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ESTUARINE LAND OF NORTH CAROLINA: LEGAL ASPECT OF OWNERSHIP, USE AND CONTROL

DAVID A. RICE†

INTRODUCTION

The vast estuarine areas of North Carolina—"those coastal complexes where fresh water from the land meets the salt water of the sea with a daily tidal flux"[1]—are exceeded in total area only by those of Alaska and Louisiana.[2] Estuarine areas include bays, sounds, harbors, lagoons, tidal or salt marshes, coasts, and inshore waters in which the salt waters of the ocean meet and are diluted by the fresh waters of the inland rivers. In North Carolina, this encompasses extensive coastal sounds, salt marshes, and broad river mouths exceeding 2,200,000 acres.[3] These areas are one of North Carolina's most valuable resources.

Estuarine areas and their preservation from spoilage are essential to a wide variety of fish and wildlife resources, all of which are important to the State not only in terms of resource conservation as such, but also as significant factors in its economy.[4] Activities in North Carolina as well as in other states, however, have already compromised the continuing quality and value of estuarine

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[1] Statement of Dr. Stanley A. Cain in *Hearings on H.R. 25 Before the Subcommittee on Fisheries and Wildlife Conservation of the House Committee on Merchant Marine and Fisheries*, 90th Cong., 1st Sess. 28 (1967) [hereinafter cited as *Hearings*].

[2] *Id.* at 30 (information contained in table compiled by Fish and Wildlife Service of the Bureau of Sport Fisheries and Wildlife).

[3] *Id.*

[4] In 1966, the commercial fisheries of North Carolina produced 244,909,000 pounds of an assorted variety of fish with a total dockside value of 9,532,000 dollars. North Carolina Commercial Fisheries Newsletter 3 (Spring 1967). These figures in no way encompass the economic impact of sport fishing and the broad variety of expenditures connected therewith. Nor do they account for the economic impact of the processing and marketing of commercial fishery products.

resources. The Bureau of Sport Fisheries and Wildlife of the U. S. Department of the Interior reported in March, 1967, that approximately 22,000 acres of basic estuarine habitat had already been lost in North Carolina through dredging and filling,[5] and, presumably, this does not account for effective losses in proximate estuarine areas resulting from changes in water flow and alteration of preëxisting physical, chemical, or microbiological characteristics of the waters caused by the dredging and filling operations.[6] Although navigation improvement is reported to be the most common reason for dredging and filling, the greatest impact upon estuarine lands, waters, and resources is probably caused by mass housing developments which appear with increasing frequency along the Atlantic coast.[7]

Conservation and protection of the remaining unspoiled estuarine areas of North Carolina as well as the return to productive use of already polluted areas is presently hampered by heretofore unresolved controversies over ownership and use of estuarine lands. Although North Carolina presently has at its disposal some measures permitting control of water pollution[8] and registration of marshland dredging activities[9] that adversely affect the strong public interest in its extensive sounds, salt marshes, bays, and inshore waters, it is important to know whether any given estuarine lands are publicly or privately owned. To the extent that they are privately owned, North Carolina may be severely limited in its ability to cope with the increasing impact of private activity on the estuarine resources of the State. It is with this in mind that this study undertakes to examine the legal history of estuarine ownership and use in North Carolina from the time of settlement to the present with a view to providing a backdrop against which title claims to

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[5] *Hearings* 30.

[6] *Id.* The statement of Dr. Cain, who presented the results of the survey of estuarine lands, indicated that it was not the purpose of the study "to dwell on the loss of estuarine productivity that results from pollution of the water by soluble and solid wastes, but to consider those changes produced by man (including sedimentation) that drastically reduce the acreage of estuarine marshes and open water."

[7] *Id.* at 31.

[8] *See, e.g.,* N.C. GEN. STAT. §§ 143-214.1, -215.1 (Supp. 1967).

[9] The 1967 General Assembly enacted legislation requiring registration with the Department of Water and Air Resources of dredges and other earth-moving equipment used in certain coastal areas. As originally introduced, the bill (S.B. 400) would have required permits for such earth-moving projects.

estuarine lands may be evaluated and future action for the preservation of estuarine resources may be taken.

History of Estuarine Ownership, Use and Control

Common Law and Colonial Origins

Long before Magna Carta—probably at about the time of the Norman Conquest—the English Crown claimed ownership of the territorial seas as far as their tidal reaches as well as the tidelands and the fish in tidal waters.[10] The title of the King was *jus privatum,* that is, of a personal proprietary nature, so that he was possessed with the authority to favor a subject with an exclusive grant of rights or privileges in or upon these waters and lands as well as in the lands not covered by tidal waters.

