstructions are navigable streams are common highways and are forever free to the citizens of this State and the United States Any obstruction of navigable waters is a nuisance and can be abated

Appeal from Charleston County

PLAINTIFF'S REQUEST

18

The 1962 S C Code of Laws, Section 70 2, states that any person who obstructs the navigable waters is guilty of a misdemeanor It also states that all such obstructions may be removed by anyone

PLAINTIFFS REQUEST

19

The shores and estuaries of the sea the beds of harbors and the navigable streams must be kept open for public use for commerce, trade and pleasure

PLAINTIFFS REQUEST

20

The South Carolina constitutional, statutory and common law give the South Carolina public the right of free and unobstructed navigation on the navigable waters of South Carolina The South Carolina public is entitled to navigate all streams that are navigable in fact 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 stage of tide (or water level), and for any length of stream, regardless of the ease or difficulty of propulsion

PLAINTIFFS REQUEST

21

When an individual has failed to prove any title at all or to connect himself with an original grant, he has been a trespasser

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PLAINTIFF'S REQUEST

22

237

The State is not barred by any statute of limitations

PLAINTIFFS REQUEST

23

Public water highways, navigable waters, are governed by the same general rules of law as are public land highways 56 Am Jur, Waters Section 225

238

Every body or stream of water navigable in fact is regarded as a public highway and subject to free and unobstructed navigation by the public 56 Am Jur, Waters, Section 208 *South Carolina S B Co v Wilmington, C & A R Co* 46 SC 327, 24 SE 337, 33 LRA 541 *State v Thompson* 33 SCL (2 Strob) 12

PLAINTIFFS REQUEST

24

239

The public has a right for pleasure boating in public waters

Waters are navigable when used, or capable of being used for any type of navigation including pleasure boats

State ex rel Lyon vs Columbia Water Power Co, 82 SC 181 63 SE 884 (1909)

240

Heyward vs Farmers Mining Co, 42 SC 138 19 SE 963 (1894)

The public has a right to fish in public waters

Boatwright vs Bookman et al Rice 447 (1839)

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DEFENDANT'S REQUEST TO CHARGE NO 1

I charge you that the State will not sue any person for or in respect to any real property or the issues or profits therefrom by reason of the right or title of the State to the same, unless

241

(1) such right or title shall have accrued within twenty (20) years before any action or other proceeding for the same shall be commenced, or,

(2) the state or those from whom it claims, shall have received the rent and profits of such real property or of some part thereof within the space of twenty (20) years

242

Title 10-121 SC Code
of Laws of South Carolina
for 1962

DEFENDANT'S REQUEST TO CHARGE NO 2

I charge you that no action shall be commenced in any case for recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty (40) years from the commencement of such action And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period

243

244

Title 10, Sec 129
Code of Laws of South Carolina
for 1962

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DEFENDANT'S REQUEST TO CHARGE NO. 3

215 I charge you that if you find that the State of South Carolina made a grant of the property or real estate which is the subject matter of this law suit, at any time, to an individual or corporation or other legal entity, the State cannot maintain an action claiming title to the property, and you should find a verdict for the Defendant

DEFENDANT'S REQUEST TO CHARGE NO. 4

216 I charge you that any presumption that the State of South Carolina may have as to the ownership of real estate, including marshland is rebutted when evidence is introduced showing that the State of South Carolina has previously made a grant of the real estate including marshland

DEFENDANT'S REQUEST TO CHARGE NO. 5

217 I charge you that the State of South Carolina, from its inception, has had the right and power to convey both tide lands, low lands, and even creek beds, to individuals, corporations or any other legal entity, provided that same was for a consideration commensurate with lands of similar value bringing the same or nearly the same consideration

DEFENDANT'S REQUEST TO CHARGE NO. 6

248 I charge you that if you find that the Defendants are the owners of the property which is the subject matter of this law suit and I further charge you that if you find that the State of South Carolina has used this property without the consent of the owners, this amounts to a taking of property without due process of law, and the

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Defendants would then be entitled to a monetary damages for any injury or damages to the real estate involved

249

DEFENDANT'S REQUEST TO CHARGE NO. 7

I charge you that in the event that you find that the Defendants are the owners of the property which is the subject matter of this law suit, and that the State has taken a portion of the property and used a portion of the property, that the Defendants are not required to prove damages to a mathematical certainty but are entitled to such damages as you, in your judgment feel that is necessary to make the Defendants whole

250

DEFENDANT'S REQUEST TO CHARGE NO. 8

I charge you that the owner of real estate is entitled to make the best use of his real estate under the law, and within the framework of the law, and that if the State or any other party commits any act to interfere with use of the property, that the property owner would be entitled to damages from the State or the party interfering with the use of his property

251

DEFENDANT'S REQUEST TO CHARGE NO. 9

I charge you that if you find that there has been a judicial determination as to the ownership of the property involved in this law suit, that that determination is final and conclusive as to the ownership of the property

252

DEFENDANT'S REQUEST TO CHARGE NO. 10

I charge you that the State of South Carolina has the power to grant marshland lying between mean high water

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and mean low water on tidal navigable streams to private
253 individuals or corporations

DEFENDANTS REQUEST TO CHARGE NO 11

I charge you that should you find for the Defendants
then you must find a sum to compensate for the wrongful
taking of said from Defendants land and for the decrease
if any, in the value of the land

APPELLANT S MOTION FOR NON SUIT

254 JUDGE AGNEW Alright do you have a motion?

MR GARDNER May it please the Court, I would
make a motion for a dismissal of the Plaintiff s case in this
action on the following grounds One that it does not
comply with the Statute 10 121 South Carolina Code of
Laws for South Carolina which states in fact that the
State will have no right to bring an action unless such right
255 or title shall have accrued within twenty years before any
action or other proceedings for the same shall be com-
menced

Second, that the State of those from whom it claims
shall have received the rent and profits from such real
property or some part therein within the space of twenty
years

256 Now if it please the Court it appears to us from the
Plaintiff's testimony that there was an action commenced
in 1932 dating back to 1884 and by the admission of the
Plaintiff s witnesses themselves that this constituted a good
and efficient title to eight hundred and twenty acres known
as Morris Island I will admit that the last witness, MR

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Vaughan was very vague in locating what was known as
Morris Island Exhibit 17 by the Plaintiff indicates that 257
the property owned by Mr Newman Kershaw was in fact
on the island known as Morris Island that lines were
drawn, meets and bounds were issued, some of which in-
cluded marsh lands The boundaries as shown by this
plat, and I will reemphasize Exhibit 17 of the plaintiff
shows the Atlantic Ocean on one side and a creek on an-
other So my second point Your Honor I think the
State here can be charged with estoppel Here we have a
matter that they knew about was understood and they 258
silently went back about their business made no effort to
have this matter clarified when in fact the question was
raised They in turn answered and did ask for a dismissal
on a technical ground If Your Honor remembers the
testimony correctly, the reason the State was made a party
to the action was because of two small parcels one I be-
lieve of some four point five acres and one of three point
four acres Nowhere in the original complaint was there a 259
mention of tidelands In the States answer the last
portion of the description, it makes an all encompassing
claim to the tidelands Your Honor I know you well know
the law in this State is that meets and bounds control In
every instance, north east south and west these lands are
bound by water or navigable streams

I also call your attention Your Honor to a grant which
is not an exhibit in this case but in 1881 where the State
itself — and this has been identified by all persons testify 260
ing for the Plaintiff, with the exception of Mr Vaughan
and he identified it as Cummings Point There was speci-
fically, and he was asked this question did it include tide

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lands and the answer is yes Now, Your Honor, getting
 261 back to the question of estoppel there is no question in
 my mind that the State can be estopped from claiming a
 claim that they had failed to pursue What they have done
 here is let a chain of innocent people follow the normal est
 course of business habits in the ownership of land without
 exerting their rights

JUDGE AGNEW Well with regard to that point
 as I understand the law there can be no estopping against
 262 the State that public policy forbids application of the doc
 trine of estoppel to the State growing out of negligence
 or conduct of State officials

MR GARDNER Your Honor I do not have a case
 where the State itself was estopped but there are numerous
 cases where municipalities and arms of the State were
 estopped

JUDGE AGNEW Well I specifically said the State
 263 I don't think the doctrine of estoppel would be applicable
 Now I think the last witness testified as to the lost land
 and that would make it a jury issue

Now with regard to the twenty year statute, Mr Lati
 mer and Mr Buckley what do you have to say about that?

MR BUCKLEY Well may it please the Court I
 don't think that applies to the State particularly in that
 264 these areas such as we have public highways or property
 such as the marsh lands which are public held in public
 trust by the State you cannot by adverse possession for
 instance, take over a highway or public road in the State
 of South Carolina And likewise, you couldn't take over

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a river and you couldn't take over the tidelands Those are
 open to the public they are useful to the public and the 265
 State holds them for the public and the State does not
 except in a few rare instances exclude the public from
 them Furthermore, of course as a matter of fact we
 show that in 1956 which is less than twenty years the
 State was asserting its title in the very law suit to which
 Mr Gardner has made reference The state came in very
 strongly and said we are claiming the tidelands and marsh
 lands

JUDGE AGNEW I know but you sat up in the 266
 answer the land below the mean tide belonged to the State
 and apparently all of the attorneys agreed to it because
 they consented to the order

MR BUCKLEY Yes Sir they consented to the order

JUDGE AGNEW Eliminating the question of the
 State having to contest or assert its right to that

MR BUCKLEY But these particular parties through 267
 whom the present defendant claims his title was certainly
 on notice from that point on that the State was claiming
 this property and the State did claim this property and the
 State has never claimed the high land from Yelsen from
 Dajon, or from anybody else In those chains of title we
 have never claimed the high land and still don't claim the
 high land but we have always asserted claim to the tide
 268 lands and marsh areas and we have done it as late as 1956
 and we certainly did it in 1967 when we put that spoil
 area in there between 1967 and 1970 The state has
 asserted its rights to the entire area We did it also when
 Mr Vaughan had consultations with Mr Felkel who is an

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269 officer of both Dajon and Yelsen The State asserted its rights to use the marsh lands And in all of the descriptions of what Mr Anton Pettersen was buying it doesn't refer to any marsh lands It refers to land the high land, what he was buying and it's on the books that he was buying high land and he had a right to make a return and show it was marsh if it was marsh but it has been returned as high land until quite recently when the present defendants have acquired this property that they are suddenly trying to lay claim to this marsh which is a public
270 domain and the property of the State of South Carolina.

MR URICCHIO Your Honor if I might say something is Mr Buckley conceding then that we own all of the high land on Morris Island? Am I correct in that?

MR BUCKLEY The State of South Carolina has never claimed the land that's above the ordinary high tides The State of South Carolina does not claim it and has never claimed it in this suit or any other suit
271

MR URICCHIO Well I understand, for the record then you concede we own all of the high land on Morris Island Yelsen and Dajon? Is that correct?

MR LATIMER That's correct and we so set down in the pleadings that the State of South Carolina is only asserting claim of title from the high water mark down In effect we will quit claim interest of the State to the area above the high water mark It only applies to the
272 island itself

MR BUCKLEY We don't know where that is, frankly The state of South Carolina doesn't know where it is We guess it's underwater And I might say this,

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when Mr Rentiers was examining that title for Mr Pettersen, he nor I neither one could find it
273

MR URICCHIO That's not in evidence Your Honor We would like to also make a motion for a directed verdict for the defendants on a further ground Under Title 10, Section 129 of the Code of Laws of South Carolina that provides no action shall be commenced in any case for recovery of real property or for any interest therein against persons in possession under claim of title by virtue of a written instrument unless the person claiming his ancestor
274 or grantor is actually in possession of the same or part thereof within forty years from the commencement of such action and the possession so connected pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period I guess the State of South Carolina is included in the word world

MR LATIMER This question of whether or not these statutes apply were raised in the original Cape Ro
275 maine Case of 1927 and '28 The Supreme Court of South Carolina made these decisions that we are now following to the effect that these are trust properties They do not follow the — they do not have adverse possession of any property below the high water mark that the State comes into Court with a presumption of title and, in effect that the individual attempting to claim this area must prove his title in an unbroken chain to an original grant which in turn, must specifically state that it is granted below
276 the high water mark

MR URICCHIO Your Honor at the outset of this case I asked, and I asked for the record, who had the bur-

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277 den of proof in this case and Mr Buckley said and we were proceeding under that presumption, that they had the burden of going forward with the evidence And that's the law in this case Whether that's the law generally that's the law in this case Your Honor

JUDGE AGNEW Do you have anything further?

278 MR GARDNER I agree with Mr Uricchio the State has assumed the burden of proof They claim we don't have any records but I disagree wholeheartedly with the idea that we began with this grant from the State and the Statute that goes along with it which grants marsh land I disagree with Mr Buckley and Mr Ed Latimer on their construction of the Cape Romaine Case There are numerous cases which says the State has a right to convey tidelands and even has the right to convey the beds of navigable rivers so long as they do not interfere with navigation This is settled law The Cape Romaine case left it open as to whether or not a presumption was rebuttable and they gave a guideline that this could be traced back to an original grant Our contention is that in fact we have traced it back to an original grant and have traced it back from a ceding to the United States Government which is all of Morris Island and it seems, if you will pardon the expression a little absurd to me that engineers of this caliber can work out meets and bounds on a shore line which is another question and can't tell us where this marsh is or they won't tell us where the marsh is

280

JUDGE AGNEW Anything further?

MR GARDNER There is one further point, Your Honor Mr Latimer said that this statute, the twenty

year statute, in my opinion was to take away the right of complete sovereignty of the State because in the last paragraph it says anyone claiming through or under the State That presupposes, in my mind sales by the State Your Honor Thank you sir

JUDGE AGNEW Do you have anything further?

MR LATIMER Nothing further Your Honor

JUDGE AGNEW Alright let the record show that the motions are denied

282

(Tr pg 189 L 15 25 pgs 190 198 L 1-22)

APPELLANTS MOTION FOR DIRECT VERDICT

MR URICCHIO Your Honor I'll be brief as we have agreed we would just state our grounds We move for a directed verdict on the same grounds as we did for a nonsuit Is it necessary that I restate them again?

MR LATIMER No

283

MR URICCHIO In addition thereto, your Honor without arguing, we move that the defendants be granted a summary judgment on the pleadings on the grounds that the only evidence in this case is that the State of South Carolina granted out this property and there is no evidence that the State of South Carolina ever regained the property and if they did regain the property they sold it back out again

MR GARDNER Your Honor if I might elaborate just a minute on Section 10 129 of the Code of Laws of South Carolina, and this is a reiteration, but in reading this last night and I have read it many times, the State is

284

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precluded from bringing an action for the recovery of land
 285 when first such right or title shall have accrued within
 twenty years before any action or other proceeding for the
 same shall be commenced. And also in the second portion
 it indicates the same thing. The State or those from whom
 it claims shall have received the rent or profits from such
 real property or of some part thereof within the said
 twenty years. We feel that an action was commenced and
 is in the record. It was admitted that the two portions
 actually repurchased by the State were deleted from this
 286 action. This to me meets the Statute's requirements in
 stating before any action or proceeding for same shall be
 commenced. Thank you sir.

JUDGE AGNEW: Alright, do you agree that you
 cannot get title against the State by adverse possession?

MR. GARDNER: No, Sir. I do not agree to that. I
 agree that there is a presumption in favor of the State
 287 that is rebuttable. I do agree that you cannot get title to
 navigable waters as described by the Court as being navig-
 able twenty-four hours a day by descriptive rights. I'll
 agree with that, yes, sir, but not the marsh lands, no, sir.
 That's rebuttable.

(Tr pg 342 L 2-25 pgs 343-344 L 1-19)

INSTRUCTIONS TO JURY BY JUDGE

288 JUDGE AGNEW: Mr. Foreman and ladies and gentle-
 men of the jury, you have heard the summations or argu-
 ments by the attorneys and it now becomes my duty to
 state to you the law that is applicable to a case of this type
 and your duty to make a determination of the facts in the

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case and apply the facts as you find them to be the law
 as I shall state it to you and write a verdict that will speak 289
 the truth and end this case.

Now at the very commencement of this trial you heard
 what we know as the pleadings read or explained to you.
 Now, the first paper that is filed in any case is known as
 the complaint and the complaint merely sets forth the
 theories and contentions that the plaintiff wishes you to
 adopt. It sets forth the reasons why it claims that it is
 entitled to a verdict in its favor at your hands.

290 Now you will have these pleadings with you in the jury
 room and you can read them in their entirety if you so
 desire. Now, when the complaint is served on the defend-
 ant it is necessary that the defendant too file an answer
 and in the answer of the defendant it sets up the defenses
 that are available to the Defendant and sets up the rea-
 sons why the defendant says or alleges that they are entitl-
 ed to a verdict in their favor at your hands. The defense
 291 of the defendant sets up what is known as a general denial
 and by that the defendants say that we deny those allega-
 tions of your complaint and require you to prove them.
 Then the answer of the defendant goes further and alleges
 that the defendants own the title to the land in question
 and goes further and sets up what is known as a counter-
 claim and alleges that the plaintiff has taken a portion of
 the property belonging which the defendant alleges that
 it owns and says that this taking on the part of the plain-
 292 tiff amounts to what is known as condemnation or a taking
 of private property under the constitution and our constitu-
 tion provides that private property shall not be taken for
 public use without just compensation being paid therefor.

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293 And on the basis of the allegations set forth in the counter-
claim of the defendants the defendants ask for a verdict
in their favor at your hands in the amount of two hundred
and fifty thousand dollars or in such lesser amount as you
find to be due to the defendants in the event that you find
that the defendants are entitled to a verdict against the
plaintiff in any amount

294 And of course when that answer and counterclaim was
served on the plaintiff it was necessary that the plaintiff
then file another paper that is known as a reply to the
counterclaim and in the reply the plaintiff sets forth the
defenses that are available to the plaintiff and on the basis
of the reply the plaintiff again asks for a verdict against
the defendants that is prayed for in the original complaint

295 So it is on the basis of these three papers that this case
has come on to be heard by you and, as I stated it now
becomes necessary for you to make a determination of
the facts and to apply the facts as you find them to be to
the law as I shall state it to you and write a verdict

296 Now under our system of law the questions of fact
when they arise the law says that a jury shall be im-
paneled and charged with the duty and the responsibility
of determining the issue or questions of fact that arise in a
case Now questions of fact have arisen in this case and
you have been selected as the jury to determine those issues
or questions of fact You have been chosen by a process
of law and by an agreement of the plaintiff and the defen-
dant as the jury to determine the questions of fact that
have arisen in this case You have been chosen as fair
and impartial jurors You are not concerned with who is
the plaintiff or the defendant That is no concern of yours

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or mine You are concerned ladies and gentlemen of the
jury, with only one thing and that is rising at the truth 297
of this controversy that exists between the plaintiff and the
defendants What is the truth of it according to the facts
as you find them to be and according to the law as I shall
hereinafter state it to you When you have done that
you will have discharged the obligation of your oath as
jurors You are not concerned with the consequences of
your verdict As I said, you are only concerned with
arriving at the truth of the controversy and when you
have done this you apply the law as I give it to you to the 298
facts as you find them to be and write upon the back of
this reply the truth because after all, that is what a verdict
means a true saying It means to speak the truth Now,
under our system of law, as I told you a moment ago you
are the judges of the facts and you are the sole judges
of the facts And, I emphasize the word "sole" because
it has a special significance It means that you and you
alone are the sole judges of the facts in this case I have 299
nothing whatsoever to do with your determination of the
facts because under the Constitution of Our State you were
made the sole judges of the facts and the framers of that
Constitution put a provision in it and said that a trial judge
such as I am should not charge a jury upon question of
fact, either directly or indirectly So I have no opinion
as to how you should decide the facts in this case I am
not entitled to one and I have none because the law makes
of you the sole judges of the facts in the case 300

Not only that, but the law makes of you the sole judges
of the credibility or believability of the witnesses And
of course, as to the force and effect that you record the

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301 testimony of the witnesses who have been sworn and testi-
fied in this case. The law says that it is for you to deter-
mine what credibility or what belief you put in the testi-
mony of the witnesses. And the law says that you become
the sole judges of the credibility or believability of the
witnesses. And the law says that in passing upon credi-
bility or believability that you can take into consideration
any interest any bias or any prejudice that may have been
shown or exhibited by the witnesses the demeanor of the
witness on the stand. The law says that you may accept
302 a portion of a witness's testimony and reject another por-
tion of it. The law says that you may reject a witness's
testimony in its entirety if there is a sound reason within
the record for your so doing. Not only that, the law says
that it does not concern itself with the number of witnesses
who testify in any case but does concern itself with the
quality of the testimony wherein the truth lies. So I tell
you again that you become the sole judges of the facts in
303 the case the sole judges of the credibility or believability
of the witnesses.