Although the law in this early stage of development recognized the King's power to convey an interest in tidelands as well as in all other land, the law admitted an important distinction between the two classes of land, a variance which guided further development of the common law. Even though the Crown was deemed to own the ungranted high lands adjacent to tidal waters and the land beneath those waters, a grant of a manor on high land did not, as a general rule, operate as a conveyance of the adjacent submerged land.[11] However, this rule did not pertain to a grant of land adjacent to non-tidal waters; a Crown grant of high land adjacent to non-tidal waters, absent specific exclusion by terms of the grant, also vested the riparian owner with title to the land beneath those waters.[12] Ownership of land on one bank of a stream gave the landowner title to the bed of the stream as far as its thread and ownership of both banks carried with the grants the riparian ownership of the entire bed of the stream.[13]

In the course of time, the legal concepts relating to the ownership of the English tidelands were refined and, though the source of change is still a subject of scholarly dispute, the common law was

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[10] 1 Waters and Water Rights § 35.2(A), at 181 (Clark ed. 1967) [hereinafter cited as Clark].

[11] Sir Henry Constable's Case, 5 Co. Rep. 106a, 77 Eng. Rep. 218 (K.B. 1601).

[12] Rex v. Smith, 2 Doug. 441, 99 Eng. Rep. 283 (K.B. 1780); Carter v. Murcot, 4 Bur. 2162, 98 Eng. Rep. 127 (K.B. 1768).

[13] Cases cited note 12 *supra.*

significantly altered long before the settlement of North America. The refinement of the law posits that the King's title to various lands was of two distinct types, *i.e.,* that some lands were *jus privatum* and others were *jus publicum.* The former category encompassed the private proprietary lands of the King and were freely alienable while the latter were held by the King for the benefit of the whole community in common and could not be conveyed to a private individual. Although it has been argued that the limitation upon the power to grant *jus publicum* lands did not actually originate with the Magna Carta,[14] it is now established in English law that after Magna Carta the King could no longer dispose of *jus publicum* lands.[15]

Tidelands fell within the *jus publicum* category of lands held in public trust. The purpose of the trust was protection of the English homeland and the preservation of the common rights of navigation and fishery in the waters of the kingdom. It should be noted, however, that this development in the law neither prejudiced preëxisting Crown grants nor absolutely barred the acquisition of title to these lands by a private person; so-called "ancient grants," those made prior to the signing of the Magna Carta, remained valid[16] and Parliament, in its capacity as the representative of the English people, could convey *jus publicum* land on behalf of the people who were the beneficiaries of the King's public trust.[17]

The problem of determining whether a conveyance of high land also conveyed some part of the shore or tideland was always of some moment in England since, even before the refinement of the common law principles relating to ownership of the tidelands, there was a need to ascertain the extent of the King's grants. The need for resolving this question became more acute, however, following the division of the King's title into two separate categories since the law was thereafter dealing with a conflict between private and pub-

[14] *See generally* CLARK §§ 35-36; 2 H. FARNHAM, WATERS AND WATER RIGHTS § 368, at 1361 (1904) [hereinafter cited as FARNHAM].

[15] Neil v. Duke of Devonshire, 8 App. Cas. 135 (1882); The Duke of Somerset v. Fogwell, 5 Barn. & Cress. 875, 108 Eng. Rep. 325 (K.B. 1826).

[16] Cases cited note 15 *supra. See also* The Royal Fishery of the Banne, Davis 55, 80 Eng. Rep. 540 (P.C. 1610) (Ire.).

[17] FARNHAM § 368a, at 1361. Shively v. Bowlby, 152 U.S. 1 (1893); State v. Leavitt, 105 Me. 76, 72 A. 875 (1909); Wooley v. Campbell, 37 N.J.L. 163 (Sup. Ct. 1874).

lic rights rather than a private controversy between the King and his subject over the terms of their private contract.

In 1601, *Sir Henry Constable's Case*[18] held that a Crown grant of land upon the seacoast was, under the general rule, a conveyance of only those lands above the high water mark. This rule applied to lands situated on the seacoast and royal rivers which, according to the 1604 decision in *The Royal Fishery of the Banne,*[19] included "[e]very navigable river, so high as the sea flows and ebbs in it. . . ." The high water mark itself was determined by "the line of the medium high tide between the springs and the neaps" on the theory that the land below that line was "not capable of ordinary cultivation or occupation" while the land above that line was "for the most part dry and maniorable."[20] Royal waters, both coastal and inland, were waters in which the public, because of their *jus publicum* character had a common right of both navigation and fishery. The unabridgeable common right of navigation extended to encompass other waters in which the tide did not ebb and flow, *i.e.*, non-tidal navigable waters, although the law did not allow private persons to receive grants conveying lands lying beneath these non-tidal waters.[21] It was also possible to receive from the Crown an exclusive or several fishery in non-tidal navigable waters, but such rights were subject to the paramount common right to use the river or stream for navigation.[22]

The common law of England distinguished between *jus privatum* and *jus publicum* lands on the basis of whether or not the waters covering the land were tidal or non-tidal rather than by deciding if the waters were navigable or non-navigable. This is made entirely clear from the language employed by the court in *The Royal Fishery of the Banne*;[23] it is even more apparent when that decision is viewed against subsequent English cases in which the common right of navigation upon non-tidal waters was upheld.[24] Thus, although

[18] 5 Co. Rep. 106a, 77 Eng. Rep. 218 (K.B. 1601).
[19] Davis 55, 80 Eng. Rep. 540 (P.C. 1610) (Ire.).
[20] Attorney General v. Chambers, 4 de G. M. & G. 206, 217, 43 Eng. Rep. 486 (Ch. 1854).
[21] Blount v. Layard, [1891] 2 Ch. 681; Leconfield v. Lonsdale, L.R. 5 C.P. 657 (1870).
[22] *See, e.g.,* the commissioner's report in Leconfield v. Lonsdale, L.R. 5 C.P. 657, 658-62 (1870). *See also* Fitzwalter's Case, 1 Mod. 106, 86 Eng. Rep. 766 (K.B. 1673).
[23] Davis 55, 80 Eng. Rep. 540 (P.C. 1610) (Ire.).
[24] Cases cited note 21 *supra.*

early decisions in the United States[25] declared that *The Royal Fishery of the Banne* defined navigable waters in terms of the ebb and flow of the tide, it can be fairly stated that this has probably never been the English rule.[26] The ebb and flow rule in the English common law was used only to determine the capacity in which the Crown held title to lands but defined neither the capacity of the waters for navigation nor the navigation rights of the public in those waters.[27] On the other hand, the ebb and flow concept did have something to do with fishery rights; it became impossible under the *jus publicum* theory for the Crown to grant an exclusive or several fishery in royal waters, but such rights could be obtained in all other waters either by a specific Crown patent[28] or by virtue of riparian ownership of lands located on non-tidal streams.[29]

The colonial period provides few, if any, clues to the law concerning estuarine lands. In 1663 Charles II granted to the Lords Proprietors the lands which comprise North and South Carolina, "together with all and singular ports, harbors, bays, rivers, isles, and islets . . . situate or being within the bounds or limits last before mentioned . . . the fishings of all sorts of fish, whales, sturgeons, and all other royal fish in the sea, bays, islets and rivers . . . together with the royalty of the sea upon the coast. . . ."[30] It is important to note that the Proprietors, in accordance with long-standing legal doctrines, could obtain no greater title to the granted lands than those possessed

[25] Palmer v. Mulligan, 3 Caines 307, 2 Am. Dec. 270 (N.Y. 1805).

[26] Further discussion of this theory may be found in 2 A. SHALOWITZ, SHORE & SEA BOUNDARIES 519 (1964). *See also* FARNHAM § 23e, at 112-17.

[27] *Compare* Palmer v. Mulligan, 3 Caines 307, 2 Am. Dec. 270 (N.Y. 1805) *with* The Royal Fishery of the Banne, Davis 55, 80 Eng. Rep. 540 (P.C. 1610) (Ire.) *and* Blount v. Layard, [1891] 2 Ch. 681.

[28] *See, e.g.,* The Royal Fishery of the Banne, Davis 55, 80 Eng. Rep. 540 (P.C. 1610) (Ire.).

[29] Cases cited notes 21 & 22 *supra,* and accompanying text.

[30] IREDELL, LAWS OF THE STATE OF NORTH CAROLINA 1715-1790 1 (1791) [hereinafter cited as IREDELL]. Most of the land titles in North Carolina are ultimately derived from the 1663 grant to the Lords Proprietors. There were, of course, earlier grants. Sir Walter Raleigh, in 1584, and Sir Robert Heath, in 1629, received grants which included present-day North Carolina from the Crown; both, however, forfeited their grants and neither passed valid title to any lands in North Carolina. 1 COLONIAL RECORDS OF NORTH CAROLINA 42 (1886). Some titles in the Albemarle Sound region may be traced back to grants from the London Company which colonized Virginia in the early 1600's. HARRISON, VIRGINIA LAND GRANTS 19 (1925). The Charter of 1663 expressly provided that the grant to the Lords Proprietors did not limit or affect the title of settlers in the Albemarle who had received grants from the Virginia Colony. IREDELL 5.