Now I cannot interfere with your prerogatives in those
respects and I have no desire to do it or no legal right to
do it. But the same law the same Constitution that makes
you the sole judges in those respects makes me the sole
judge of the law in this case and requires me to deliver
this charge to you. To tell you what the law is so that
when you make a determination of the facts and you have
304 to take the law as I give it to you whether you agree with
it or disagree with it. So you see, I can't interfere with
your rights and you cannot interfere with mine, yet we
have the common purpose of arriving at the truth of this

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controversy according to the evidence and according to
your findings of fact and according to the law as I declare 305
it to you.

Now, I tell you that where a plaintiff brings an action
against a defendant, the law places upon the plaintiff the
burden of proving his case against the defendant and the
plaintiff must prove his case by the greater weight or the
preponderance of the evidence. And if the plaintiff proves
this by that measure of proof then he would be entitled
to a verdict at your hands in his favor. If he does not 306
prove it by that measure of proof or if the evidence is
evenly divided or evenly balanced in your minds then you
must return a verdict for the defendant in the case because
the plaintiff is only entitled to a verdict at your hands when
the plaintiff discharges the burden of proof and proves his
case by the greater weight or the preponderance of the
testimony.

Now, what is meant in law by the greater weight or 307
preponderance of the testimony? You have no scales upon
which you can weigh evidence. A merchant down in one
of these stores weighs a commodity upon a mechanical
scale and he can tell you what it weighs but you as jurors
have no scales upon which you can weigh testimony. It is
a mental process that you engage in. You weigh the evi-
dence in your minds and from such weighing you determine
whether or not the preponderance of it the greater weight
of it, sustains and makes out the material allegations of 308
the plaintiff's complaint. If it does then the plaintiff
will have discharged the burden of proof and will have
made out its case by the measure of proof that the law
requires of it and I tell you also in that connection

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that the greater weight of the evidence, the preponderance
 309 of the evidence means nothing more or less than the greater
 amount of truth as you find it to be from the evidence,
 the greater amount of truth as you find it to be in this
 case which sustains the claims and contentions of the plain-
 tiff. If the plaintiff has discharged the burden of proof
 and satisfied you by that measure of proof, then it would
 be entitled to a verdict at your hands. If it has not or
 if it is evenly balanced in your mind then write a verdict
 for the defendant in this case.

10 Now Mr Foreman and ladies and gentlemen of the
 jury I charge you that the title to all land was originally
 in the State in the Sovereign prior to the revolution and
 the Crown of England. And that is called the source of
 all titles in the State. Now there are two ways in a case
 of this type in which a person may show title to land.
 First by tracing it to the State under a grant from the
 State and second by tracing the title from a common
 311 source. Now it is necessary that I define certain terms
 to you.

I charge you that tideland is defined as the area between
 the high water mark and the low water mark of tidal
 navigable streams. It is a principle derived from the
 English Common Law and firmly established in the United
 States that the title to the soil under navigable waters is
 in the sovereign except as far as private rights in it have
 been acquired by express grant. Now during the time
 312 when a territory now comprising one of the states was a
 colony of Great Britain the title to land under navigable
 waters or tide waters within such colony was held by the
 crown, in trust for the people of the realm. I charge you

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that by high water mark is meant the line on the shore
 which is reached by the limit of the flux of the usual tide 31
 that is the high mark made on the shore as the tide ebbs
 and flows twice in each lunar day and not the point reached
 at new or full moon nor when there is an intervening dis-
 turbance such as a storm or earthquake.

I further charge you that the State of South Carolina
 comes into court with a presumption of title whenever the
 question as to ownership of tidelands arises. It is incum-
 bent upon the individual claiming real property to trace 314
 his title in an abstract of title in an unbroken chain to a
 grant from the sovereign.

I further charge you that a grant by a sovereign to the
 tidelands must be in definite and express terms. The grant
 is strictly construed against the grantee.

I further charge you that in South Carolina the rules
 of the common law by which the title in the land under tide
 waters is in the State, and a grant of land bounded by 315
 such waters possess no title below high water mark.

I further charge you with regard to grants of the gov-
 ernment for lands bordering on tide water it has been
 distinctly settled that they only extend to high water mark
 and that the title to the shore and lands under water in
 front of lands so granted inures to the state within which
 they are situated, if a state has been organized and estab-
 lished there. And such title to the shore and lands under 316
 water is regarded as incidental to the sovereignty of the
 state—a portion of the royalties belonging thereto and
 held in trust of the public purposes of navigation and
 fishery.

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I further charge you that the doctrine of the common
317 law as to the seashore and the soil lying under tidewaters
and navigable streams were peculiar. The fundamental
idea was that the property in the sea and tidewaters and
in the soil and shore thereof was in the sovereign. These
are all channels in which the tide ebbs and flows and, as
to such the well established rule is that a grant of such
should give title only to the high water mark.

I further charge you that the title to navigable waters
15 and tidelands of South Carolina is in the State subject to
the public use. The title is held by the state as represen-
tative of the public and in trust for them as part of its
prerogative rights and not as private property.

I further charge you that in the absence of specific words
contained in a grant the State of South Carolina holds title
to the high water mark in all navigable waters.

I further charge you that the title to land below the
19 high water mark on tidal navigable streams under the well
settled rule that it is in the state not for the purpose of
sale but to be held in trust for public purposes.

I further charge you that the general principle is that
laches is not imputable to the government. This maxim
is found not in the notion of extraordinary prerogative
but upon a great public policy. There can be no estoppel
against the State. The public policy to prevent loss to the
state through the negligence of public officers forbids the
320 application of the doctrine of estoppel to the state growing
out of the conduct and representations of its officers.

I further charge you that the payment of taxes is not
evidence of title.

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I further charge you that our Supreme Court has held
that required language in the grant must include the words 321
'to the low water mark.'

I further charge you that adverse possession does not
run against public land dedicated to and used by the public
for streets and highways. Tidelands are held in trust for
the people and are water highways. Statutory law provides
that the tidelands and submerged lands shall continue to
remain as a common for the people of the State for the
taking of fish and other public purposes.

322

I further charge you that the statute of limitations does
not run against the State of South Carolina.

I further charge you that the payment of taxes is not
evidence of either possession or title.

I further charge you that Article 1 Section 28 of the
South Carolina Constitution provides that all navigable
waters of the State of South Carolina shall be open to
the public.

323

I further charge you that when the only territory under
consideration lies on or borders on tidal navigable streams
the question of navigability does not arise.

I further charge you that the rights of the public in
navigable waters extend to all parts of such waters. Ordin-
arily, the right to actual navigation is co extensive with
the actual water line expanding and contracting therewith
as it fluctuates between the high and low water mark. When
the volume of a stream swells in the time of high water
its surface remains the surface of the highway and the
riparian owner must do nothing that will interfere with the

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325 use of the highway or any part of it up to the line of high water

I further charge you that the 1962 South Carolina Code of Laws Section 70-1 states that all waters which have been rendered or can be rendered capable of being navigated by rafts or lumber or timber by the removal of accidental obstructions are navigable streams are common highways and are forever free to the citizens of this state and the United States. And, any obstruction of navigable waters is a nuisance and can be abated

326 I further charge you that Section 70-2 of the 1962 Code of Laws states that any person who obstructs the navigable waters is guilty of a misdemeanor. And it also states that all such obstructions may be removed by anyone

I further charge you that the shores and estuaries of the sea the beds of harbors and the navigable streams must be kept open for public use for commerce trade and pleasure

327 I further charge you that the South Carolina Constitutional statutory and common law give the South Carolina public the right of free and unobstructed navigation on the navigable waters of South Carolina. The South Carolina public is entitled to navigate all streams that are navigable in fact. A stream is navigable in fact if a person can float any vessel of any size or construction, for any purpose whatsoever pleasure or commercial, at any stage of tide or water level and for any length of stream regardless of the ease or difficulty of propulsion

328 I further charge you that when an individual has failed to prove any title at all or to connect himself with an original grant he has been a trespasser

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I further charge you that public water highways and navigable waters are governed by the same general rules of law as are public land highways. Every body or stream of water navigable in fact is regarded as a public highway and subject to free and unobstructed navigation by the public

I further charge you that the public has a right for pleasure boating in public waters. Waters are navigable when used or capable of being used for any type of navigation, including pleasure boats

330

I further charge you that the public has a right to fish in public waters

I further charge you that the state will not sue any person for or in respect to any real property or the issues of profits therefrom by reason of the right or title of the state to the same unless One that such right or title shall have accrued within twenty years before any action or other proceeding for the same shall be commenced, or

331

Two the state or those from whom it claims shall have received the rent and profits of such real property or of some part thereof within the space of twenty years. This is provided for in Title 10-121 of the Code of Laws of South Carolina, 1962, and Section 129 of the 1962 Code of Laws provides as follows. That no action shall be commenced in any case for recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the

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possession of a defendant sole or connected pursuant to
 333 the provisions of this section shall be deemed valid against
 the world after the lapse of such period

I further charge you that if you find that the State of
 South Carolina made a grant of the property or real estate
 which is the subject matter of this law suit at anytime to
 an individual or corporation or other legal entity, the State
 cannot maintain an action claiming title to the property,
 and you should find a verdict for the defendant

334 I further charge you that any presumption that the State
 of South Carolina may have as to the ownership of real
 estate including marsh land is rebutted when evidence
 is introduced showing that the State of South Carolina
 had previously made a grant of the real estate including
 marsh land

I further charge you that the State of South Carolina
 from its inception has had the right and power to convey
 335 both tide lands low lands and even creek beds to individ-
 uals corporations or any other legal entity, provided that
 same was for a consideration commensurate with lands of
 similar value bringing the same or nearly the same con-
 sideration

I further charge you that if you find that the defend-
 ants are the owners of the property which is the subject
 matter of this law suit and I further charge you that if
 336 you find that the State of South Carolina has used this
 property without the consent of the owners, this amounts
 to a taking of property without due process of law and the
 defendants would then be entitled to monetary damages
 for any injury or damage to the real estate involved

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I further charge you that in the event that you find
 that the defendants are the owners of the property which
 is the subject matter of this law suit and that the State of
 South Carolina has taken a portion of the property and
 used a portion of the property, that the defendants are not
 required to prove damages to a mathematical certainty but
 are entitled to such damages as you in your judgment,
 feel that is necessary to make the defendants whole

I further charge you that the owner of real estate is
 entitled to make the best use of his real estate under the
 law and within the framework of the law, and that if the
 state or any other party commits any act to interfere with
 the use of the property that the property owner would
 be entitled to damages from the state or the party inter-
 fering with the use of his property

I charge you that if you find that there has been a judi-
 cial determination as to the ownership of the property
 involved in this law suit that this determination is final
 and conclusive as to the ownership of the property

I further charge you that the State of South Carolina
 has the power to grant marsh land lying between the mean
 high water and mean low water on tidal navigable streams
 to private individuals or corporations

I further charge you that should you find for the de-
 fendants then you must find a sum to compensate for the
 wrongful taking of said from defendants' land and for
 the decrease if any, in the value of the land

I further charge you Mr Foreman and ladies and
 gentlemen of the jury, that the Constitution of the State
 of South Carolina provides that private property shall not

341 be taken for public purposes without just compensation being paid therefor and that just compensation which the Constitution says that a private owner of property is entitled to when land is taken for public purposes is the full and perfect equivalent in money of the value of that property. That means that the landowner shall be awarded such sum as would put him in as good position financially after the taking as he was in before the taking.

352 I further charge you that just compensation is measured by the market value of the property taking into consideration all uses to which the property is presently devoted as well as all of the uses including the most profitable use to which it may be adapted in the reasonable foreseeable future.

343 I further charge you that the fair market value of property taken for public use is such a price as a purchaser would give and a fellow would take in the ordinary course of trade with neither of them acting under any circumstances of compulsion.

344 Now, Mr Foreman and ladies and gentlemen of the jury if you should conclude that the plaintiff is not entitled to a verdict in its favor because of its failure to establish by the greater weight or preponderance of the testimony that which it claims it would then become your duty to consider the counterclaim of the defendants which has been read or explained to you. Now in doing so you would simply reverse the position of the parties and apply the legal principles which I explained to you to them in their role because insofar as the counterclaim is concerned the defendant has the affirmative of the issue and in order

to recover the defendant must establish by the preponderance of the evidence the three essential elements of its 345 alleged cause of action against the plaintiff. First that the defendant was the owner of the property which is the subject matter of this suit and secondly that the plaintiff acquired a portion thereof, and third, that the defendant was entitled to just compensation therefor, as I have explained the term to you.

Now, Mr Foreman and ladies and gentlemen of the jury, depending upon your view of the evidence your 346 determination of the facts in this case there are three possible verdicts which you may render. Now one verdict which you may render is simply "We find for the plaintiff." If that be your verdict it would mean that the State has proven to your satisfaction by the greater weight or preponderance of the testimony that it is the owner of the land in question.

Another form of your verdict could be "We find for 347 the defendant Dajon Realty Company and award the sum of blank dollars as just compensation. Writing the amount out in words and not in figures. If that be your verdict, it would mean that you have ascertained that the defendant was the owner of the property which is the subject matter of this law suit that the Defendant Dajon Realty Company would be entitled to just compensation in such sum as you may determine in the event that you may determine that it is entitled to any sum as just compensation for the taking of the property which is the subject 348 matter of this law suit.

And in the event that you should conclude that the defendants own the title to the land which is the subject

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349 matter of this action but are not entitled to a money verdict then the form of your verdict would simply be 'We find for the defendants'

Now Mr Foreman and ladies and gentlemen of the jury whatever your verdict is let it speak the truth because that is the meaning of the word "verdict" Now Mr Foreman while you would write the verdict for the entire jury, any verdict that you write must be agreed upon by all twelve jurors You would write the verdict
350 on the back of this paper beneath the printed word "Verdict" and then Mr Foreman you would sign your name above the line under which is printed the word 'Foreman' And simply for your convenience I have written the three possible verdicts on this yellow sheet You would copy the one that speaks the mind of the jury on the back of this blue paper Now you will attach no significance whatsoever to the order in which I have listed these verdicts because you will recognize that I had to list them in some
351 order

All right, you are entitled to have with you in the jury room these four papers, along with all of the exhibits that have been placed in evidence

Now, Mr Foreman I will ask you and the other members of the jury to retire to the jury room at this time Do not begin your deliberations until the bailiff brings these papers along with the exhibits to the jury room and
352 tells you that you may commence

Alright you may now retire

(The jury retired to the jury room at 12 10 P M)

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JUDGE AGNEW I realize that you attorneys will except to those portions of the charge to which you have
353 already excepted and let the record show that you make those exceptions Now without reiterating them at this time, those are made Does the Plaintiff have any additional exceptions or any requests to the charge?

MR LATTIMER Nothing, your Honor, on behalf of the Plaintiff

MR URICCHIO Your Honor we respectfully except to your Honor's failure to charge the request that we
354 handed up awhile ago about navigable streams

JUDGE AGNEW In addition to your exception to all charges requested by the Plaintiff? Does that cover it?

MR URICCHIO I think that about covers it

JUDGE AGNEW Alright, you may deliver these to the jury and tell them to commence their deliberations

(Tr pg 360, L 8 25 Pgs 361 382)

355

JUDGMENT ON VERDICT

This case having been tried by a jury and a verdict having been brought in by the jury for the Plaintiff on the 6th day of April, 1972, the jury having found that the State of South Carolina the Plaintiff is the owner of the tidelands herein described, and that said tidelands lie below the ordinary or usual high water mark of the usual or
356 ordinary high tide in the harbor of Charleston State of South Carolina, it is, hereby,

ORDERED, that the motions of the Defendants for judgment NOV and for a new trial are denied, and it is

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357 FURTHER ORDERED that the Defendants their agents servants or employees are hereby restrained and enjoyed from asserting title to or any rights of ownership or possession in the real property herein described which consists of the tidelands submerged lands and waters, adjacent to Morris Island in Charleston County, South Carolina, and it is

358 FURTHER ORDERED that the Defendants are hereby restrained and enjoyed from making any use of said property other than such use which they make be entitled to make as members of the general public of the State of South Carolina subject to the laws and regulations of the State of South Carolina, and it is,

359 FURTHER ORDERED that the title of the State of South Carolina is hereby confirmed to the real property hereinafter described and the Defendants and all persons claiming by through or under them are hereby enjoyed and restrained from making any claim of title therein or right to possession thereof, and it is,

FURTHER ORDERED that the Defendants their agents and servants are hereby enjoyed and restrained from trespassing upon or attempting to trespass upon said real property or in any way attempting to change that area from its natural state

360 The real property which is the subject of this judgment is described as follows

All that piece, parcel or tract of land, situate lying and being in the County of Charleston, South Carolina, lying below the usual or ordinary high water mark

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adjacent to Morris Island Said tidelands submerged lands and water appearing on a map entitled James Island Quadrangle South Carolina — Charleston County E 5 Minute Series (Topographic) which is dated 1959 and which was prepared and published by a Geological Survey of the United States Government a copy of the pertinent portion of which map is annexed to this Order as part hereof The area consists of the tidelands, submerged lands and waters butting and bounding to the North on Charleston Harbor and Schooner Creek to the West on the usual or ordinary high water mark of James Island and Lighthouse Creek to the Southwest and South on Lighthouse Creek and to the South and East on the Atlantic Ocean and the high water mark of Morris Island The tract herein described is shown within the red lines drawn on the above map a copy of which is attached to this Order for judgment as part thereof, and it is,

FURTHER ORDERED that a certified copy of this Order be served on each of the named Defendants and on the Auditor for the County of Charleston, and also a certified copy of this Order be placed on record in the R M C Office for Charleston County South Carolina

AND IT IS SO ORDERED this 3rd day of December 1973

E HARRY AGNEW
Presiding Judge of the
Ninth Judicial Circuit

Anderson South Carolina

EXCEPTIONS

365

1 The Court erred in overruling the Appellants objection to the reception of so much of the testimony of the witness Dr James A Timmerman, relating to the value to the citizens of the State of the real estate involved the error being that the sole question was one of title and not of value and the same was highly prejudicial to the Appellants

366

2 The Court erred in overruling Appellants motion for a non suit at the close of the Respondent's case the error being that the Respondent was precluded from maintaining the action by reason of the provisions of Sections 10 121 and 10 129 S C Code of Laws 1962 as amended

367

3 The Court erred in overruling Appellants motion for a non suit at the close of the Respondent's case the error being that the Respondents was estopped from maintaining the action

4 The Court erred in overruling Appellants motion for a non suit at the close of the Respondents case the error being that the Respondents assumed the burden of proof and failed to prove its case by the greater weight or preponderance of the evidence

368

5 The Court erred in not directing a verdict in favor of the Appellants after all of the evidence was presented, the error being that the only evidence before the Court was that the real estate in question had been granted by the State to the Appellants predecessors in title

6 The Court erred in not directing a verdict in favor of the Appellants at the close of Appellants case, the error

being that title to the real estate having been previously granted, Respondent had no standing to maintain this action 369

7 The Court erred in not directing a verdict in favor of the Appellants at the close of the Appellants case the error being that Respondent was estopped from maintaining the action, having previously granted title to the real estate involved, and upon re acquiring same for failure of previous owners to pay taxes, by re conveying same to the Appellants' predecessors in title 370

8 The Court erred in not directing a verdict in favor of the Appellants at the close of Appellants case the error being that Respondent was precluded from maintaining the action by reason of Sections 10 121 and 10 129 S C Code of Laws, 1962, as amended

9 The court erred in not directing a verdict in favor of the Appellants, at the close of Appellants case the error being that Respondent, having assumed the burden of proof failed to prove its case by the greater weight or preponderance of the evidence 371

10 The Court erred in not directing a verdict in favor of the Appellants, the error being that there was no issue or question of title for the jury to pass upon but rather one of location and boundaries which was an equitable issue for the Court to determine and not the jury

11 The Court erred in not directing a verdict in favor of the Appellants after all of the evidence was presented the error being that the uncontradicted evidence showed Appellants to have good marketable title to the real estate involved, tracing their title back to a grant from the State 372

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12 The Court erred in holding as a matter of law
373 that the doctrine of estoppel did not apply as against the
State and particularly as to Respondent in this case

13 The Court erred in holding as a matter of law
that Sections 10-121 and 10-129 S C Code of Laws, for
1962 as amended did not apply as against the State, and
particularly as to the Respondent in this case

14 The Court erred in instructing the jury as requested
374 in Respondent's written requests numbered one (1) through
twenty (20) and twenty-two (22) through twenty four
(24) the error being said requests were inapplicable,
erroneous and misleading and were highly prejudicial

15 The Court erred in refusing to instruct the jury
as requested in Appellants written requests numbered twelve
(12) and thirteen (13) the error being said requests
contained accurate and proper legal definitions concerning
375 navigable streams and were appropriate in view of the
erroneous request of the Respondents

16 The Court erred in failing to instruct the jury
that Respondent's presumption of title was rebuttable, and
could be rebutted by Appellants proof of title, particularly
by proof of a grant

17 The Court erred in failing to instruct the jury that
Respondents' presumption of title was rebuttable and could
376 be rebutted by evidence showing that Respondent failed
to comply with the provisions of Sections 10-121 and
10-129 of the S C Code of Laws for South Carolina as
amended

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18 The Court erred in that the verdict is contrary to
the evidence 377

19 The Court erred in that the verdict is contrary
to the law

AGREEMENT OF COUNSEL

We hereby agree that the foregoing together with the
exhibits introduced in evidence which shall be forwarded
to the Supreme Court by the Clerk of Court of Common
Pleas, shall constitute the Transcript of Record on appeal 378
in the above case

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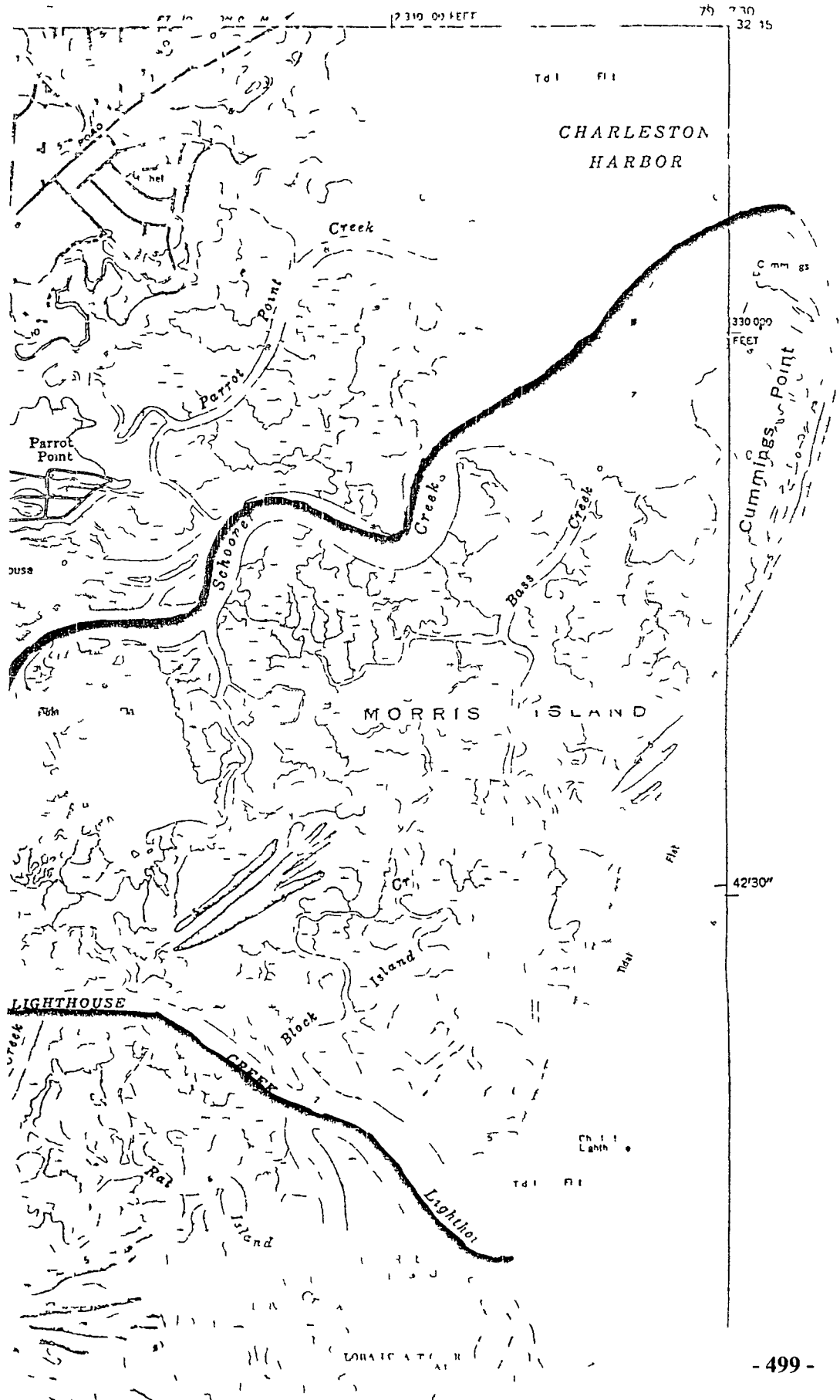
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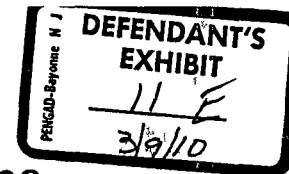
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NAVY DEPARTMENT
 SOUTH CAROLINA-CHARLESTON CO
 7.5-MINUTE SERIES (NOTOGRAPHIC)





The State of South Carolina
IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
HONORABLE E HARRY AGNEW, JUDGE

*YELSEN LAND COMPANY, INC , a corporation and
DAJON REALTY COMPANY, a corporation,
Appellants,*

against

THE STATE OF SOUTH CAROLINA, Respondent

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

Question I

Was the verdict of the jury and the judgment of the court without evidentiary support?

(Exceptions 1, 14, 18 and 19)

Question II

Did Appellants produce an unbroken chain of title back to an original grant from the sovereign which specifically granted land below the usual high water mark?

(Exceptions 2, 5, 6, 7, 8 9, 10, 11, 12 and 13)

STATEMENT

The State of South Carolina brought this suit to protect State property in the area which is the subject of this suit and which consists of tidelands (lands lying below the usual or ordinary high tide in Charleston harbor), adjacent to and west of the fastlands (the area above the usual high water mark) known as Morris Island. Morris Island is a coastal barrier island in Charleston Harbor bounded on the East by the Atlantic Ocean and on the West by the tidelands which are the subject of this action. The State does not assert any claim to the fastland of Morris Island (Tr, ff 270-272).

The State of South Carolina has never conveyed the tidelands here in suit.

The Appellants claim through two separate title chains. One purported chain was allegedly to a grant by the State to the United States of America of 562 acres where the lighthouse stood. Yelsen Land Company acquired this. This is the southern portion of Morris Island and most of it has eroded into the sea (Tr ff 87, 166 & 205) (Plaintiff's Exhibit 9, see Respondent's Brief Appendix). No taxes were paid until the United States sold this to J. Preston Richardson.

The other purported chain, of Appellant Dajon Realty Co., comes through Anton Pettersen and Gadsden Insurance Agency. It purports to contain 840 acres. This is the northern portion of Morris Island and a good part of this is under ocean waters (Tr f 166). It has been carried as highland on the Charleston County Auditor's books (Tr, ff 185-193). Only nominal taxes were paid on this. Dajon has

only Ten Thousand (\$10,000 00 Dollars in this property) (Tr, ff 167-171).

Both Appellants are owned by Mr. St. Elmore "Speedy" Felkel, who is an officer of each company (Tr, ff 71-76, ff 154-155). He knew the State claimed the tidelands when his corporation purchased from Gadsden Insurance Company.

The State through its testimony and its exhibits clearly showed that most of what the appellants claim is under the waters of the Atlantic Ocean. The jury so found.

Dajon has increased its claim to Morris Island from 840 acres to 2,210 7 acres (Tr, ff 193, 194, 202 & 203), between the time of acquisition and the time of suit. The grant under which it claims calls for only 348 acres.

Except for the dates on which this case was tried, the matters set out in f 16 of the Appellants' Brief are irrelevant and are not in the Transcript or the record at any place.

The Appellants have abandoned Exceptions 3, 4, 15, 16 and 17.

ARGUMENT

Question I

Was the verdict of the jury and the judgment of the court without evidentiary support?

(Exceptions 1, 14, 18 and 19)

Appellant Dajon Realty Company claims under a conveyance from Anton Petterson through Gadsden Realty Co., title to the Northern portion of Morris Island (820 acres). Appellant Yelsen Land Company claims title to the Southern portion under a con-

veyance from J Preston Richardson who acquired his title to 562 acres from the United States of America (Tr, f 4)

The United States Government for more than a century and a half owned and occupied the lighthouse and lands around it, about 562 acres. Most of this eroded during the last century and the lighthouse at the time of the trial was surrounded by the sea (Plaintiffs Exhibit 9, see appendix to Respondent's Brief) No taxes were paid on this area until it was acquired by J Preston Richardson, only nominal taxes have been paid since (Tr, ff 189-194) It is carried as highland on the Auditor's books

The Board of Assessment for Charleston County could find only one hundred and eight acres of "marsh" and four hundred fifty three and half acres of submerged lands claimed by Yelsen Land Company (T₁, ff 201 & 205), for Dajon Realty Co it found a claim of one hundred ten acres of highland, which includes Cummings Point. There were two thousand one hundred acres of tidelands to the west of Morris Island, M₁ Felkel filed a claim for all of this (T₁, ff 199-203)

The South Carolina State Ports Authority determined through a title search in 1967, that the tidelands (land or marsh lying below the ordinary high water mark) adjacent to Morris Island were being used by the State of South Carolina (Tr, ff 55-63) The Pettersen title did not embrace the tidelands area (T₁, ff 66 & 67) Mr St Elmore (Speedy) Felkel, who is an officer of both Yelsen Land Company and Dajon Realty Company, Appellants, was asked if he wished to litigate a claim to the tidelands area and he stated he preferred not to. He discussed the State's position with the S C State Ports Authority's Coun

sel before his corporations purchased Morris Island (Tr, f 55)

The record shows that the State of South Carolina was claiming all the tidelands (T₁, ff 68) (Plaintiff's Exhibit No 6 See Appendix to Respondent's Brief)

Mr Meredith of the United States Army Corps of Engineers computed that Nine hundred eighty-seven (987) acres of the front beach of Morris Island had eroded between 1854 and 1955, (T₁, ff 142-143) (Plaintiff's Exhibit 9 & 13 See Respondent's Appendix) Mr Felkel admits a great deal of what was conveyed by the United States is under water (Tr, ff 166), and also of the Pettersen portion (Tr, ff 165-166) Felkel decided that since the Atlantic Ocean had claimed almost all of Morris Island that he would claim all of the state owned tidelands between Morris Island and James Island (between 2 and 3 thousand acres of tidelands)

The Dajon tract has paid nominal taxes for many years on 820 acres of highland (Tr, ff 97-99)

Plaintiff's Exhibits 9 and 13, copies of which are annexed hereto, clearly show the erosion which has occurred on Morris Island and plainly prove that most of what Appellants claim is under the Atlantic Ocean. There was sufficient highlands or fastlands on Morris Island for the United States to acquire 562 acres in 1790 and there was more than enough for John Maillard to acquire 348 acres of highland in 1819

There is more than enough evidence that the State proved its claim to the tidelands lying between the Morris Island fastlands on the east and James Island on the west. The record, including the maps in evidence, adequately and clearly show the area in con-

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troversy The jury held that no area was above the high water mark between Morris Island and James Island

With reference to Appellants' Brief ff 18-21, the State asserted ownership of the area lying below the usual high water mark of Morris Island on the Atlantic Ocean side and asserted ownership of the area lying below the usual high water mark of the main land side of Morris Island Plaintiff's Exhibit No 6, attached to this brief, shows there were oyster leases throughout the entire area from the high water mark of Morris Island to the high water mark of James Island Appellants knew this when they bought the fastlands of Morris Island The jury understood that oysters will grow only below the usual high water mark

With reference to Appellants' Brief ff 46-47, tidelands are trust property the title to which must be shown under a legal construction of a grant Under Sections 28-754 and 28 791, 1962 South Carolina Code of Laws, the tidelands continue to remain trust property The evidence showed that the State was in possession of all the tidelands between Morris Island and James Island, through oyster leases, through possession of a spoil disposal area by the S C State Ports Authority and through general use by the public.

With reference to Appellants' Brief ff 55-57, the Appellants did not connect their title to the cited grants Even if a connection had been shown the grant did not grant anything below the usual high water mark The State had the entire area between the usual high water marks of James Island and Morris Island under oyster leases with the exception of the spoil area taken by the South Carolina State Ports Authority under statutory authority Felkel

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stated that he wished to "develop" the tidelands, including the S C State Ports Authority spoil area

With reference to Appellants' Brief ff 57-62, the tidelands value is relevant and essential Sections 28 754 and 28 791, 1962 South Carolina Code of Laws, show that the South Carolina General Assembly puts a high value on the State's tidelands Judge Lawrence, in *U S v Diamond*, (C A No 3092, April 17, 1974, Southern District of Georgia), held that the tidal (marshes) tidelands are important in the life cycle of living organisms, are the most productive areas on earth and are the nursery of the sea, citing 33 Md L R 231 and *U S v Lewis*, 355 F Supp 1132

The Appellants were alleging an inverse taking by the State and were attempted to show damages of approximately a quarter million dollars Evidence showing the value of the tidelands was certainly not prejudicial to the Appellants and was an essential defense of the State

The finding of the jury in this case that the entire area was State owned tidelands, which were based on competent evidence, are not subject to review by the Supreme Court

Question II

Did appellants produce an unbroken chain of title back to an original grant from the sovereign which specifically granted land below the usual high water mark?

(Exceptions 2, 5, 6, 7, 8, 9, 10, 11, 12 and 13)

The appellant Dajon Realty Co could not produce an unbroken chain of title back to an original grant, or grants, from the sovereign (Tr, pp 1, 2, ff 4, 5, 6)

The Appellant Yelsen Land Co did trace its title to 5 Statutes at Large 147 passed in 1790. However, this statute does not describe the area conveyed by acreage. It was not conveyed by a plat and of the natural boundaries described in the statute only the Atlantic Ocean to the east and the Folly Inlet to the south can be identified. Of these the evidence is that the Atlantic Ocean has steadily encroached westward so that the present eastern boundary of Morris Island probably lies to the west of the western boundary of Morris Island in 1790 (Plaintiff's Exhibit 9). For some reason which does not appear in the record the United States of America quit-claimed the Lighthouse and whatever interest it had in 536 acres of land around it to J. Preston Richardson in 1965, at which time the Lighthouse and hundreds of acres surrounding it were at sea in the Atlantic Ocean. The conveyance except as noted copied the language of 5 Statutes at Large 147 verbatim and contained no plat. We submit that a proper construction of 5 Statutes at Large 147 would be that this area reverted to South Carolina when the United States of America ceased using it for a lighthouse.

Appellant Dajon Co. contended that its title rested on a grant from the State to John M. Maillard dated August 3, 1818, of 236 acres of highlands and 102 acres of marsh, "situate in the District of Charleston on the south west of Charleston Bay, being part of an island called Maurice's or Light House Island." The intent of this grant, derived from the unambiguous description of the grant, shows a grant only of land lying above the usual high water mark. The words "high lands, marsh, bay and island" convey only the area above the usual high water mark, as a matter of law. A present day jury cannot give away State

property that was not expressly conveyed by a grant. The S. C. Constitution expressly forbids the giving away of State property, directly or indirectly.

Appellant Yelsen Co. contended that its title rested on a tract of land that the United States of America had acquired under 5 Statutes at Large, 147, passed in 1790, an area described as "Middle Bay 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 other Island aforesaid" (Tr., p. 2, f. 5). The grant's words "bay, island, inlet, ocean, sound and creek" stop the conveyance at the usual high water mark. The grant shows no intent, by the terms of the grant, to go below the usual high water mark. Deeds in the chain of title cannot enlarge a original grant. If this were possible then the grant would have no meaning and deed conveyances could take State property.

The State grant and act mentioned by the Appellants described the boundaries of the conveyance as "island, inlet, Atlantic Ocean, sound, creek, marsh and bay."

The grants purport to convey fastland (highland above the high water mark), and did convey large acreages of fastland. No mention concerning the conveyance of tidelands appears in any of the grants.

The State has taken the position that on the facts proven in this trial the construction of the grants was a question of law for the trial judge and that under the law the State should prevail in a legal construction of the grants.

In the recent case of *Clair P. Guess, Jr., et al v Conch Creek Corporation* (Opinion No. 19886, filed

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September 3, 1974), this Court held that when a demurrer showed that nothing but tidelands was embraced within a grant then the grant would convey tidelands, but the case surely implies strongly that where as in the instant case large acreage of fastlands was conveyed by the grant, then the grant will stop at the ordinary high water mark

In 1972, in *State v Hardee*, 259 S C 535, 193 S E (2d) 497 (1972), the holdings of the *Cape Romain* case were challenged. The question was put squarely to the Court that the following quotation was *dicta*

"The title to land below high watermark 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" *Cape Romain Land and Improvement Co v Georgia-Carolina Canning Co*, *supra*, at 438

The Court accepted this challenge and responded

"The foregoing quote from the *Cape Romain* case has been criticized as being *dicta* only and should not be read to prevent private persons from obtaining title to tidelands. The State, through its attorney general, has consistently expressed the view that the statement is a part of the holding of the case and precludes sale of tidelands except by an act of the legislature." At Page 500

* * *

"We adhere to the rule announced in the *Cape Romain* case and as reaffirmed in the *Rice Hope Plantation* case" At Page 500

In the *Hardee* case there was a plat annexed to the grant and a description which bounded the area con-

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veyed on the west by a creek. The Court held that this did not grant anything below the high watermark

The Court emphatically stated

"In the absence of *specific language*, either in the deed or on the plat, showing that it was intended to go below high watermark, the portion of land between high and low water mark remains in the State in trust for the benefit of the public" At 501 (Emphasis added)

In *Cape Romain* there were grants of large acreage most of which was then below the high watermark. The Court held that the claimant had title only to such islands, banks and marshes which were above the high watermark in the absence of *specific language* in a grant or plat showing a grant below the high watermark

In the *Hardee* case the property was described as bounded "west by a Creek". The Court held that this conveyed only to the high watermark of the creek, which had been located by the jury as a question of fact

Acreage, more or less, described in a grant cannot be used to show any intent to convey below the usual high watermark. *Cape Romain Land and Improvement Company v Georgia-Carolina Canning Company, et al*, 143 S C 428, 146 S E 434, at p 437, (1928) *Trapier v Wilson*, 13 S C L 191, 197

Tidelands undergo rapid change. The usual high watermark constantly changes. The original high watermark of a grant may not be the present high watermark. The boundary between private fastlands and State trust tidelands is the present high watermark. *Cape Romain Land and Improvement Co v*

Georgia Carolina Cannery Co, 148 S C 428, 146 S C 434, 437 (1928) The truth of this statement made in 1928 is again verified by the showing in this case of the tremendous migrations of the usual high water-marks of Morris Island over the years (Plaintiff's Exhibits 9 and 13, attached as appendix hereto)

With reference to Appellants' Brief ff 22-28, the Appellants did not connect their chain of title to the cited grant. Even if a connection had been made there is nothing in the language of the grant to show any intention to convey anything below the usual high water mark. The area originally above the usual high water mark is now under the Atlantic Ocean. Morris Island has eroded toward the mainland and the land now above the usual high water mark was originally either high or hard marsh (land above the usual high water mark) or was originally tideland (See Exhibits 9 and 13 attached to this brief)

The boundary line was the usual high water mark. The boundary changed with the change of the usual high water mark. Appellants gained land when the ocean receded and the appellants lost land when Morris Island eroded (See Exhibits 9 and 13, showing the natural change of the usual high water mark of Morris Island, attached to this brief)

With reference to Appellants' Brief ff 26-27, this was a tax sale deed and was not a grant from the State. The purchaser at a tax sale gets only a quit-claim deed to the area.