by the Crown.[31] Thus the common law limitations on the power of the King to grant certain lands, limitations well established before 1663, also limited the Proprietors in such a way that they could not convey the *jus publicum* lands beneath tidal waters to private individuals.[32] It might be assumed that the ebb and flow doctrine was the test for *jus publicum* lands, since the English common law generally applied in the colonies.[33] It is important to note, however, that the common law was adopted only so far as it was applicable to conditions in the colonies; if it was found that the reason for a common law principle had ceased to exist, the principle was changed to comport with reason.[34] Later portions of this study undertake to analyze subsequent judicial decisions with a view to obtaining at least some guidance concerning the law which was applicable during the colonial period. The statutes enacted by the colonial assembly provide little guidance in this area; the basic purpose of the various acts was clearly limited to the establishment of procedures for the orderly disposition of land rather than the codification of more fundamental common law and statutory rules pertaining to public and private ownership of real property.[35]

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[31] FARNHAM § 368b, at 1363; Martin v. Wadell's Lessee, 41 U.S. (16 Pet.) 367, 413-14 (1842).

[32] Cases cited note 31 *supra*.

[33] N.C. Laws 1711, ch. 1.

[34] The old common law maxim, *"Ratio est legis anima; mutata legis ratione mutatur et lex"* (Reason is the soul of the law; the reason of law being changed the law is also changed), serves as the basis for rejecting certain portions of the English common law as inapplicable to conditions in North Carolina. *See* Rollison v. Hicks, 233 N.C. 99, 105, 63 S.E.2d 190, 195 (1951).

[35] *See, e.g.*, N.C. Laws 1748, ch. 4; N.C. Laws 1715, chs. 29, 33. Apparently the only statute enacted by the colonial assembly which specifically pertained to acquisition of title to estuarine lands was N.C. Laws 1715, ch. 29, § 3:

> [N]o Person whatsoever shall take up any Marsh, Swamp, or sunken Lands, but shall first give Notice, in writing, to the Owner of the Land adjoining; After Notice delivered in writing before Evidence, such Person or Persons shall have six months Time to resolve whether he will take up the same or no; and in Case he shall not, before the End of the said six Months, take out a Warrant to survey such Marsh, Swamp, or sunken Land, as shall be contiguous to his own Land, then the first Person who gave such Notice may survey and patent the same.

According to Iredell, this chapter was repealed, but he could find no record of its repeal. IREDELL 15 n.(a).

State Regulation

(1) 1777-1868

Lands not granted by the Crown or the Proprietors prior to July 4, 1776, were opened to entry by the General Assembly in 1777. Although the entry and grant statute failed to distinguish between estuarine and other types of land, it did establish the basic system governing the disposition of marsh and swamp lands for many years to come—the entry and grant laws which pertained in North Carolina until the 1959 revision of the State Lands statutes. The 1777 statute contained a wide variety of provisions ranging from those establishing the procedures for electing entry-takers and surveyors to those setting forth the procedures for making an entry and obtaining a grant. In the latter category, the act required the filing of an entry with the entry-taker, survey of the land, return of the survey to the Secretary of State, and issuance of a grant by the Secretary of State. With reference to the methods of survey, the statute provided that in surveys of lands on navigable waters "the Water shall form one Side of the Survey, and the Breadth on such Water shall not be more than one fourth Part of the Distance back from the Water."[36] Entries were limited to six hundred and forty acres except that up to one thousand acres could be entered if the land was situated between the lines of lands already surveyed and laid out for another person. The entry and grant statute of 1777 did not distinguish between estuarine and other types of land, nor did it define the term "navigable water." The language set forth by quotation in the preceding paragraph might well be interpreted to permit entry to land covered by navigable water by persons entering the adjacent high land, but the Supreme Court of North Carolina in a case dealing with an 1807 State grant, declared that neither the 1715 nor 1777 statutes permitted entry to any land lying beneath navigable water "not by reason of any express prohibition in that act, but being necessary for public purposes as common highways for the convenience of all, they [navigable waters] are fairly presumed not to have been within the intention of the legislature."[37] It is not clear from the opinion of the court whether the decision followed the leading case of *Palmer v. Mulligan*[38] in applying the ebb and flow rule in ascertaining the

[36] N.C. Laws 1777, ch. I, § X (2d Sess.).
[37] Tatum v. Sawyer, 9 N.C. 226, 229 (1823).
[38] 3 Caines 307, 2 Am. Dec. 270 (N.Y. 1805).

navigability of the waters near Currituck Inlet, although the case reporter's preliminary notes on the parties' statements did make reference to the fact that the tide ebbed and flowed in the waters covering the marsh land in question.[39]