With reference to Appellants' Brief ff 28-30, the State was entitled to a directed verdict of all areas presently lying below the usual high water mark as a matter of law under a legal construction of the grant. The jury did not have the authority to consider the grant. The jury could only determine the fac-

tual issue, which was whether the area between the usual high water mark of Morris Island and the usual high water mark of James Island contained any land lying above the usual high water mark. The appellants, in effect, were attempting to oust the South Carolina State Ports Authority from the area previously conveyed to the U S Army Corps of Engineers for a spoil disposal site *State v Yelsen Land Co*, 257 S C 401, 185 S E (2d) 897 (1972)

With reference to Appellants' Brief f 31, the *Cape Romain* case held that a grant not specifically showing an intent to go below the usual high water mark conveyed only the acreage *presently* lying above the usual high water mark.

With reference to Appellants' Brief ff 33-35, the 1790 South Carolina Act conveyed only the area lying above the usual high water mark of Morris Island for the purpose of erecting a lighthouse. The lighthouse was erected on the fastland of the island above the high water mark.

With reference to Appellants' Brief ff 36-39, the United States only quit claimed the land it claimed from the State, being the land presently lying above the usual high water mark.

With reference to Appellants' Brief ff 39-41, there is nothing in the cited grants showing a specific intent to convey anything below the usual high water mark. The State was entitled to a directed verdict to all areas lying below the present usual high water mark under a legal construction of the grants as a matter of law *State v Yelsen Land Co (supra)*

With reference to Appellants' Brief ff 41-45, the real and only question is whether the Appellants can connect their title to a grant and if such grant, un-

der a legal construction, specifically showed the intent to convey below the usual high water mark

With reference to Appellants' Brief ff 45-46, the South Carolina Act of 1790 does not refer to "marsh" and does not show any intent to convey in fee simple or to convey below the usual high water mark No taxes were paid by the United States on the fastlands With reference to the prior "law suit", South Carolina left the suit by consent after asserting title to the tidelands (Tr, f 266)

With reference to Appellants' Brief ff 48-55, the real and only question is whether the Appellants traced title to a grant which, under a legal construction, specifically showed the intent to convey below the usual high water mark, as a matter of law

With reference to Appellants' Brief ff 63-70, the charges were correct statements of law The State was entitled to a directed verdict as to all areas lying below the usual high water mark under a legal construction of the cited grants, as a matter of law If this was error it was corrected by the verdict of the jury

In the case of a tidal navigable stream, the boundary line is the usual 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

"Tideland" is defined as the "area between the high water mark and the low water mark of tidal navigable streams"

It is a principle derived from the English common law and firmly established in the United States that the title to the soil under navigable waters is in the sovereign except as far as private rights in it have

been acquired by express grant During the time when territory now comprising one of the states was a colony of Great Britain, the title to land under navigable waters or tide waters within such colony was held by the crown, in trust for the people of the realm

It has been held or recognized in numerous cases that by the common law of England the title of all land covered by navigable waters in which the tide ebbs and flows is held by the crown in trust, however, for the people of the realm Such ownership extends to the bank, shore, or space between high and low water marks, or the land between high tide and low tide, and a riparian owner owns only to high water mark

The State owns the lands underlying its navigable waters in its sovereign capacity, that is, as a representative of, and in trust for, the public Thus the state holds title to submerged lands in trust for and subject, to, the public purposes or rights of navigation, commerce, fishing, bathing, recreation or enjoyment, and other appropriate public and useful purposes, or such other rights as are incident to public waters at common law, free from obstruction and interference by private persons

Ownership on the part of the state of land under navigable waters is subject to the paramount right of control of the federal government over commerce with foreign nations and among the states, including its power over navigation The fact that the federal government occupies the bed of a stream for the purpose of constructing structures in aid of navigation does not divest the state of its title thereto

The title to all real property in South Carolina was originally vested in the sovereign, the King of England and subsequently the State of South Carolina

A grant would be made to an individual by the sovereign. This original grant (accompanied by a plat) could be lost by the individual in many ways, *e g*, forfeiture for taxes, abandonment, etc. This tract of land would then be granted a second time (or more).

The construction of a Colonial Lords Proprietor grant or a Royal grant is under local state law as interpreted by the state court. The construction of a state grant is under local State law. The state court has the authority to interpret the state constitution, state statutes and state common law concerning real property. The State court has the authority to establish, and interpret, rules of construction concerning all real property grants.

The State of South Carolina comes into court with a presumption of title whenever the question as to ownership of tidelands arises. It is incumbent upon the individual claiming real property to trace his title, in an abstract of title, in an unbroken chain to a grant from the sovereign.

A grant by a sovereign to the tidelands must be in definite and express terms and will not be presumed. The grant is strictly construed against the grantee.

The State of South Carolina has absolute title to submerged lands, *i e*, the area below usual low tide, in the navigable waters of the State. The State has *prima facie* title to tidelands, *i e*, the area between usual low tide and usual high tide, in (and adjacent to) the navigable waters of the State. The State holds these tidelands in trust for the people of the State.

A claimant to tidelands in (and adjacent to) the navigable waters of the State must produce an unbroken chain of title to a grant from the sovereign. This would be done by tracing the title to (1) a Grant from the Lords Proprietors between 1670-1719, (2)

a royal Grant from the Crown between 1719-1776 or (3) a State Grant between 1776 and the present.

If the claimant cannot produce an unbroken chain of title to a grant then there is a presumption that no grant was issued or that a grant reverted to the State by virtue of abandonment escheat, purchase, etc.

The construction of a grant concerning tidelands is a *question of law* for the court to decide. At the present time the courts and lawyers have definite guides to show them how to construe such grants, contained in the case of *Cape Romain Land and Improvement Co v, Georgia-Carolina Canning Co*, 148 S C 428, 146 S E 434 (1928).

One or more of the various State agencies or departments are at the present time exercising ownership, custody and control over practically all of the tidelands in the State in connection with the enforcement of the laws concerning navigation, fish and wildlife, etc.

The United States and the State of South Carolina have concurrent jurisdiction over the navigable waters of the United States (which are also navigable waters of the State). The State of South Carolina has exclusive jurisdiction over the remainder of the navigable waters of the state (*i e*, those that are not also navigable waters of the United States).

The state agencies exercising control over the tidelands, submerged lands and navigable waters of the state are South Carolina Wildlife & Marine Resources Department, South Carolina Parks, Recreation and Tourism Dept, South Carolina Forestry Commission, South Carolina Highway Department, South Carolina Ports Authority, South Carolina Public Service Authority (Santee-Cooper), South Carolina Public Service Commission, South Carolina Soil

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Conservation and Drainage Districts, and the South Carolina Health & Environmental Control Department

The phosphate deposits in South Carolina tidelands are extensive and invaluable. Leases have been issued by the Budget and Control Board for the mining of phosphates and other minerals.

The Court, in the case of *Cape Romain Land and Improvement Co v Georgia-Carolina Canning Co*, 148 S C 428, 438, 146 S E 434, stated that

"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."

Rice Hope Plantation v S C Public Service Authority, 216 S C 500, 59 S E (2d) 132, 145 (1950), held

"We adhere to our opinion in the case of *Cape Romain Land v Improvement Co v Georgia-Carolina Canning Co*, 148 S C 428, 146 S E 434, 438, *supra*, wherein it was said 'The title to land below high water mark on tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes. But we do not deem it necessary or proper upon this appeal to determine under what circumstances and by what method, if any, title might be acquired by private owners, because any such ownership would be, in our opinion subject to the dominant power of the government (State and Federal) to control and regulate navigable waters'."

The Supreme Court in both the *Cape Romain* case and the *Rice Hope Plantation* case said that the tide

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lands are held in trust for the people of the State and are not for sale, and in the *Rice Hope* case the Court left open the question as to whether or not the Legislature could grant tidelands, or if any other method could be used to dispose of these lands by the State. In several of the earlier cases our Supreme Court held that the tidelands were not public lands or vacant lands in the normal sense and were not subject to disposal in the same manner as other public lands. This seems to be the general law throughout the United States—the tidelands being put in a class by themselves, and held in trust for public use for navigation, fishing, recreation and other public purposes.

The Common Law, as shown by the South Carolina decisions, may be briefly summarized as follows:

1 After the American Revolution, the title to the lands below high water mark on and under tidal navigable streams vested in the State of South Carolina, which held them as sovereign in trust for the public rights of navigation and fishery, and for the public welfare.

2 Any grant of such lands by the State of South Carolina was a grant by the State, in its sovereign capacity, of lands held by the State for the benefit of the public, in its sovereign capacity, and were grants in derogation of the rights, privileges and powers of the general public, and of the common law.

3 Such grants by the State as sovereign are construed strictly in favor of the State and the general public, and against the grantee, carry with them nothing by implication, and convey nothing which is not carried under such grants by an unavoidable construction.

4 The language of the grant must be special or express, and unambiguous, and must signify expressly

the intention, in unequivocal terms, to part with the title between high and low water mark

5 Where the boundary of the grant is given as the ocean, or a tidal navigable stream, or the shore or shores thereof, the grant extends only to the high water mark, in the one case and excludes the shore in the other, stopping at high water mark

Legislation with respect to the oyster industry is illustrative of the State's concern that the interest of the public is paramount in the matter of tidelands ownership. Nothing can better serve to show the present policy of the State and the wisdom of the earlier decisions of the Courts in respect of the State's title to such lands as the trustee for the public than this legislation, and the needs and requirements of the public welfare of the inhabitants of the State which have manifestly impelled this legislation. And nothing can better serve to justify the wisdom of the rule of construction and interpretation, that nothing in this territory passes by implication, and only an express grant definitely and particularly describing such territory can in any case be relied on. The Court will see from an inspection of these statutes that the State by its legislature has acted to exercise for the public good those rights and privileges which, by the common law and by the decisions of the Courts of every jurisdiction from time immemorial, were held to be vested in the State, or the sovereign, as trustee for the people of the State.

The S C Supreme Court in *Cape Roman Land & Imp Co v Georgia-Carolina Can Co*, 148 S C 428, 146 S E 434, 437 (1928), held

"In the case of *Shively v Bowlby*, *supra*, Mr Justice Gray, as the organ of the court, makes this reference to the rule in South Carolina. 'In

South Carolina, the rules of the common law, by which the title in the land under tide waters is in the State, and a grant of land bounded by such waters passes no title below high water mark, appear to be still in force'—citing *State v Pacific Guano Co*, *supra*, *State v Pinckney*, *supra*. In the case of *Hardin v Jordan*, *supra*, in discussing the rule, the court uses this language 'With regard to grants of the government for lands bordering on tide water, it has been distinctly settled that they only extend to high water mark, and that the title to the shore lands under water in front of lands so granted inures to the state within which they are situated, if a state has been organized and established there. Such title to the shore and lands under water is regarded as incidental to the sovereignty of the state—a portion of the royalties belonging thereto and held in trust for the public purposes of navigation and fishery * * *' in the case of *State v Pacific Guano Co*, *supra*, Mr Justice McGowan, in his opinion as the organ of the court, gives this statement of the rule. 'The doctrines of the common law as to the seashore and the soil lying under tidewaters and navigable streams were peculiar. The fundamental idea was that the property in the sea and tidewaters, and in the soil and shore thereof, was in the sovereign * * * These are all channels in which the tide ebbs and flows, and as to such the well established rule is 'that a grant of' such should give 'title only to high water mark'. In the case of *Morris v United State*, *supra*, the writer of the opinion in that case refers to the reasoning of the opinion in the case

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of *State v Pinckney, supra*, with approval' "

* * *

"The title to land below high water mark on tidal navigable streams, under the well settled rule, is in the state, not for the purpose of sale, but to be held in trust for public purposes" (at page 438)

In determining the extent of the boundaries of a body of land, the same rule does not apply to navigable streams, such as the one in question, that applies to the nonnavigable stream. When a body of land is bounded by a nonnavigable stream, the general rule is that the boundary line is the middle of the stream, whereas, in the case of a 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.

The decided cases fully support a finding that upon this showing the grants should be interpreted as extending to high water mark.

A planimeter study of the United States Geological Survey maps of the South Carolina coast shows that there are approximately 1,088,968 acres from the high water mark to the three mile state boundary. There are approximately 660,808 acres landward from the head line and approximately 428,160 acres seaward. Ninety-eight (98%) of all coastal fisheries depend on the tidelands and estuarine lands for life. The tidelands are the nursery ground for shrimp, fish, crabs and oysters. Some of the tidelands are hunted, some are fished for pleasure, some are fished commercially, some are boated for pleasure, some are

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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 front 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.

Adverse possession does not run against public land dedicated to and used by the public for streets and highways. Tidelands are held in trust for the people and are water highways. Statutory law provides that the tidelands and submerged lands shall continue to remain as a common for the people of the State for the taking of fish and other public purposes.

Lands lying between the high and low water marks of navigable waters are, under the express decisions of the South Carolina Supreme Court, held by the state in trust for public purposes. *Rice Hope Plantation v S C Public Service Authority*, 216 S C 500, 59 S E (2d) 132. *Cape Romain Land and Improvement Co v Georgia Carolina Canning Co*, 148 S C 428, 146 S E 434. *State v Pacific Guano Co*, 22 S C 50.

The rule of construction applicable to the grant under consideration in this case in determining what is passed from the State to the original grantee and whether it included the territory between high and low water mark, has been laid down by the Supreme Court of South Carolina in the case of *State v Pacific Guano Company* (22 S C, at page 86), very explicitly as follows:

"In all grants from the Government to the subject, the terms of the grant are to be taken most strongly against the grantee, and in favor of the grantor, reversing the rule as between individuals * * * This rule applies *a fortiori* to a case where such grant by a government to individual proprietors is claimed to be not merely a conveyance of title to land, but also a portion of that public domain which the government held in a fiduciary relation for the general and public use"

Whether the grantee thereunder took title to the territory lying between high and low water marks in tidal navigable streams must be determined from the language of the grant, construed against the grantee, and in favor of the State and the general public. The grant cannot invade the territory between high and low water marks, under any circumstances, unless the language of the grant is unequivocal, and expressly discloses the intention to convey below the high water mark.

It is submitted that the grant under consideration did not carry or convey the title to the territory between high and low water marks, but such title remained in the state in trust for the public, and the grant, by its terms, properly construed, extended only to high water mark.

An inspection of the wording of the descriptions in the grant in this case will of course show that such territory was not expressly granted, nor was it impliedly granted. There is not a single mention in the grant of "low water mark," nor any language which in the most strained construction could be taken to

suggest any intention to convey below high water mark.

Other rules of construction are peculiarly applicable in this case in determining what the description contained in the grant conveyed. These rules can best be set forth in the language of the Court.

"It will be observed that the territory embraced is bounded on all sides by navigable tidal streams * * *, and such description according to the well established common law rule only carried the title of the riparian property owner down to the ordinary high water mark, excluding all the marsh lying below that line, and subject to the daily ebb and flow of the tides * * *" *State v Pinckney*, 22 S C 484, 507.

"If the boundary be a navigable stream, * * * the land extends only to the water's edge, or to high water mark * * *. So a conveyance bounding "westerly by the beach" excludes the shore or land between low and high water mark. The same is the rule where the land is bound by the sea, or an arm of the sea' "

Ibid, at page 507.

"In determining the extent of the boundaries of a body of land, the same rule does not apply to tidal navigable streams, such as those in question, that applies to the ordinary or nonnavigable stream. When a body of land is bounded by a nonnavigable 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. The plaintiff's deeds give as boundaries of the lands referred to in the complaint the Atlantic Ocean,

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certain bays, islands, marshes, streams, etc., and do not give low-water mark as the boundary in any instance. In this connection, appellant contends that the plats of the lands described in the several deeds, and which accompanied the deeds, should have been considered by his honor, Judge Grimbail, in passing upon this issue. The transcript of the case contains this agreed statement on that point: "The testimony shows that no grant or any plat referred to in any part of the case contains the words 'low water mark', except in one plat covering one of the Morrison grants, the surveyor (states?) that on Bull's Bay, an arm of the sea not a navigable stream, the line is at 'low water mark,' and on the same plat containing navigable streams, no such language is used, and there is no testimony that any oysters were gathered or cultivated, or any stakes driven in Bull's Bay." It is therefore clearly seen that the plats to which the appellant refers do not offer any additional proof on the issues under consideration." *Cape Romain Land & Imp Co v Georgia Carolina Can Co*, 148 S. C. 428, 146 S. E. 434, 436.

We gather from the foregoing, that the following rules and presumptions are also followed by the Court, in the consideration of such grants as we have here:

1 A grant by the government or State of lands bordering on navigable streams is presumed to extend only to the line of high water.

2 A conveyance bounding by its terms on a navigable stream is construed to extend no further than high water.

3 A conveyance bounded on the "sea" or on the "ocean," or on arm of the sea, extends no further than high water mark, and does not include the shore.

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4 A conveyance bounded on the shore of the sea, or of an arm thereof, of a navigable stream, excludes the shore therefrom, and extends no further than high water mark.

The appellants contend that the acreage called for in the grant and plat should control.

What the grant conveyed, of course, must be determined by the language of the grant taken as of the date of the grant.

This argument was answered in the *Cape Romain* case, page 437, when the court held:

"The appellant contends that, if the grants in question do not go to low-water mark, they convey nothing, for the reason that at high tide practically all of the land is covered by water. We do not agree with this contention. In the first place, the testimony on which appellant relies as showing or tending to show that a large portion of the land is covered by water at high tide is not conclusive of the question. Neither does the fact that the land described in some of the deeds is referred to as marsh land, to which attention is called, settle the question. Then, too, there are other facts in the case to be considered. While a marsh is land usually wet and soft and commonly covered wholly or partly with water and is often referred to as a swamp, it is also known as a meadow which remains green during the dry seasons, 37 C. J. 1363.

"In this connection, it may be mentioned that there are only two small tracts, one containing 1,040 acres and the other containing 3,684 acres, which are described in the deeds as a marsh, while the balance of the 34,000 acres is described as islands, sand islands and bank, except a 360 acre tract which is described as 'a tract of shell sand

bank and marsh' being a part of Cassena Island. If the use of the word 'marsh' is to be considered as significant in connection with about 5,000 acres of said land, then the terms 'island' and 'sand banks' should be considered as significant in connection with the remaining 30,000 acres. Also, in considering the question presented, inquiry should be made as to whether or not the land involved is covered by water at high tide on account of the usual tide or under abnormal conditions."

The *Cape Roman* case stands for the propositions that the gross acreage called for by the grant cannot be considered, the perimeter of the accompanying plat cannot be considered, the usage and custom of the times cannot be considered and the interpretation evidenced by the parties to the specific grant cannot be considered.

Title to the area above the usual high water mark is conceded. This identical point was covered in *Cape Roman* when the Court held, 146 S. E. at page 438.