1825 brought significant changes in the State lands statutes, particularly in the laws governing the disposition of salt marshes and other swamplands. In that year, the proceeds from the sale of these lands were earmarked for the Literary Fund established for the support of the common schools.[40] The Literary Board was given control over the marsh and swamp lands and their disposition,[41] but entry was confined to tracts of marsh and swamp lands not exceeding fifty acres in area which were located between the lines of previously granted lands.[42] The 1830-1831 General Assembly subsequently amended the 1825 fifty acre limitation upon entry by providing in addition for the filing of an entry to marsh and swamp lands "when the quantity of land in any one marsh does not exceed two thousand acres" if the land involved had not already been surveyed by the State for purposes of drainage and reclamation.[43] Thus, after passage of the amendment, only two classes of marsh land could be entered: that which was either a tract of not more than fifty acres situated between the lines of previously entered and surveyed land, or land situated in one marsh not exceeding 2,000 acres in area which had not yet been surveyed by the State. All other entries were made null and void and, could not be relied upon to support a title claim.[44]

The Literary Board was reorganized and the entry law somewhat revised in 1837. The Board, in anticipation of large State receipts from the Federal Government's sale of public lands, was allotted substantial funds and granted broader powers to be used in the drainage, reclamation, and sale of marsh and swamp lands.[45] The revised statutes retained the 1825 and 1831 limitations upon entry to estuarine lands but again failed to define the term "marsh and swamp lands." The 1837 revisal, however, did vest the Board with the authority to sell its reclaimed estuarine lands at public auction with-

[39] 9 N.C. at 226-27.
[40] N.C. Laws 1825, ch. 1.
[41] *Id.*
[42] N.C. Laws 1826, ch. 6.
[43] N.C. Laws 1830-31, ch. 12.
[44] N.C. Laws 1777, ch. I, § X.
[45] N.C. Laws 1836-37, ch. 23 POMEROY & YOHO, NORTH CAROLINA LANDS 99 (1964).

out regard to the limitations contained in the entry and grant laws.[46] It is important to note that the 1836-37 General Assembly omitted, presumably through inadvertence, those provisions of the 1715 and 1777 statutes prescribing the methods to be employed in surveying lands located on navigable waters. In 1846, the Supreme Court of North Carolina held that an 1839 Literary Board grant of land lying beneath non-tidal waters navigated by commercial and pleasure vessels was valid; the court reverted to the common law tidal rule because of the 1837 statutory omission of the survey provisions. The decision in *Hatfield v. Grimsted*[47] is not, however, inconsistent with that of the court in *Tatum v. Sawyer*,[48] the case in which the court declared that land beneath navigable water could not be entered even though the 1715 and 1777 statutes did not expressly bar such entries. Rather, *Hatfield v. Grimsted* is of particular interest because it applied the English common law ebb and flow rule of navigability without reference to or consideration of two earlier decisions in which the court declared that the English common law rule was inapplicable in North Carolina due to the variance between the nature of the waters of England and those of this State. The omission in the 1837 statutory revisal was corrected by legislation enacted in 1846 and effective in early 1847, but it has since been stated by the courts that land beneath all non-tidal waters could be entered and granted during the ten year period between 1837 and 1847.[49]

There was little subsequent change in the entry and grant laws or the authority of the Literary Board prior to the Civil War except for the 1854 statutory provision allowing owners of land adjacent to navigable waters to enter the submerged lands as far out as deep water for purposes of constructing wharves.[50] This privilege extended only to the actual owners of the high land[51] and the statutes authorizing such entries have been interpreted to mean that the land owners have an easement in the entered tidelands rather than a fee simple title.[52]

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[46] N.C. Laws 1836-37, ch. 23.

[47] 29 N.C. 139 (1846).

[48] 9 N.C. 226 (1823).

[49] *See, e.g.,* Swan Island Club, Inc. v. White, 114 F. Supp. 95, 103 (E.D.N.C. 1953), *aff'd sub nom.,* Swan Island Club, Inc. v. Yarborough, 209 F.2d 698 (4th Cir. 1954); Development Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952).

[50] N.C. Laws 1854-55, ch. 18, § 1.

[51] Zimmerman v. Robinson, 114 N.C. 39, 19 S.E. 102 (1894).

[52] Railroad Co. v. Way, 172 N.C. 774, 90 S.E. 937 (1916); Land Co. v. Hotel Co., 132 N.C. 366, 46 S.E. 749 (1903).