"We must bear in mind, as stated in the agreed statement of facts, that the crux of the whole case is, has the plaintiff title to low water mark in navigable streams. It is conceded for the purpose of this appeal that the plaintiff owns all of the land contained within the boundaries appearing in the deeds executed by the agent of the state, unless such boundaries be construed to include lands between high and low water mark in the navigable streams, but, as we view the case, the plaintiff has failed to prove title to the lands between high and low water mark in the navigable streams, as held by the circuit judge, for the

reasons we have stated above in connection with the authorities cited. The title to land below high-water mark on tidal navigable streams, under the well-settled rule, is in the state, not for the purpose of sale but to be held in trust for public purposes.

"We are therefore of the opinion that appellant's position is not well taken and that there is no proof of title in plaintiff to the land between high and low water mark in the navigable streams within the territory described in the complaints, as disclosed by the record."

It is, therefore, respectfully submitted that there is no proof of title in the appellants to the land between the high water mark and the low water mark in the navigable stream, within the territory described in the original grants.

CONCLUSION

In grants as are here involved the construction shall be against the grantees, and in favor of the State and the general public, and any doubt, ambiguity, or uncertainty must be resolved against the grantee. Every presumption shall be indulged in favor of the State and the general public, and nothing passes except what is expressly granted, in so many words.

It is not open to doubt, in the light of our decisions, that the common law governs in South Carolina, and is applied by our Courts consistently, particularly for the protection of the rights of the general public and the furtherance of the welfare and development of the resources of the State.

In view of all the legislation and aid of the protection and development of the oyster industry, and the cultivation and utilization of the State's natural re-

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sources in oyster lands, and in other lands which may be used for their cultivation, and the cultivation of other fish and shell fish, the question is one of greatest public moment and interest

The appellants have failed to prove title to the land between the high and low water marks in the navigable streams named in the testimony

The common law rule in South Carolina was that a grant to land adjacent to navigable waters conveyed title to the high water in the absence of language specifically conveying title to the low water mark. The *Cape Romain* case specifically reaffirmed the original common law rule

Each of the states has modified The Common Law to suit the actual conditions of that state. This was so held by the S C Supreme Court concerning inland navigation *State v Pinckney*, 22 S C at pp 507, 508

The State relies on the *Cape Romain* case and the reaffirmation of that case by the S C Supreme Court in the cases of *Jones v State Board of Fisheries*, 161 S C 309, 159 S E 651 (1931), *Rice Hope Plantation v S C Public Service Authority*, 216 S C 500, 59 S E (2d) 132 (1950), *Early v S C Public Service Authority*, 228 S C 392, 90 S E (2d) 472 (1955), *State v Hardee*, 259 S C 535, 193 S E (2d) 497 (1972)

The office of the South Carolina Attorney General has consistently held, since the *Cape Romain* decision, that the lands lying between high water and low water belong to the people in common. The present position of the Office of the South Carolina Attorney General is not new

The State of South Carolina comes into court with a presumption of title to the tidelands. The owner of property adjacent to navigable waters has title only

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to the usual high water mark. A claimant to tidelands must produce an original grant in order to show language specifically conveying title to the usual low water mark. If a claimant is entitled to show title to tidelands by adverse possession then there would be no necessity in any case for a claimant to produce an original grant. There would, in effect, be a presumption of a grant to the claimant. The tidelands would no longer be trust property held by the State for the people in common. Tidelands would be in the same category as other real property and a claimant would win or lose solely on the jury question of adverse possession

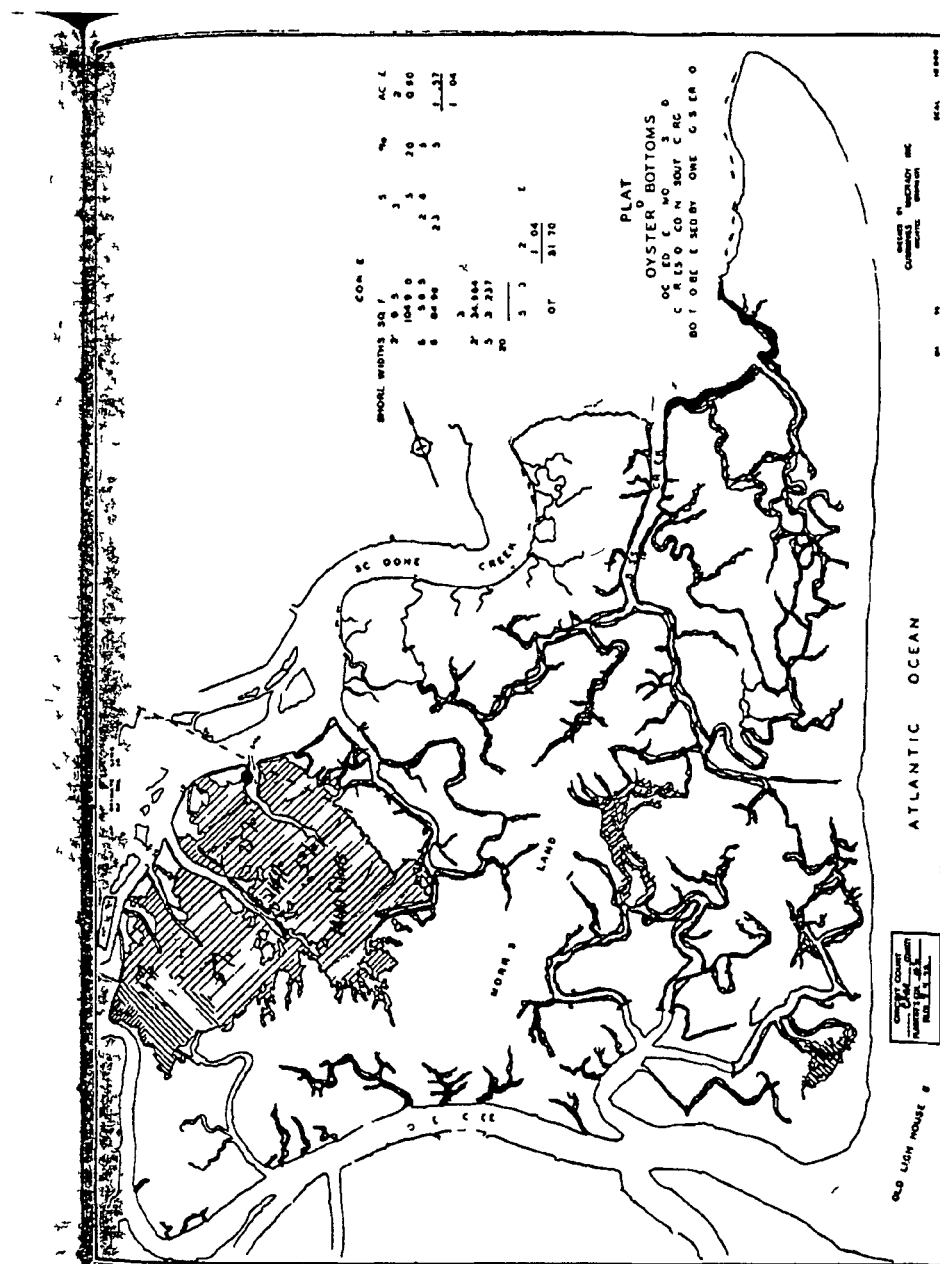
We respectfully submit, therefore, that the judgment of the jury and the order of the circuit judge should be affirmed. The evidence clearly showed that the entire area between the usual high water marks of James Island and Morris Island consisted solely of tidelands that were in the possession of, and were owned by, the State of South Carolina

Respectfully submitted,

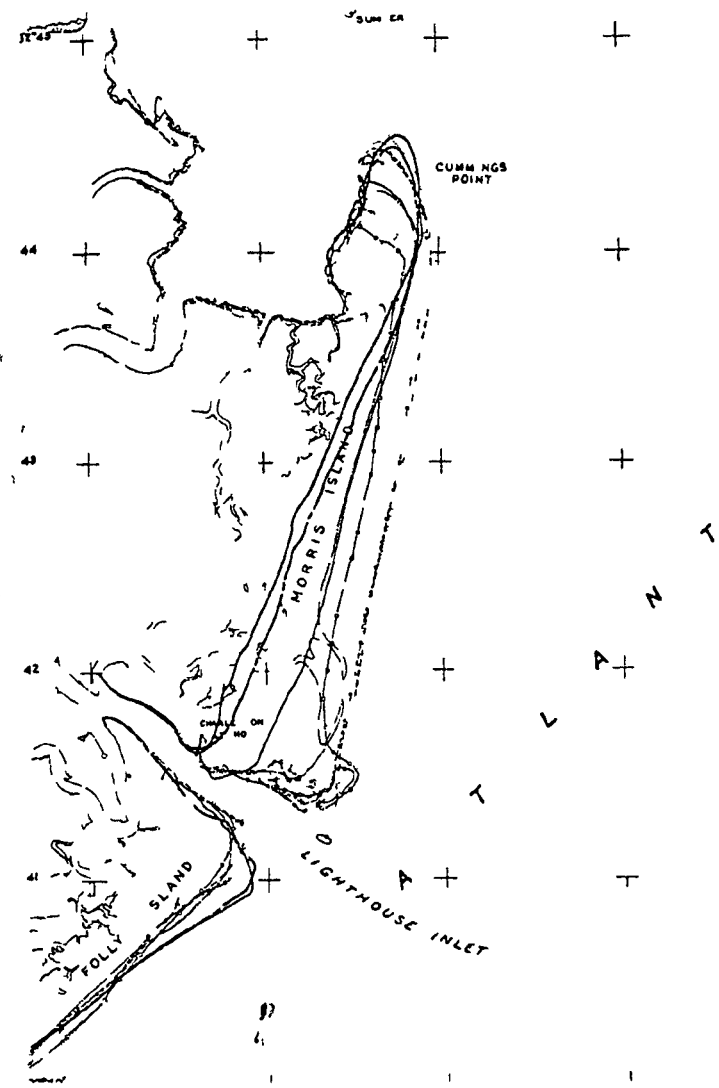
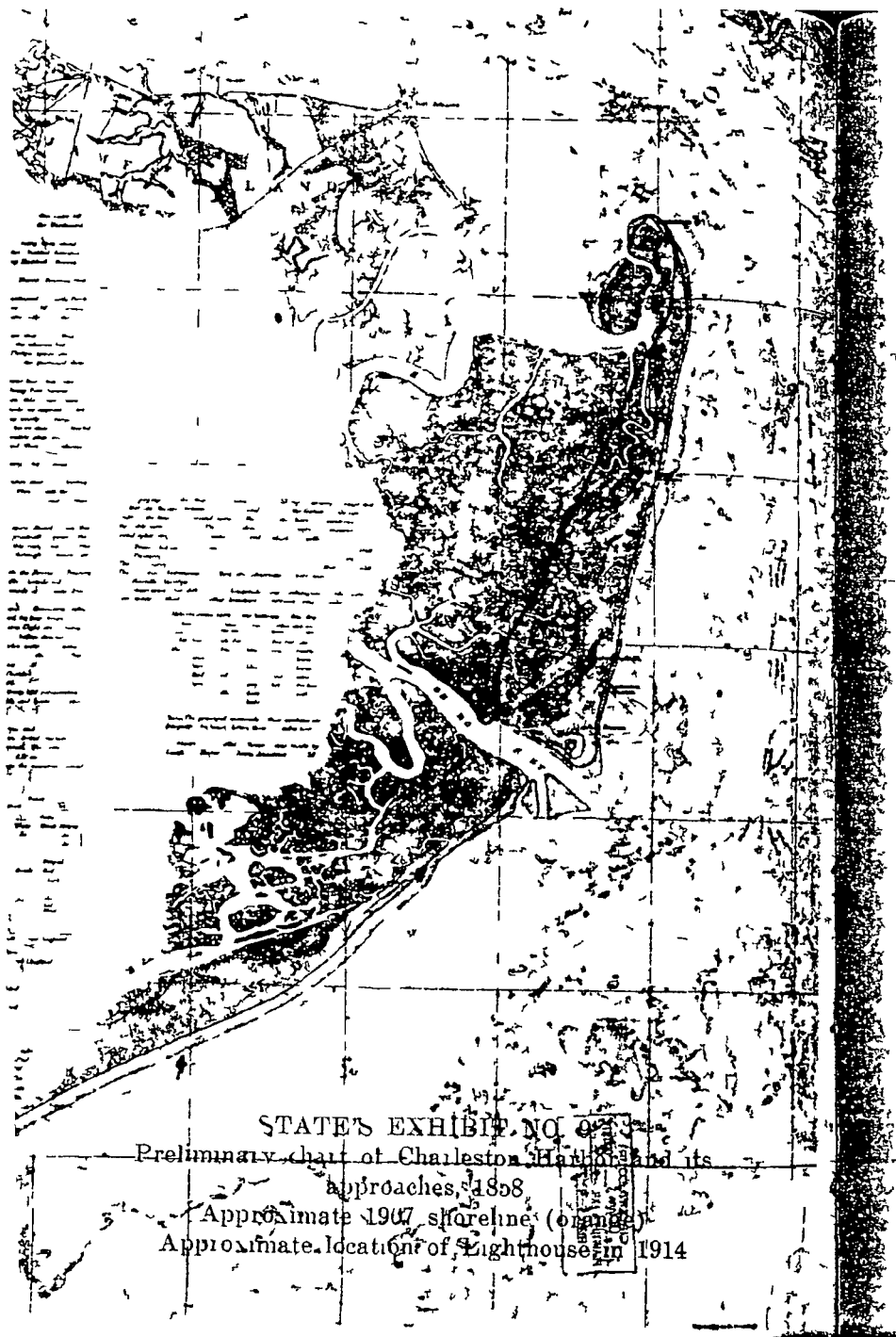
DANIEL R. McLEOD,
Attorney general,

EDWARD B. LATIMER,
Assistant Attorney General,

EDWARD D. BUCKLEY,
BAILEY AND BUCKLEY,
Attorneys for Respondent



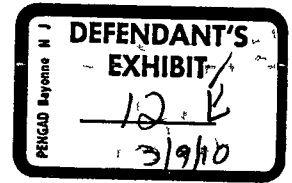
STATE'S EXHIBIT NO 6
Oyster losses shown in red



STATE'S EXHIBIT NO 13

Morris Island high water shoreline

1849 1854	USC and GS
1857 1858	USC and GS
1864	USC and GS
1900	USC and GS
1921	USC and GS
1933	
1955	
1967	



 [West Reporter Image \(PDF\)](#)

265 S C 78, 216 S E 2d 876

Supreme Court of South Carolina
The STATE of South Carolina, Respondent,
v
YELSEN LAND COMPANY, INC , and Dajon Realty Company, Appellants

No 20060
July 14, 1975

State brought action to settle dispute between it and claimants concerning title to certain tidelands. The Common Pleas Court, Charleston County, E. Harry Agnew, J., entered judgment on the verdict in favor of State and claimants appealed. The Supreme Court, Lewis, J., held that State was presumptively the owner of tidelands, that grants in which claimants' predecessors obtained title to land, the boundaries of which were described as 'a small inlet, the Folly Inlet,' the Atlantic Ocean, a sound or Creek,' and the waters of Charleston Harbor, did not convey title to low water mark and thus did not convey title to tidelands, that, since grants to claimants' predecessors did not convey the tidelands in question, claimants could not assert title based on adverse possession, and that any errors in admission of testimony as to value of tidelands or in instructions to the jury did not prejudice claimants.

Affirmed

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↪ [270 Navigable Waters](#)

↪ [270II Lands Under Water](#)

↪ [270k36 Ownership and Control in General](#)

↪ [270k36\(3\) k Land Between High and Low Water Marks, Tide Lands, and Flats](#) [Most Cited Cases](#)

State is presumptively the owner of the tidelands

[2]  [KeyCite Citing References for this Headnote](#)

↪ [270 Navigable Waters](#)

↪ [270II Lands Under Water](#)

↪ [270k36 Ownership and Control in General](#)

↪ [270k36\(7\) k Proceedings for Recovery of Submerged Lands](#) [Most Cited Cases](#)

Burden rests upon claimants to tidelands to prove that the state has granted title to such lands to them or their predecessors in title

[3]  [KeyCite Citing References for this Headnote](#)

↪ [270 Navigable Waters](#)

↪ [270II Lands Under Water](#)

↪ [270k37 Grants to and Acquisition by Private Owners or Municipalities](#)

↪ [270k37\(4\) k Construction of Grants, and Title and Rights of Grantees in General](#) [Most](#)

- 520 -

Cited Cases

Naming of boundaries to land with terms such as "inlet" and "sound or creek" will convey land only to the high water mark in the absence of specific language, either in the grant or upon the plat, showing that it was intended to convey land below the high water mark

[4] KeyCite Citing References for this Headnote

↪ 270 Navigable Waters

↪ 270II Lands Under Water

↪ 270k37 Grants to and Acquisition by Private Owners or Municipalities

↪ 270k37(4) k Construction of Grants, and Title and Rights of Grantees in General Most

Cited Cases

Language in which claimants' predecessor was granted land described as Middle Bay Island, Bounded to the North by a small inlet passing between 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 said Middle Bay Island and the other island aforesaid conveyed land only to the high water mark

[5] KeyCite Citing References for this Headnote

↪ 270 Navigable Waters

↪ 270II Lands Under Water

↪ 270k37 Grants to and Acquisition by Private Owners or Municipalities

↪ 270k37(4) k Construction of Grants, and Title and Rights of Grantees in General Most

Cited Cases

Conveyance which described the subject land as All that lot, piece or parcel of land on Morris Island, in Charleston County, and State aforesaid, measuring and containing eight hundred twenty acres, more or less, being the whole of Morris Island, excepting that portion belonging to the United States Government, the said Island being bounded by the Atlantic Ocean and the waters of Charleston Harbor' did not convey title to the low water mark and thus did not convey title to the tidelands

[6] KeyCite Citing References for this Headnote

↪ 270 Navigable Waters

↪ 270II Lands Under Water

↪ 270k37 Grants to and Acquisition by Private Owners or Municipalities

↪ 270k37(4) k Construction of Grants, and Title and Rights of Grantees in General Most

Cited Cases

Where grants of land to claimants predecessors in title did not convey tidelands, there could be no basis, on theory of presumption of possession from title, for claimants' claims of possession or assertion of bar of statute precluding the state from suing in respect to real property unless such right or title shall have accrued within 20 years and precluding any action for recovery of real property from being instituted against a person unless the claimant has been in possession within the past 40 years Code 1962, §§ 10-121, 10-129

[7] KeyCite Citing References for this Headnote

↪ 30 Appeal and Error

↪ 30XVI Review

↪ 30XVI(J) Harmless Error

↩ 30XVI(J)10 Admission of Evidence

↩ 30k1052 Defect Supplied or Objection Removed Subsequently

↩ 30k1052(8) k Appellant Not Entitled to Favorable Decision in Any Event Most Cited

Cases

↩ 30 Appeal and Error  KeyCite Citing References for this Headnote

↩ 30XVI Review

↩ 30XVI(J) Harmless Error

↩ 30XVI(J)18 Instructions

↩ 30k1068 Error Cured by Verdict or Judgment

↩ 30k1068(3) k Appellant Not Entitled to Favorable Determination in Any Event Most Cited Cases

Where claimants failed to establish any defense to State's claim of ownership of tidelands, any errors in admission of testimony as to value of the tidelands or in instructions to the jury could not have prejudiced claimants

****877 *79** Arthur G. Howe and Paul N. Uricchio, Jr., of Uricchio, Howe & Krell, Charleston, and Edwin P. Gardner of Sloan & Gardner, Columbia, for appellants

Atty. Gen. Daniel R. McLeod, Asst. Atty. Gen. Edward B. Latimer, Columbia, and Edward D. ***80** Buckley of Bailey & Buckley, Charleston, for respondent

LEWIS, Justice

This action was brought by the State of South Carolina against Yelsen Land Company, Inc., and Dajon Realty Company, Inc., to settle a dispute between the State and the defendant Corporations concerning title to certain tidelands adjacent to the highlands on Morris Island located near Charleston, South Carolina. It is conceded that Yelsen and Dajon own the highlands comprising Morris Island, Yelsen claiming the southern portion and Dajon the northern ****878** part. The line of demarcation between the respective areas claimed by each corporation cannot be ascertained, but both corporations are owned by the same party. This controversy involves only the respective claims of the parties to the adjacent tidelands.