In 1859, the General Assembly focused on an additional area of regulation relevant to this study—oyster and clam bed licensing. Chapter 33 of the Public Laws of 1858-1859 established a scheme under which it became possible for private persons to obtain a license to make or lay down oyster and clam beds for the purposes of planting, cultivating and harvesting oysters and clams. The statute did not allow any private individual to obtain a license for the exclusive use of natural beds, but a license for use of other areas created an exclusive alienable privilege which was forfeitable by the licensee, his assigns or his heirs only upon failure to use or properly stake out the bed for any continuous two year period. It would appear likely that these licenses would (if the terms of the licenses and the statute under which they were issued have not been breached) still be valid today under the rationale of *Oglesby v. Adams*,[53] the recent decision declaring that certain portions of the oyster lease statutes enacted by the 1965 General Assembly were unconstitutional abridgments of contract obligations of the State to private parties.

During the War between the States, the system of common schools collapsed. Since State disposition of marsh and swamp lands was so closely linked with the common schools and the Literary Fund, there is also a corresponding gap in the history of the law relating to estuarine lands.

(2) 1868-1959

The North Carolina Constitution of 1868 provided that "the net proceeds of all swamp lands belonging to the State" should, along with other specified funds and revenues, be employed solely for the establishment and maintenance of a public school system.[54] Control of these lands was placed with the newly created State Board of Education which also administered the Literary Fund under the terms of the pre-war statutes pertaining to the disposition of marsh and swamp lands. The Board of Education harbored some doubts concerning the extent of the swamp lands owned by the State and, at the request of the Board, a report concerning these lands was filed in 1883. That report stated in part that "[i]t is not certain that the Board holds a single acre of these lands by an undoubted title,"[55] and, in 1887, the Board adopted a policy of making no outright sales

[53] 268 N.C. 272, 150 S.E.2d 383 (1966).
[54] N.C. CONST. OF 1868 art. IX, § 4.
[55] KERR, REPORTS ON THE LANDS OF NORTH CAROLINA (1883).

of these lands until a survey was made to establish which land was subject to entry or sale.[56] The request of the Board to embody this policy in a statute was not, however, honored by the General Assembly. The survey itself was, despite the failure of the General Assembly to create a moratorium in the disposition of marsh and swamp lands, undertaken for the Board by the State Geological and Economic Survey and in 1908 the completed report declared that the State probably owned less than 100,000 acres of marsh and swamp land.[57]

There was little change in the entry and grant statutes at any time between 1868 and 1959, at least so far as the law concerned marsh and swamp lands. There were some amendments to the statutes allowing entry to navigable waters for purposes of wharf construction[58] and a statute permitting entry of and grants to phosphate beds lying beneath navigable waters was ratified in 1891.[59] The phosphate bed grant was for a term of twenty-five years and was forfeitable upon failure to mine, dig, or remove phosphate rock for two years.[60] The laws relating to the use of submerged lands as oyster and clam beds were also amended during this period. In 1887, the General Assembly enacted a law declaring a moratorium on the issuance of oyster and clam bed licenses in those waters south of Roanoke and Croatan Sounds and north of Core Sound—in essence, the general area of Pamlico Sound—until the area was surveyed for purposes of mapping and staking out natural beds.[61] Following completion of the so-called Winslow Survey on file in the State Archives, private persons were allowed to enter all parts of the surveyed area not staked out as natural beds by complying with the provisions of the entry statutes.[62] Instead of receiving a grant from the State, those who filed entries were given a document by which the Secretary of State issued a perpetual franchise for the exclusive use of the bottom which was entered.[63] The statute required that the franchisee make "in good faith within five years from the day of obtaining said franchise an actual effort to raise and

[56] Legislative Documents of N.C. 1887, No. 17.
[57] POMEROY & YOHO, note 45 *supra*, at 110.
[58] *E.g.*, N.C. Laws 1891, ch. 532.
[59] N.C. Laws 1891, ch. 476.
[60] *Id.*, §§ 3, 5.
[61] N.C. Laws 1887, ch. 119, § 1.
[62] *Id.*, § 5.
[63] *Id.* § 6.

cultivate shell-fish on said grounds."[64] These franchises, as well as the earlier exclusive licenses, would appear to be protectable today under the decision of the court in *Oglesby v. Adams.*[65]

All marsh and swamp land titles conveyed prior to April 23, 1953 by the Literary Fund, Literary Board, State Board of Education or by the State for lands situated in New Hanover, Onslow, and Pender Counties were validated by Chapter 966 of the 1953 Session Laws. The statute declared that the title to marsh and swamp lands held by the grantees or their successors in interest was as full and complete as that which the original conveyances purported to grant and made all laws in conflict with this confirmation of title inoperative in the three counties to the extent that those laws could be used as a basis for challenging such titles. The terms of the statute are sufficiently specific to support the argument that the act does not cover lands beneath navigable waters running through the marsh lands. This is the only legislation that could be found which specifically confirms marsh and swamp land titles or title to lands generally situated in counties comprised in part of estuarine lands.[66] The statute was relied upon in *Parmele v. Eaton*[67] in 1954, but it does not appear from the opinion of the court that the validity of the statute was questioned. It has, however, been held that the General Assembly may not revive void deeds of gift by a validation statute where the law originally provided that all deeds of gift not registered within two years are void.[68] The present situation is not identical, but does involve subsequent validation of deeds and grants

[64] *Id.*

[65] 268 N.C. 272, 150 S.E.2d 383 (1966). *See also* notes 77-79 *infra,* and accompanying text.