After a prior appeal involving the mode of trial, State v. Yelsen Land Company, et al., 257 S. C. 401, 185 S. E. 2d 897, the case was tried before the court and a jury, resulting in a verdict in favor of the State. Yelsen and Dajon have appealed, asserting by their exceptions, error in the trial court's refusal of their timely motion for a directed verdict and, alternatively, seek a new trial upon the basis of ***81** alleged trial errors in the admission of testimony and in the instructions to the jury.

[1]  The State is presumptively the owner of the tidelands and contends, in this case, that it has never parted with title to the area in question. Yelsen and Dajon contend that they are the owners of the tidelands in controversy by virtue of grants from the State-Yelsen under a grant in 1790 to its predecessor in title, the United States of America, and Dajon under a grant in 1818 to its claimed predecessor in title, John M. Maillard. Since the claims of Yelsen and Dajon are based upon separate chains of title, they will be discussed separately.

[2]  Since the State is presumptively the owner of the tidelands, the burden rested upon Yelsen and Dajon to prove that the State had granted title to such lands to their predecessors in title. State v. Pinckney, 22 S. C. 484, State v. Hardee, 259 S. C. 535, 193 S. E. 2d 497

According to the agreed Statement in the Transcript of Record, Yelsen is claiming under a grant by the State of South Carolina to the United States of America, on January 20, 1790, as contained in Act No. 1486 of 1790, Vol. 5, pages 147, 148 of the Statutes of South Carolina from 1786 to 1814. The area included in the grant is described as Middle Bay 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

[3]  In State v. Griffith, (filed herewith) S C , 216 S E 2d 765, we held that similar descriptive language was insufficient to convey title to the tidelands there in dispute. The record here shows conclusively that the 'inlet' and 'sound or creek' referred to as boundaries in the grant, under which Yelsen claims, were arms of the Atlantic Ocean and subject to the ebb and flow of the tides. ***82** Under well settled rules of construction naming such boundaries will convey land only to the high water mark in the absence of specific language, either in the grant or upon a plat, showing that it was intended to convey land below the high water mark. State v. Hardee, 259 S C 535, 193 S E 2d 497, Cape Romain Land & Improvement Co. v. Georgia-Carolina Canning Co., 148 S C 428, 146 S E 434

[4]  Under the principles set forth in State v. Griffith, supra, the language of the grant, under which Yelsen claims, being insufficient to convey the land below the high water mark and there being no other fact tending to prove an intent to grant title beyond the high water mark, Yelsen has completely failed to establish its claim to the tidelands in question.

[5]  Appellant Dajon has likewise failed to prove its claim. It traced its title to a conveyance from J. A. Leland, Master in Equity, to G. W. McCormick, dated February 6, 1884, for a tract of 820 acres described as

All that lot, piece or parcel of land on Morris Island, in Charleston County, and State aforesaid, measuring and containing eight hundred twenty acres, more or less, being the whole of Morris Island, excepting that portion belonging to the United States Government, the said Island being bounded by the Atlantic ****879** Ocean and the waters of Charleston Harbor.

The boundaries given of the Atlantic Ocean and the waters of Charleston Harbor did not convey title to low water mark, and the foregoing deed, therefore, did not convey title to tidelands. State v. Griffith, supra

In further support of its claim of title to tidelands, Dajon introduced into evidence a deed from the State to John M. Maillard, dated August 3, 1818, covering a tract on Morris Island, consisting of 236 acres of highland and 102 acres of marsh land.

***83** It is conceded that Dajon could not connect its title to the above conveyance from the State to Maillard. Since Dajon was unable to connect its title to a grant from the State, it failed to establish its claim to the tidelands in question.

We therefore, hold that there was no evidence to sustain the claims of title of either Yelsen or Dajon to the tidelands in question and the trial judge properly denied their motions for a directed verdict.

Appellant, Yelsen and Dajon, argue also that the State is precluded from maintaining this action by reason of the limitation provisions of Sections 10-121 and 10-129 of the 1962 Code of Laws.

Section 10-121 provides

The State will not sue any person for or in respect to any real property or the issues or profits thereof by reason of the right or title of the State to the same unless

(1) Such right or title shall have accrued within twenty years before any action or other proceeding for the same shall be commenced, or

(2) The State or those from whom it claims shall have received the rents and profits of such real property or of some part thereof within the space of twenty years.

Section 10-129 provides

No action shall be commenced in any case for the recovery of real property or for any interest therein against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action

Assuming the applicability of these code sections to the assertion of the rights of the State to tidelands, the present action would not be barred under the facts of this case

[6]  The position of appellants, Yelsen and Dajon, that this action is barred by the foregoing limitation statutes is based solely upon the contention that they *84 and their predecessors in title have been in possession of the tidelands in question for the statutory periods under a claim of title by virtue of the above mentioned grants of the State to the United States Government in 1790 and to John M Maillard in 1818 The possession, which they assert to defeat the right of action of the State, is based upon the presumption of possession which follows the establishment of legal title Since, as previously pointed out, the foregoing grants did not convey the tidelands in question, there could be no basis for appellants' claims of possession or the assertion of the bar of the statutes

[7]  The remaining exceptions, which charge error in the admission of testimony by the State as to the value of the tidelands and in the instructions to the jury, could not have resulted in prejudice to the appellants, since their failure to establish any defense to the State's claim of ownership of the tidelands in question deprived them of the right to a verdict in any event

The judgment is accordingly affirmed

MOSS, C J , and BUSSEY, LITTLEJOHN JOHN and NESS, JJ , concur

S C 1975

State v **Yelsen** Land Co , Inc ,
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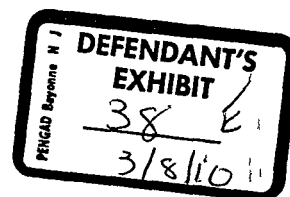


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**Dredged Material Management Plan
Preliminary Assessment**

**Charleston Harbor
and Shipyard River
Charleston, South Carolina**

January 1997



DREDGED MATERIAL MANAGEMENT PLAN PRELIMINARY ASSESSMENT FOR CHARLESTON HARBOR AND SHIPYARD RIVER CHARLESTON, SOUTH CAROLINA

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**DREDGED MATERIAL MANAGEMENT PLAN
PRELIMINARY ASSESSMENT
FOR
CHARLESTON HARBOR
AND
SHIPYARD RIVER
CHARLESTON, SOUTH CAROLINA**

PROJECT NAME AND DESCRIPTION

Charleston Harbor (CWIS - 02980) is a natural tidal estuary located at Charleston, South Carolina. The harbor covers an area of approximately 14 square miles and is formed by the confluence of the Ashley, Cooper, and Wando Rivers. The entrance to Charleston Harbor is flanked by a dual weir-jetty system 2900 feet apart. Construction of the rubble mound jetties was completed in 1895. The south jetty, which springs from Morris Island, is 19,104 feet in length. The north jetty extends seaward from the southern tip of Sullivan's Island and is 15,443 feet in length. The elevation of the jetties is approximately 12 feet above mean low water (MLW) with the ends extending from station 0+00 to station -112+00 of the Federal navigational channel. The existing 40-foot Federal navigational channel extends from the 42-foot ocean contour through the jetties to the North Charleston Terminal on the Cooper River, a distance of 26.97 miles. An additional 2.08 mile 40-foot channel extends up the Wando River to the Wando Welch Terminal belonging to South Carolina States Ports Authority. The existing Federal channel varies in width from 400 feet in Town Creek and Wando River to 1000 feet wide in the entrance channel, Fort Sumter Range. A small 110-foot wide by 12-foot deep navigational channel also extends through the harbor, behind Crab Bank and up Shem Creek to Mount Pleasant. The mean and spring tidal range in the entrance channel are 5.1 feet and 5.9 feet, respectively.

Shipyard River (CWIS - 16730) provides an entrance channel 300 feet wide and 38 feet deep from deep water in the Cooper River to Basin A, and then a 200 foot wide by 30 feet deep channel to Basin B. Basin A and Basin B are 38 and 30 feet deep, respectively. The mean range of tide at Shipyard Creek, 0.8 miles above the entrance is 5.3 feet above mean low water, and the spring tide is 6.1 feet above mean low water.

The maximum sailing draft of the fleet using Charleston Harbor is 40 feet. Nominal project dimensions for both projects are listed by segment in Table 1. A map of each project is contained on Figures 1 and 2.

South Carolina State Ports Authority (SCSPA) sponsored the recent deepening of Charleston Harbor from 35 feet to its present depth of 40 feet. Deepening to 40 feet was essentially completed in September 1994 with a 1550 foot extension of the Wando Channel. A feasibility study has just been completed recommending deepening of the harbor to 45 feet. The existing 30-foot project in Shipyard River was completed in 1951.

The Local Cooperation Agreement (LCA) for the Charleston Harbor 40-foot project was signed on 5 February 1988. An LCA supplement for the Wando Channel and Turning Basin was signed on 8 March 1989. Extension of the Wando Channel was subsequently approved and the LCA supplement was signed on 2 December 1993. No local cooperation agreement is presently required for Shipyard River. Shipyard River is combined into this Charleston Harbor report as both projects use the same disposal areas and are combined into the same dredging contracts for convenience and efficient use of funds. The sponsor, South Carolina States Ports Authority, has furnished necessary funds and disposal areas in a timely manner. The mailing address of South Carolina States Ports Authority is P. O. Box 817, Charleston, South Carolina 29402.

TABLE 1

PROJECT DIMENSIONS

CWIS Number	Reach or Segment	Nominal Depth		Nom Chan Width		Max Sailing Draft ¹	Project Sponsor (Y/N)
		(as auth)	(as maint)	(as auth)	(as maint)		
02980 (Shipyard River)	Fort Sumter Range	42	42	1000	1000	40	Y
	Mount Pleasant Range	42	42	600-1000	600-1000	40	Y
	Rebellion Reach	40	40	600	600	40	Y
	Folly Reach	40	40	600	600	40	Y
	Shutes Reach	40	40	800	800	40	Y

TABLE 1
(CONT)

PROJECT DIMENSIONS

CWIS Number	Reach or Segment	Nominal Depth (as auth) (as maint)		Nom Chan Width (as auth) (as maint)		Max Sailing Draft ¹	Project Sponsor (Y/N)
02980	Horse Reach	40	40	800	800	40	Y
	Hog Island Reach	40	40	600	600	40	Y
	Drum Island Reach	40	40	600	600	40	Y
	Myers Bend	40	40	800	800	40	Y
	Daniel Island Reach	40	40	600	600	40	Y
	Daniel Island Bend	40	40	700	700	40	Y
	Clouter Creek Reach	40	40	600	600	40	Y
	Navy Yard Reach	40	40	600 675	600 675	40	Y
	North Charleston Reach	40	40	500	500	40	Y
	Filbin Creek Reach	40	40	500	500	40	Y
	Port Terminal Reach	40	40	600	600	40	Y
	Ordnance Reach	40	40	1400	1400	40	Y

TABLE 1
(CONT)

PROJECT DIMENSIONS

CWIS Number	Reach or Segment	Nominal Depth (as auth)	(as maint)	Nom Chan Width (as auth)	(as maint)	Max Sailing Draft ¹	Project Sponsor (Y/N)
02980	Custom House Reach	40	40	Varies	Varies	40	Y
	Upper Town Creek	40	40	500	500	40	Y
	Lower Town Creek	40	40	400	400	40	Y
	Town Creek Turning Basin	40	40	1400	1400	40	Y
	Tidewater Reach	40	40	650	350	40	Y
	Wando Channel	40	40	400	400	40	Y
	Wando Turning Basin	40	40	1400	1400	40	Y
	Anchorage Basin	35	35	2250	*	35	Y
	Shem Creek Channel	12	12	110	110	12	Y
16730	Entrance Channel	38	38	300	300	38	Y
	Basin A	38	38	700	700	38	Y

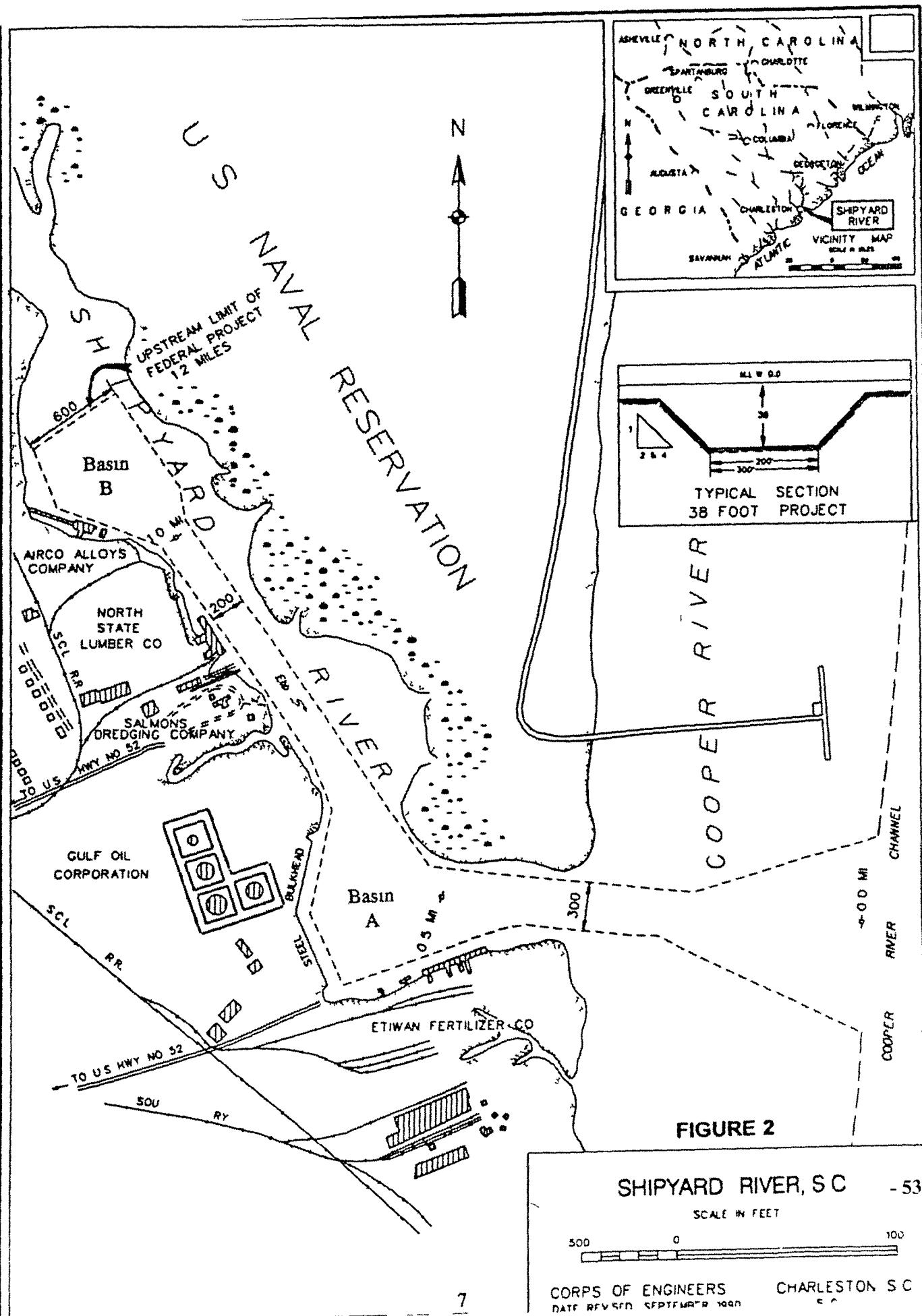
TABLE 1
(CONT)

PROJECT DIMENSIONS

CWIS Number	Reach or Segment	Nominal Depth (as auth) (as maint)		Nom Chan Width (as auth) (as maint)		Max Sailing Draft ¹	Project Sponsor (Y/N)
16730	Connector Channel	30	30	200	200	30	Y
	Basin B	30	30	600	600	30	(Y
Project Sponsor Reach(s) A -- X							
Name South Carolina State Ports Authority							
Address P O Box 817							
City Charleston				State South Carolina		ZIP 29402	
Point of Contact Larry W Setzler				Phone # (803)856-7051			

NOTE ¹ For vessels currently using the harbor

* Maintenance discontinued due to lack of use



PROJECT AUTHORITY

Charleston Harbor, SC (CWIS - 02980) has enjoyed numerous authorizations beginning with the River and Harbor Act of June 18, 1878, and continuing through to the present. The latest authorization, the 1986 Water Resources Development Act (P L 99-662) provided for deepening the harbor to its current 40-foot depth. The Water Resources Development Act also authorized Federal maintenance and deepening of the locally dredged Wando Channel and Turning Basin.

Shipyard River, SC (CWIS - 16730) was initially authorized by the River and Harbor Act of July 25, 1912 to provide a depth of 18 feet. The 1986 Water Resources Development Act authorized deepening the lower portion of Shipyard River to 38 feet as part of the Charleston Harbor improvements under the same authority.

ECONOMIC ASSESSMENT

The Charleston Harbor project was originally authorized by the River and Harbor Act in 1878. Today, the harbor is a modern intermodal transportation hub, shipping and receiving containerized cargo from around the world. In terms of twenty-foot equivalent units (TEUs)¹ of throughput, Charleston Harbor is the second largest container cargo port on the East and Gulf Coast and the sixth largest in the nation. The existing 40-foot project was authorized by the 1986 Water Resources Development Act. Traffic movements of 1977 were used as the economic basis for authorization of the current project. This tonnage movement of approximately 9.2 million tons was comprised mainly of petroleum products, followed by bulk and containerized tonnage.

Economic information since the completion of the existing project not only warrants continued operation and maintenance of the existing project but has resulted in a feasibility study to consider deepening the harbor. In 1994, Charleston Harbor handled more than 10 million short tons of waterborne commerce. The most important products shipped from Charleston include coal, chemicals, paper, grains, wood pulp, cement, textiles and lumber. Petroleum products, chemicals, bauxite and non-ferrous ores are the most important commodities shipped into Charleston. Unlike the commodity mix in 1977, three-fourths of the current traffic consists of containerized cargo. In 1994, 7.5 million tons of containerized cargo was handled in Charleston Harbor, with about 65 percent being export traffic. With the recent completion of additional berthing space and landside facilities at the Wando Terminal, Charleston Harbor has the capacity to handle about 11.5 million tons of containerized cargo annually. The South Carolina State Ports Authority (SCSPA) currently has plans

¹ The large containers which carry the majority of Charleston's containerized cargo are forty feet long and equal two TEUs.

underway to construct a new containerized terminal that could potentially double the existing capacity

TABLE 2

ECONOMIC ASSESSMENT

Reach or Segment	Benefit Indicators ¹	Current Operations	Trend (Up Down)	Summary/ Remarks
PROJECT	COMMODITY TYPES	Container Bulk Petroleum	Up Up Up	
	TONNAGE	10 million short tons	Up	Total for Charleston Harbor Wando Welch Terminal expansion completed in 1994
	GROWTH RATES	11%	Up	As reported by SCSPA from 1994 to 1995
	VESSEL TYPES	Containership Deep draft bulk Tankers Ro Ro	Up	As reported by SCSPA in 1995 15% more vessels than prior year
	VESSEL SIZES	20 000 to 60 000 DWT	Up	Vessel draft increased since project deepened to 40 feet
	RECREATIONAL VESSEL TYPES	Cabin Cruisers Sail Boats	Up	Marinas continually being developed in Charleston area
	RECREATIONAL VESSEL SIZES	Unknown	Unknown	
	COMMERCIAL FISHING, CHARTER	Unknown	Up	
	COMMERCIAL FISHING OTHER	shrimp boats cruise ships	n a	

NOTE ¹ Include only pertinent indicators

TABLE 3A

CHANNEL MAINTENANCE COST HISTORY CHARLESTON HARBOR

Reach or Segment	Construction/ Acquisition		Dredging Cost ¹ (thousands of dollars per year)						
	Year	Cost		1990	1991	1992	1993	1994	Avg
Entrance Channel			Dredging ²	1395	93	2590	1527		
			Env Studies				390	75	
			Total	1395	93	2590	1917	45	1208
Anchorage Basin			Dredging		418	719		1331	
			Env Studies						
			Total		418	719		1331	494
Lower Harbor			Dredging	555	2583	662	889	1478	
			Env Studies						
			Total	555	2583	662	889	1478	1113
Upper Harbor			Dredging	149	922	18	303	194	
			Env Studies						
			Total	149	922	18	303	194	317
Wando River			Dredging	40 ³			143	130	
			Env Studies						
			Total	40			143	130	47
Shem Creek			Dredging					376	
			Env Studies						
			Total					376	75
Total Project			Dredging	2059	4016	3989	2862	3509	
			Env Studies				390	45	
			Other O&M	31	254 ⁴	1		11	
			Total	2090	3762	3990	3252	3565	3332

NOTE ¹ Show amount dredged by year for each of last 5 years if available. If not available or if reach not dredged in last 5 years, show computed average per year.