[66] Other validation statutes pertaining to land in other than estuarine areas have also been enacted. *See, e.g.,* N.C. Laws 1887, ch. 201; N.C. Laws 1868-69, ch. 71.

[67] 240 N.C. 539, 83 S.E.2d 93 (1954). The Court stated therein that "We rest [our] decision on the findings of fact which bring the conveyances made by the State Board of Education . . . within the purview of the statutes authorizing and validating sales and conveyances of marsh or swamp lands." *Id.* at 545, 83 S.E.2d at 97.

[68] Cutts v. McGhee, 221 N.C. 465, 20 S.E.2d 376 (1942); Booth v. Hairston, 195 N.C. 8, 141 S.E. 480 (1928). Grants made contrary to the provisions of the statutes permitting entry are void. *See, e.g.,* N.C. GEN. STAT. § 146-39 (1964) and N.C. Laws 1777, ch. I, § IX. This rule applies, however, only to fundamental aspects of the law; other sections of the statute provide for correction of errors such as entry in the wrong county (N.C. GEN. STAT. § 146-48 (1964)), errors made by the surveyor (N.C. GEN. STAT. § 146-49 (1964)), or use of a wrong number, name or words in the grant (N.C. GEN. STAT. § 146-52 (1964)). On the other hand, an entry

which were void at issue due to non-conformity with substantive rather than mere technical requirements; to that extent it is analogous to the deed of gift cases. Moreover, it seems clear that the statute cannot operate to divest title otherwise properly obtained by parties other than those relying upon the validation statute.[69]

(3) *1959-1967*

Effective June 2, 1959, North Carolina abolished the entry and grant system and shifted completely to a statutory scheme which provides for the direct sale or lease of State lands. The new statute prescribed the terms upon which the State Department of Administration could sell, lease or otherwise dispose of the various categories of State lands.[70]

The State Lands Act (N.C. GEN. STAT. Ch 146 (1964)) does not, as did past statutes, treat the several types of state-owned lands as mere varieties of "vacant and unappropriated lands," but separately defines in N.C. GEN. STAT. § 146-64 (1964), three sub-categories of state lands including submerged lands, swamp lands, and vacant and unappropriated lands in such a manner that it appears clear that these sub-categories are intended to be mutually exclusive.

The first of the sub-categories listed in the preceding paragraph, submerged lands, is defined as

> . . . State lands which lie beneath
> a. Any navigable waters within the boundaries of this State, or
> b. The Atlantic Ocean to a distance of three geographical miles seaward from the coastline of this State.[71]

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and grant to lands in one marsh exceeding 2,000 acres is void. State Bd. of Educ. v. Roanoke R.R. Co., 158 N.C. 313, 73 S.E. 994 (1912). *Cf.* Insurance Co. v. Parmele, 214 N.C. 63, 197 S.E. 714 (1938) (*re* direct sale of lands situate in one marsh exceeding 2,000 acres).

[69] *E.g.*, even if lands lying in one marsh exceeding 2,000 acres could not be entered, they could be sold by the State Board of Education. State Bd. of Educ. v. Roanoke R.R. & Lumber Co., 158 N.C. 313, 73 S.E. 994 (1912). *See also* Insurance Co. v. Parmele, 214 N.C. 63, 197 S.E. 714 (1938). In such a case, the rule of N.C. GEN. STAT. § 146-39 (1964), that junior grants are void and not even color of title, would seem to be inapplicable since there would be no valid senior grant in existence. *Cf.* Lovin v. Carver, 150 N.C. 710, 64 S.E. 775 (1911), wherein the court discusses the effect of a State grant which is void for vagueness of its description in a situation where a junior grantee asserts the preference of his claim because the vague grant and entry provided no notice of ownership.

[70] N.C. GEN. STAT. § 146-4 (1964).

[71] N.C. GEN. STAT. § 146-64(7) (1964).