² Dredging: Transportation and Placement Costs are combined. Costs also include condition surveys and associated Engineering and Design costs.

³ Reflects accrued earnings for work performed in FY 89.

⁴ Includes diking disposal fees received.

TABLE 3B

CHANNEL MAINTENANCE COST HISTORY SHIPYARD RIVER

Reach or Segment	Construction/ Acquisition		Dredging Cost ¹ (thousands of dollars per year)						
	Year	Cost		1990	1991	1992	1993	1994	Avg
Total Project			Dredging ²		366 5		306 0		
			Env Studies						
			Other O&M	32 3	64 4	29 5	41 8	35 5	
			Total	32 3	430 9	29 5	347 8	35 5	175 2

NOTE ¹ Show amount dredged by year for each of last 5 years if available. If not or if reach not dredged in last 5 years show computed average per year.

² Dredging Transportation and Placement Costs are combined. Costs also include condition surveys and associated Engineering and Design costs.

TABLE 4A

CHANNEL MAINTENANCE COST PROJECTIONS CHARLESTON HARBOR

Reach or Segment	Programmed Dredging Cost (thousand dollars per year, consistent with 10 year project O&M maintenance schedule)											
		1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Avg
Entrance Channel	Dredging	2319		1478		1568		1663		1764		
	Env Studies	25		25		25		25		25		
	Total	2344		1503		1593		1688		1789		892
Inner Harbor	Dredging	828	3400	2840	3504	1885	3717	2000	3943	2122	4183	
	Env Studies	20	55	35	55	15	55	15	55	15	55	
	Total	848	3455	2875	3559	1900	3772	2015	3998	2137	4238	2880
Total Project	Dredging	3146	3400	4318	3504	3453	3717	3663	3943	3886	4183	
	Env Studies	45	55	60	55	40	55	40	55	40	55	
	Other O&M	846	505	231	291	300	312	321	335	343	359	
	Clouter Creek Diking		400									
	Total	4238	4360	4609	3850	3793	4084	4024	4333	4269	4597	4216

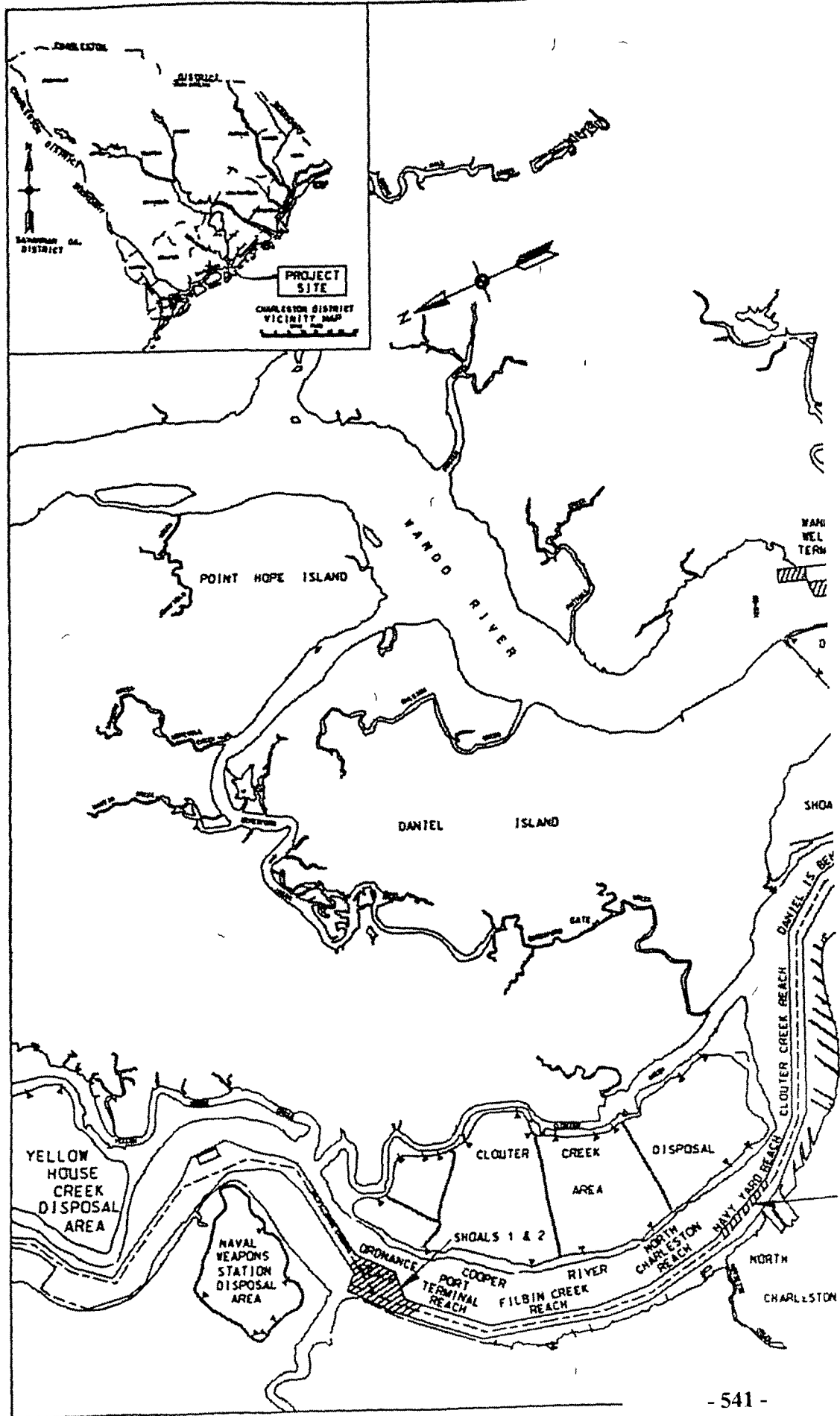
TABLE 4B

CHANNEL MAINTENANCE COST PROJECTIONS SHIPYARD RIVER

Reach or Segment	Programmed Dredging Cost (thousand dollars per year consistent with 10 year project O&M maintenance schedule)											
		1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Avg
Total Project	Dredging	250	380	366	371	383	395	408	421	435	449	
	Env Studies		15	15	15	15	15	15	15	15	15	
	Cond Surveys		14	14	14	14	14	14	14	14	14	
	Other O&M	40	26									
	Total	290	435	395	400	412	424	437	450	464	478	419

MAINTENANCE DREDGING HISTORY

The existing Charleston Harbor project is maintained to the authorized project depth of 40 feet MLW (42 feet for the entrance channel) and 38 feet MLW in Shipyard River. In addition, two feet of advance maintenance and two feet of allowable overdepth are authorized. Rapid shoaling occurs in some reaches. The shoal in Drum Island Bend and Drum Island Reach requires dredging on almost a six-month cycle. Other reaches with significant shoaling problems are the Wando Terminal Extension, Wando Turning Basin, Shipyard River, Lower Town Creek, Daniel Island Reach, Custom House Reach, Ordnance Reach and Ordnance Reach Turning Basin. Advanced maintenance of four to six feet is accomplished in the rapidly shoaling reaches. Shoaling in the entrance channel typically occurs between stations -132+00 and -292+00. Dredging records from 1988 to 1994 indicate the average annual maintenance dredging quantities to be approximately 1.8 million cubic yards throughout the inner harbor. This material is placed in upland disposal sites located throughout the inner harbor area as shown on Figure 3. Maintenance dredging of the inner harbor and Shipyard River is conducted by use of a hydraulic pipeline dredge. Maintenance material dredged from portions of the lower harbor was disposed of in the Offshore Dredged Material Disposal Site (ODMDS) during the 40-foot deepening effort as it was cost effective to include this material with new work material. This work was performed with a clamshell dredge and was transported to the ODMDS in scows. The entrance channel is dredged by a hopper dredge and the material transported to the ODMDS. Table 5A shows the maintenance yardage dredged for the last five years for both Charleston Harbor and Shipyard River. Table 5B shows yardage removed during the past five years from berthing areas and placed in project disposal areas. Table 6A and 6B respectively shows the anticipated yardage to be dredged over the next 10 years from both the federal channel and private berthing areas.



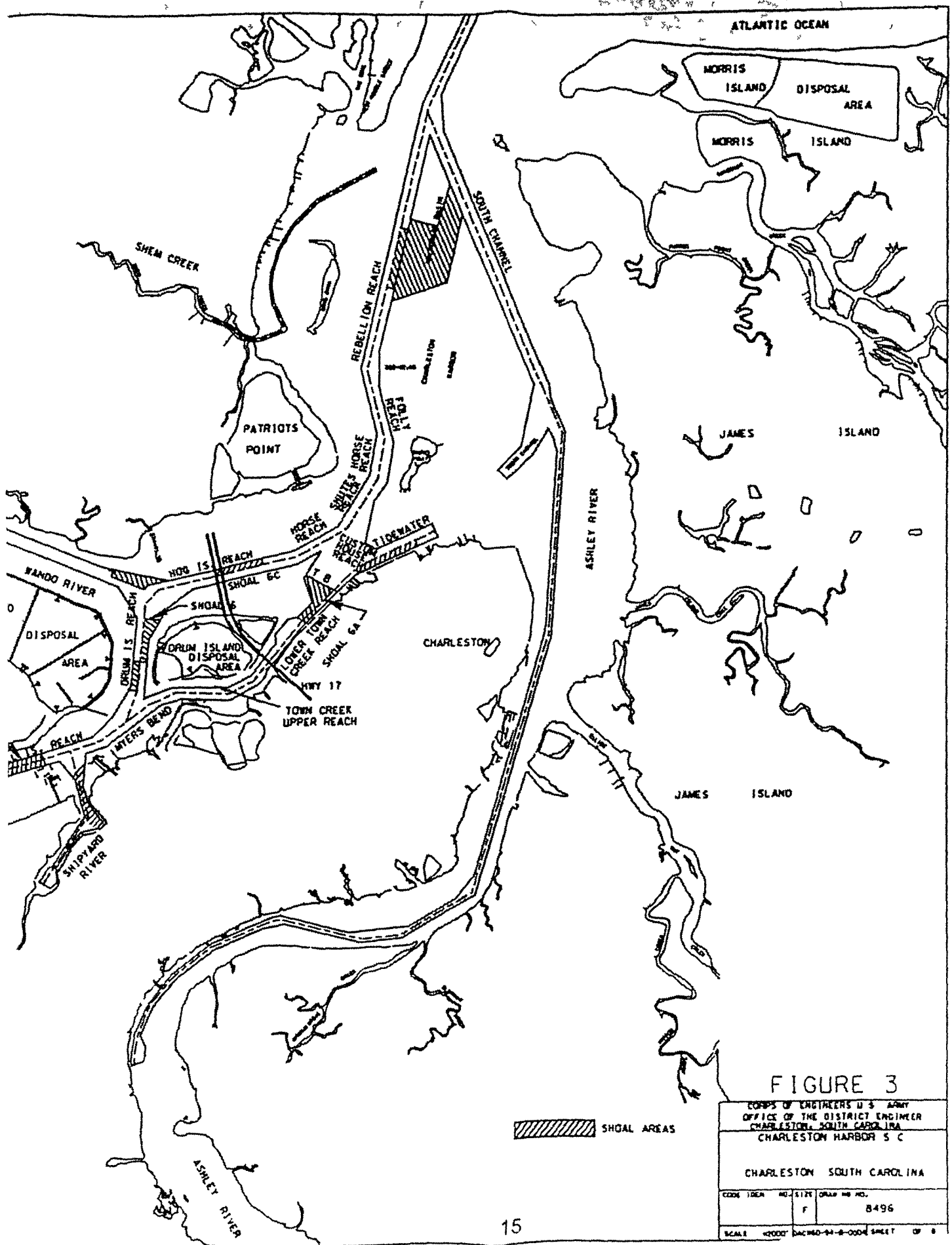


TABLE 5A

DREDGING HISTORY FEDERAL CHANNEL

Reach or Segment	Primary Dredging Method ¹	Dredging History ^{2 3} (thousand CY per year)						Disposal Site(s) Used (Identifier)
		1990	1991	1992	1993	1994	Avg	
Fort Sumter & Mount Pleasant Ranges	1		1 066 1	551 7			323 6	ODMDS
Anchorage Basin	2			867 8		487 0	271 0	Morris Island
Rebellion Reach	2					31 9	6 4	Morris Island
Tidewater Reach	2					160 7	32 1	Daniel Island
Tidewater Reach	4		399 5				79 9	ODMDS
Shoal 6A	2	74 8					15 0	Drum Island
Shoal 6A	2				307 5	191 7	99 8	Daniel Island
Shoal 6A	4		93 9				18 8	ODMDS
Shoal 6C	2		168 9		281 0	156 0	121 2	Daniel Island
Shoal 6	2		338 7	159 9		284 5	156 6	Daniel Island
Shoal 5A Lower	2		85 5	167 1			50 5	Daniel Island
Shoal 5A Upper	2		6 6				1 3	Daniel Island
Shoal 3	2		18 5				3 7	Clouter Creek
Shoal 4	2	37 5	53 2	44 7			27 1	Clouter Creek
Shoals 1 & 2	2		538 5	249 0			157 5	Clouter Creek
Shem Creek	2					137 0	27 4	Morris Island
Shipyards River	2		399 6		372 1		154 3	Daniel Island
Wando River	2		205 5	414 6	212 0		166 4	Daniel Island

NOTES

¹ Select one of the following types of Dredging Methods

- 1 Hopper Dredge
- 2 Cutterhead Dredge
- 3 Dustpan/Sidecaster Dredge
- 4 Mechanical (Clamshell)
- 5 Ejector (For example Pneuma Pump Toyo Pump etc)
- 6 Other (Define in the text)

² Show amount dredged by year for each of last 5 years if available. If not or if reach not dredged in last 5 years show computed average per year

³ All quantities are based on required pay prism and not gross yardage

TABLE 5B

DREDGING HISTORY PRIVATE WORK

Reach or Segment	Primary Dredging Method ¹	Dredging History ^{2 3} (thousand CY per year)						Disposal Site(s) Used (Identifier)
		1990	1991	1992	1993	1994	Avg	
Union Pier	2	23 1					4 8	Drum Island
Union Pier	2					154 0	30 8	Daniel Island
Union Pier	4		43 2	78 3			24 3	ODMDS
Columbus Street Terminal	2	63 5					12 7	Drum Island
Columbus Island Terminal	2		61 3	106 1	217 7	253 6	127 7	Daniel Island
Columbus Street Terminal	4		24 9	98 4			24 3	ODMDS
Wando Terminal	2		27 3	47 7	29 7	78 8	36 7	Daniel Island
North Charleston Terminal	2				3 9		0 8	Clouter Creek
Allied Terminal	2					23 4	4 7	Daniel Island
Chem Marine	2		17 5				3 5	Clouter Creek
Shipyard River Coal Terminal	2	31 3	47 2		65 8		29 9	Daniel Island
Shipyard River Coal Terminal	2					20 3	4 1	Drum Island
Chevron/(BP)	2		36 8		64 3		20 2	Daniel Island
Hess	2	35 7			15 1		10 2	Clouter Creek
Koch Refinery	2		23 1				4 8	Clouter Creek
Ordnance Reach Pier	2	61 3					12 3	Naval Weapons Station Dike
Ordnance Reach Pier	2		79 8	40 0 ⁴	35 2		31 0	Clouter Creek

NOTES

¹ Select one of the following types of Dredging Methods

- 1 Hopper Dredge
- 2 Cutterhead Dredge
- 3 Dustpan/Slocaster Dredge
- 4 Mechanical (Clamshell)
- 5 Ejector (For example Pneuma Pump Toyo Pump etc.)
- 6 Other (Define in the text)

Show amount dredged by year for each of last 5 years if available. If not or if reach not dredged in last 5 years show computed average per year.

All quantities are based on required pay prism and not gross yardage.

Work performed by Navy dredge *Orion*

TABLE 6A

ANTICIPATED DREDGING FEDERAL CHANNEL

Reach or Segment	Programmed Dredging ^{1 2} (thousand CY) (consistent with 10- year O&M maintenance plan)											Disposal Site(s) to be Used
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Avg	
Fort Sumter & Mount Pleasant Ranges	1584		1000		1000		1000		1000		400 0	ODMDS
Rebellion Reach				60					60		12 0	Morns Island
Tidewater Reach			200								20 0	Daniel Island ³
Tidewater Reach						200			200		40 0	ODMDS
Shoal 6A		361	180								54 1	Daniel Island ³
Shoal 6A					180		180		180		54 0	ODMDS
Shoal 6A				180		180		180		180	72 0	Drum Island
Shoal 6C		110	150								28 0	Daniel Island ³
Shoal 6C					200		150		150		50 0	ODMDS
Shoal 6	135	280	180								44 0	Daniel Island ³
Shoal 6				180		180		180		180	72 0	Drum Island
Shoal 6					180		180		180		54 0	ODMDS
Shoal 5A Lower		143									14 3	Daniel Island ³
Shoal 5A Upper					150			150			30 0	Clouter Creek
Shoal 4			50					50			10 0	Clouter Creek
Shoals 1&2	489	410		500		500		500		500	241 0	Clouter Creek
Shipyard River	209	288	300								56 8	Daniel Island ³
Shipyard River					250		250		250		75 0	Clouter Creek
Wando River		557	200								78 0	Daniel Island ³
Wando River					500		500		500		150 0	ODMDS

NOTES ¹ Show amount programmed for dredging from each reach to be placed in each disposal site by year for each of the next 10 years. If it is not to be dredged, show computed average yardage per year.

² All quantities are based on required pay prism and not gross yardage.

³ Easement on Daniel Island expires in January 1998 and is not renewable due to anticipated development.

TABLE 6B

ANTICIPATED DREDGING PRIVATE WORK

Reach or Segment	Programmed Dredging ^{1 2} (thousand CY) (consistent with 10-year O&M maintenance plan)											Disposal Site(s) to be Used
	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Avg	
Union Pier	327.3		75.0								40.2	Daniel Island ³
Union Pier				75.0		75.0		75.0		75.0	30.0	Drum Island
Union Pier					75.0		75.0		75.0		22.5	ODMDS
Columbus Street Terminal		96.0	300.0								39.6	Daniel Island ³
Columbus Street Terminal				300.0		300.0		300.0		300.0	120.0	Drum Island
Columbus Street Terminal					300.0		300.0		300.0		90.0	ODMDS
Wando Terminal	67.7		75.0								71.4	Daniel Island ³
Wando Terminal					75.0		75.0		75.0		22.5	ODMDS
North Charleston Terminal		20.0		20.0		20.0		20.0		20.0	10.0	Clouter Creek
Allied Terminal										25.0	2.5	Clouter Creek
Chem Marine						20.0					2.0	Clouter Creek
Shipyard River Coal Terminal	7.3	30.0									3.7	Daniel Island ³
Shipyard River Coal Terminal			30.0	30.0	30.0	30.0	30.0	30.0	30.0	30.0	24.0	Clouter Creek
Chevron	31.8										3.2	Daniel Island
Chevron			50.0		50.0		50.0		50.0		20.0	Clouter Creek
Hess		20.0			20.0			20.0			6.0	Clouter Creek
Koch Refinery	8.8				15.0				15.0		3.9	Clouter Creek
Ordnance Reach Pier	45.8	45.0		45.0		45.0		45.0		45.0	22.5	Clouter Creek

NOTES: ¹ Show amount programmed for dredging from each reach to be placed in each disposal site by year for each of the next 10 years if it is not to be dredged; show computed average yardage per year.

² All quantities are based on required pay prism and not gross yardage.

³ Easement on Daniel Island expires in January 1998 and is not renewable due to anticipated development.

DREDGED MATERIAL DISPOSAL SITE CAPACITY AND USAGE

The inside channels of Charleston Harbor are served by four upland disposal sites: Morris Island, Drum Island, Daniel Island, and Clouter Creek (see Figure 3). A fifth site, the Naval Weapons Station Dike (see Figure 3), is used for maintenance material dredged from the Naval Weapons Station channels and wharves, but may also be used for maintenance of the Federal channels if necessary. The Charleston Harbor Ocean Dredged Material Disposal Site (ODMDS) is used for disposal of material removed from the entrance channel.

The Charleston Harbor ODMDS is located south-west of the entrance to Charleston Harbor and was designated for use of dredged material by the Environmental Protection Agency (EPA) on 3 August 1987. In addition, a second site was also designated by EPA specifically for disposal of harbor deepening (new work) material. This second site was located within the boundaries of the original disposal site and was three square miles in size and averaged 11 meters in depth. The Charleston Harbor ODMDS, with an interim designation for a seven-year period, was 11.8 square nautical miles in size and averaged 11 meters in depth. On 23 October 1995, EPA modified the language for the designated use of the larger site from "seven years" to "continued use". Additionally, the smaller site was designated in order to protect recently identified natural resources found within its boundaries. For future disposal of harbor deepening and maintenance material, a site which is four square miles in size and averages 12 meters in depth will be used. This site is located within the boundaries of the original 11.8 square nautical mile site.

Morris Island is a barrier island south of Charleston Harbor and southwest of the entrance to Charleston Harbor. It is owned by the South Carolina State Ports Authority, which has renewed the disposal easement to the Government until August 2017. The site is divided into two cells. The North Cell contains approximately 168 acres and the South Cell contains approximately 359 acres. The North Cell dikes currently provide about eight feet of freeboard, while the South Cell dikes provide about nine feet. Due to the distance of this site from the inner harbor channels, it has historically been used to contain maintenance material dredged from Rebellion Reach, the Anchorage Basin, and Shem Creek only. The site is not deemed to be within an economical pumping distance from other inner harbor shoals. However, the area has been used to contain new work material dredged from other reaches of the harbor. Maintenance of the Anchorage Basin has been discontinued due to lack of use. Morris Island is expected to have excess capacity for the next twenty years.

Drum Island is located in Charleston Harbor, northeast of the City of Charleston, and opposite the confluence of the Wando and Cooper Rivers. It is owned by the South Carolina State Ports Authority and the Government enjoys a disposal easement until January 2012. The central diked area contains approximately 138 acres and the recently-raised dikes now provide approximately 14 feet of freeboard. The site has historically been used in conjunction or rotation with Daniel Island Disposal Area for maintenance material dredged from the lower harbor reaches between Tidewater and Hog Island Reaches northward to Shipyard River and Daniel Island Reaches (from about channel Mile 5 to Mile 10), but principally from Tidewater Reach and Shoal 6A (Town Creek). Due to the relatively small size of this area, it cannot be used to contain large quantities of material during a single dredging cycle. It is well-suited to off-cycle maintenance of the State Ports berths and high-shoaling areas of the Federal channel, during which quantities are relatively small.

Daniel Island Disposal Area is located at the southern tip of Daniel Island, about three miles northeast of Charleston, at the confluence of the Wando and Cooper Rivers. The eastern three-fifths of the area is owned by the Guggenheim Foundation and the western two-fifths is owned by the South Carolina State Ports Authority. The Ports Authority has granted an easement to the Government which expires in January 1998. It is doubtful that the easement will be renewed for more than a one to two year term as the Guggenheim Foundation has a masterplan for development of the entire island and the Ports Authority plans to develop a new shipping terminal on their portion of the land. The present site is divided into three cells: the West Cell contains 177 acres, the Middle Cell contains 198 acres, and the Wando Cell contains 300 acres. The present site has been used since 1969 to contain maintenance and new work material dredged from about Mile 5 to Mile 10 of the lower harbor channels, which includes Town Creek, Wando River, and Shipyard River. Daniel Island is a large disposal area centrally located with respect to the rapid-shoaling areas of the lower harbor reaches. It has been actively managed by the Charleston District to extend its useful life, and the loss of this area will be a severe blow to continued economic maintenance of the lower harbor channels.

Clouter Creek Disposal Area is located on the east bank of the Cooper River to the east of North Charleston, South Carolina. It is bounded on the north, west and south by the Cooper River and on the east by Clouter Creek. Approximately the southern two-thirds are owned by the U.S. Navy while the northern third is owned by the South Carolina State Ports Authority. The Government enjoys a perpetual easement on the state-owned portion. With the closure of the Charleston Naval Base and Shipyard, the Navy determined that they had no further need for their area. The property was transferred from the Navy to the Department of the Army on 6 June 1996. Therefore, the government will retain ownership of the area and it will be managed by

the Corps of Engineers. During the 1980's, the area was divided by the construction of cross dikes into four cells. Their names and approximate contained acreages, from south to north are: South Cell (418 acres), Middle Cell (414 acres), Highway Cell (466 acres) and North Cell (190 acres). The government-owned portion, which includes the South and Middle Cells, was historically used in maintenance of the Naval piers and slips. It was also used to some extent during maintenance and new work dredging of the 40-foot Federal channel by the Corps under a Joint-Use Agreement with the Navy. The North and Highway Cells have been used mainly for maintenance and new work dredging of the channels at the upper end of the Federal project, including Ordnance Reach Turning Basin. With proper management, the total capacity of the Clouter Creek Disposal Area exceeds anticipated needs over the next twenty years.

The Naval Weapons Station Disposal Area, located at the south end of the Naval Weapons Station, is bounded to the south and east by the Cooper River and to the west by Goose Creek. It is to the north of Clouter Creek Disposal Area and the upstream limit of the Federal project at the mouth of Goose Creek. In 1985, the Navy granted the Army a 25-year license to use the area for disposal of material dredged from the Navy Channel as well as from the commercial channel. The area contains about 300 acres and the recently-raised dikes provide about eleven feet of freeboard. The area has been used to contain maintenance material from the Naval Weapons Station and new work material from the deepening of Ordnance, Port Terminal, and Filbin Creek Reaches. The site is managed primarily for maintenance of the Weapons Station but could be used for the Federal channels if needed.

With the loss of the centrally located Daniel Island easement in January 1998, most of the material that previously was placed in the site will have to be transported to the ODMDS. Material from Shipyard River and Daniel Island Reach vicinities can be pumped upstream to the South Cell of Clouter Creek Disposal Area. These alternatives to Daniel Island will be more costly than use of Daniel Island due to increased pumping and/or haul distances using dump scows.

A feasibility study has recently been completed recommending deepening of Charleston Harbor and the lower portions of Shipyard River to 45 feet (47 feet in the entrance channel). Some of the material from this deepening can be placed in the upland sites having excess capacity (such as Morris Island and Clouter Creek) if the pumping distances and associated costs are less than ocean disposal. However, since deepening involves large quantities of dredged material, consideration will have to be given to the impacts on disposal area capacities required for annual maintenance.

TABLE 7

DISPOSAL SITE DATA

Disposal Site(s) (Name or Identifier)	Site Type ¹ (select)	Disposal Site Capacity ²		Beneficial Uses (CY/Year)		Other Users ³	Disposal Site Sponsor (Y/N)
		Original (MCY)	Percent Filled ³	Existing	Anticipated	(select)	
ODMDS	2	154 9	8%	None	None	D	Y
Morris Island	6	15 3	46%	None	None	D	Y
Drum Island	6	5 7	60%	None	None	D	Y
Daniel Island	6	34 2	75%	None	Development	D	Y
Clouter Cr	6	33 5	71%	None	None	D	Y
Naval Weapons Station	6	6 8	29%	None	None	E	Y

Sponsor(s) for Disposal Site(s)		
Name South Carolina State Ports Authority (SCSPA)		
Address P O Box 817	City Charleston	State SC
Point of Contact Larry W Setzler	Phone # (803) 856-8051	
Name Naval Weapons Station c/o Commander Officer, Southern Division		
Address P O Box 10068	City Charleston	State SC
Point of Contact	Phone # (803)	

NOTES

¹ Select one of the following types of Disposal Sites (1) Open Water, unrestrained, (2) Designated Open Water (3) Near Shore (surf zone), (4) On Shore (beach nourishment) (5) Near Shore Confined (in water CDF), (6) Upland Confined, (7) Upland Unconfined

² Based on existing diking

³ Select one of the following types of Non Corps Users

- A None [Corps has exclusive use]
- B Authorized [Other parties allowed to use, with or without Corps consent]
- C Allocated [Space available for project related non Corps dredging at no cost]
- D Permitted [Space available for non Corps dredging in the area at a cost]

E - Restricted [Non Corps use controlled by another party, Corps has full use]

F - Royalty [Site controlled by another party, Corps uses at a cost]

TABLE 8

PLACEMENT HISTORY

Disposal Site(s) (Identifier)	Primary Disposal Method ¹	Placement History ^{2 3} Gross Yardage CY per year (thousand)					
		1990	1991	1992	1993	1994	Avg
ODMDS	5	2768 ⁶	1647 ⁶	6621 ⁶		1241 ⁶	2456 ^{6 7}
Morris Island	1 & 6		1332			946	456
Drum Island	1	64					479 ⁵
Daniel Island	1	302	2225	718	2267	1331	1369
Clouter Creek	1	2138 ³	3411 ³	2423 ³	2039 ³	2382 ³	2479 ⁴
Naval Weapons Station	1	2315 ⁸	-				463

NOTES

¹ Select one of the following Disposal Methods

- | | |
|--------------------------|---|
| 1 Hydraulic Pipeline | 4 Flowline (Thalweg) |
| 2 Mechanical (Clamshell) | 5 Bottom Dump |
| 3 Sidechannel | 6 - Other (define in text) pump out from scow |

² Show amount placed by year for each of last 5 years if available. If not or if site not used in last 5 years, show computed average per year

³ Assumes 2.0 MCY placed by Charleston Naval Shipyard annually

⁴ Future average will not include Navy yardage due to closure of Naval Base. Expected future average without Navy is 479 thousand cubic yards

⁵ 9 year average from 1982 through 1990

⁶ Figure includes maintenance and new work from 40-foot deepening project

⁷ Estimated average for maintenance material only, approximately 1 MCY per year

⁸ Includes maintenance material from Naval Weapons Station channels and maintenance and new work material from Charleston Harbor 40 foot deepening project

ENVIRONMENTAL COMPLIANCE

The existing Charleston Harbor project requires maintenance dredging of the navigational channel which extends from the 42-foot ocean contour to a point 26.97 miles up the Cooper River. In addition to the main channel, maintenance dredging is

also required in the Anchorage Basin, Tidewater Reach, Upper and Lower Town Creek Reaches, Wando Channel, and the Shipyard River channels. Frequent shoaling is a problem in particular reaches, such as in the vicinity of Drum Island where dredging occurs on almost a six-month cycle. Maintenance dredged material removed from the inner harbor is placed in the five existing upland disposal sites located throughout the study area. Dredging in the inner harbor is typically done by pipeline dredges. Hopper dredges are used to maintain the entrance channel and clamshell dredges have been used to load barges to transport inner harbor material to the Ocean Dredged Material Disposal Site. The five upland disposal sites include Morris Island, Drum Island, Daniel Island and Clouter Creek.

A recently completed Draft Feasibility Report dated October 1995 for the Charleston Harbor Deepening/Widening Study recommends a 47-foot entrance channel depth that is 800 feet wide and 16.3 miles long with continuing maintenance of the remaining portions of the existing 42-foot deep by 1000 feet wide entrance channel, 45-foot deep interior channels and turning basins (with no improvement in width), a re-alignment of the channel in the Shutes/Folly Reaches of the lower harbor, a reduction of the Upper Town Creek Channel (from the Cooper River Bridges to Myers Bend) to a 16-foot deep by 250-foot wide barge channel and construction of a new turning basin in Daniel Island Reach for the proposed Daniel Island Terminal.

As part of the Charleston Harbor Deepening/Widening Study, the District prepared an Environmental Assessment (EA) which is included in the October 1995 draft feasibility report. This EA addressed water quality, hazardous and toxic waste, sediment analysis, threatened and endangered species, and cultural resources. The findings of the EA are summarized as follows:

Water Quality - Charleston Harbor is classified as SB by South Carolina Department of Environmental Control (SCDHEC) and the Wando River as SA. These classifications mean the water is suitable for primary & secondary contact recreation, crabbing, and fishing, except for the harvesting of clams, mussels, or oysters.

Hazardous and Toxic Waste - Bulk sediment chemistry testing was conducted on sediments to the proposed 45-foot project depth. No HTRW was identified based on the sediment analysis.

Sediment Analysis - Testing of bottom sediments was done to obtain Section 401 Water Quality Certification for upland disposal and Section 103 approval for ocean disposal of dredged material. Project dredged material would be disposed of at both upland sites and the ocean disposal site, based on sediment analysis and proximity of shoals to the respective disposal site(s).

Threatened and Endangered Species - From an extensive list of threatened and endangered species provided by the U S Fish and Wildlife Service and the National Marine Fisheries Service it was determined that the deepening project as well as project maintenance may impact the following

Humpback whale (Megaptera novaeangliae) - E
Right whale (Eubaleana glacialis) - E
West Indian manatee (Trichechus manatus) - E
Shortnose sturgeon (Acipenser brevirostrum) - E
Kemp's (Atlantic) ridley sea turtle (Lepidochelys kempi) - E
Green sea turtle (Chelonia mydas) - T
Loggerhead sea turtle (Caretta caretta) - T

A Biological Opinion (BO) of the potential threat to these species was prepared by the National Marine Fisheries Service (NMFS). This BO specified reasonable and prudent measures to be taken during dredging operations which include a winter hopper dredging window (1 November - 31 May), specially designed dragheads, and a program to monitor for turtles and whales. Implementation of these measures will ensure that Endangered and Threatened species will be protected. Standard manatee protection measures will be provided for in project plans and specifications if construction occurs during summer months (June through September).

Cultural Resources - Work was coordinated with the State Historic Preservation Office (SHPO) and a magnetometric survey and diving reconnaissance was conducted in the project area. No cultural or historical resources were identified in the proposed channel alignment for Charleston Harbor or in the area of the new turning basin in Daniel Island Reach.

Clean Water Act - A Section 404(b)(1) evaluation was prepared in conjunction with the latest Feasibility report. The 404(b)(1) evaluation summarized potential impacts of the proposed action as follows:

Benthic Impact - Impacts of deepening the harbor will be minimal & short-term. Re-colonization of the deeper channel will occur from bordering areas and will occur quickly.

Water Quality - Temporary changes in water quality at the dredging and disposal sites are expected due to suspended sediments. A Section 401 Water Quality Certification was issued for upland disposal of dredged material associated with the project by the South Carolina Department of Health and Environmental Control (SCDHEC) on May 2, 1995. Further, the Office of Ocean and Coastal Resource Management provided certification.

that the deepening project was consistent with the Coastal Zone Management Program by letter on March 10, 1995

Endangered/Threatened Species - There are potential impacts to threatened/endangered sea turtles related to hopper dredging in the entrance channel. These impacts will be reduced/eliminated by the use of specialized equipment, monitoring by trained observers, and/or compliance with dredging windows. The USFWS and the NMFS have concurred with this determination and have indicated that Section 7 Coordination with the District has concluded.

Land Disruption - N/A

Wetlands - No wetlands will be disturbed during the deepening of the main channels. An insignificant amount of Spartina wetlands will be impacted during construction of a contraction dike associated with the project. These impacts are temporary and the wetlands will be restored.

Noise - Increased ambient noise levels associated with the dredging will be no different than that experienced during normal maintenance dredging.

Air Quality - Any increase in air pollution would be due to exhaust from the dredging equipment & will be minor and temporary. These increases will not be any different than those experienced during maintenance dredging.

Flora - See Wetlands above

Fishery - The fishery resource of Charleston Harbor would not be significantly impacted by the proposed project nor maintenance of the project.

Dredged Material Disposal - The environmental impact statement (EIS) for the Charleston Ocean Dredged Material Disposal Site (ODMDS) addressed impacts associated with the disposal of dredged material at the site. Live bottoms on the western portion are currently already being avoided. All of the upland dredged material disposal sites proposed for use during the deepening of Charleston Harbor are existing sites and have been utilized for dredged material disposal for many years.

Unavoidable impacts associated with the deepening project include a temporary increase in noise and air pollution, a temporary increase in turbidity, a permanent increase in maintenance dredging quantities in future years, and impacts to benthic organisms at the dredging sites. These temporary impacts also apply to maintenance dredging of the existing 40-foot project.

The five currently used upland disposal sites have a combined area of 3,000 acres available for disposal of material removed from the inner harbor, as well as the ocean disposal site for material removed from the entrance channel. The District does not have immediate plans to develop any new upland disposal sites.

During the recent feasibility study of deepening Charleston Harbor, three areas were considered for beneficial use of dredged material. The first area was shore/erosion protection along the beaches of Morris Island & Folly Island. However, cost and unsuitability of the material precluded this option. The second was improving the nesting habitat at Crab Bank and the third was improving the nesting habitat at Castle Pinckney as well as protection of the island and the historical Civil War fortification on the island from the erosive forces now working on it. The second and third options will be evaluated further during the Planning, Engineering and Design phase of the recommended deepening project.

Currently, there are no known or potential impediments to maintaining compliance with applicable environmental laws and regulations for dredging and dredged material disposal for Charleston Harbor. However, continued compliance will be necessary for future deepening.

TABLE 9

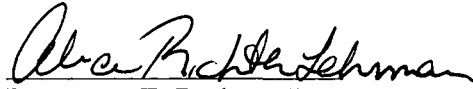
PROJECT COMPLIANCE

Reach or Segment	Document ¹	Preparation Date	Expiration Date	Scheduled Update
Entire Project	Coordination Act Report	6 Jan 1995	N/A	N/A
	EA	2 May 1995	N/A	N/A
	CZM	10 Mar 1995	N/A	N/A
	WQ	Draft Oct 1995	N/A	N/A

NOTES ¹ List NEPA Document or documentation showing compliance with environmental law or regulation e.g. Water Quality Certification

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material



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Attorneys for Appellants

March 25, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-in-Equity

Trial Court Case No. 2007-CP-10-2053
Court of Appeals Case No. 2010199806

Yelsen Land Co., Inc.,

Appellant

v

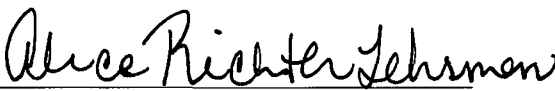
The State of South Carolina
and The State Ports Authority

Respondents

CERTIFICATE OF SERVICE

I DO HEREBY certify that on this date I have served 3 copies of the Record on Appeal upon counsel for the Respondents by mailing a copy to him at the address below via United States Mail

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Mt. Pleasant, South Carolina
March 28, 2011

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SC Court of Appeals



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