The statute defines navigable waters as "all waters which are navigable in fact."[72] Under N.C. GEN. STAT. § 146-3 (1964) submerged lands may not be conveyed in fee, but the act does permit the grant of an easement in such lands under conditions deemed proper by the Department with the approval of the Governor and Council of State.[73] The class of lands known as vacant and unappropriated lands includes all other State lands with the exception of swamp lands.[74] Under N.C. GEN. STAT. §§ 146-3, -4 (1964) both vacant and unappropriated lands and swamp lands may be sold in fee, with the exception of State-owned natural lakes fifty acres in extent or larger. Swamp lands are, however, the subject of special treatment in several respects and, therefore, separately defined in N.C. GEN. STAT. § 146-64 (1964) as:

> . . . lands too wet for cultivation except by drainage, and includes
> a. All State lands which have been or are known as "swamp" or "marsh" lands, "pocosin bay," "briary bay," or "savanna," and which are part of one swamp exceeding 2,000 acres in area, or which are a part of one swamp 2,000 acres or less in area which has been surveyed by the State; and
> b. All State lands which are covered by the waters of any State-owned lake or pond.[75]

The new statutory definition of swamp lands was obviously designed to bring together in one category all of those lands for which a grant or deed could be obtained from the State Board of Education, *i.e.*, both marsh lands which could be entered and those that could be sold. This definition, however, omits that category of marsh and swamp land which, after the 1831 amendment to the entry and grant statute, was the most open to entry—land lying in one swamp of 2,000 acres or less which had not been surveyed by the State. Oversight may be the cause for the omission of certain swamp lands from the statutory definition; there is no apparent purpose for its exclusion. However, there are at least two fundamental reasons why such an omission probably is not significant. First, on the basis

[72] N.C. GEN. STAT. § 146-64(4) (1964).
[73] N.C. GEN. STAT. § 146-12 (1964).
[74] N.C. GEN. STAT. § 146-64(9) (1964) provides that:
'Vacant and unappropriated lands' means all State lands title to which is vested in the State as sovereign, and land acquired by the State by virtue of being sold for taxes, except swamp lands as hereinafter defined.
[75] N.C. GEN. STAT. § 146-64(8) (1964).

of reports referred to in previous portions of this study, it is probably safe to say that there is little, if any, of this land which has not already been granted by the State. Second, so long as these lands do not fall within the definition of swamp lands, they must come within the definition of vacant and unappropriated lands. The only remaining difficulty is that all proceeds from the sale of such lands must, in accordance with the state Constitution, go to the support of the common schools rather than into the State Land Fund.

The 1965 General Assembly enacted a comprehensive revision of the laws in another relevant area. The act, among other things, dealt with oyster and clam leases and established the procedures for lease applications, methods for the survey of oyster and clam beds, and maximum and minimum area limitations of leased bottoms.[76] It also provided for termination and renewal of outstanding leases with increased rentals. The rental alteration, however was held unconstitutional in *Oglesby v. Adams,* a 1966 decision of the North Carolina Supreme Court.[77] In 1953, Oglesby had obtained a twenty year lease of ten acres at an annual rate of fifty cents per acre for for the first ten years and one dollar per acre for the second ten years; the lease was renewable upon its expiration for successive ten year periods upon the terms applying in the last ten years of the lease. The 1965 act permitted a charge of five dollars per acre and would have terminated the lease on April 1, 1967. The court held that the statutory alteration of the annual rental was an unconstitutional abrogation of the State's contract with Oglesby even though Oglesby could claim no vested right in the provisions of the prior statute, but the court did not rule directly upon that part of the statute altering the term of the lease and its renewability. It probably may be assumed that the lease term is as much an inviolable element of the contract as the annual rental rate under the interpretation made in the case of *State v. Spencer.*[78] Spencer, pursuant to Chapter 119 of the Laws of 1887, had obtained a perpetual franchise for an oyster bed beneath the waters surveyed by Winslow. He successfully defended against a prosecution for violation of an 1893 statute which declared that the same lands were not subject to entry. The court declared that "rights of property have been acquired

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[76] N.C. GEN. STAT. § 113-202 (Supp. 1967).
[77] 268 N.C. 272, 150 S.E.2d 383 (1966).
[78] 114 N.C. 770, 19 S.E. 93 (1894).

which the State itself cannot take away except after compensation and under the principle of eminent domain."[79]

The 1965 statute also contains a registration provision pertaining to all claims of title to lands lying beneath navigable waters and "any right of fishery in navigable waters superior to that of the general public." All such claims must be registered with the Commissioner of Commercial and Sports Fisheries on or before January 1, 1970; titles and rights not registered by that time are null and void.[80]

The 1967 General Assembly enacted two statutes in response to the *Oglesby* decision. First, in Chapter 88 of the 1967 Session Laws, the Assembly repealed the 1965 legislation concerning oyster and clam leases. Then, in Chapter 876, it proceeded to adopt a revised scheme of lease regulation. The revised regulations omitted the invalidated rental alteration as well as the provisions terminating existing leases and the requirement for bottom surveys to accompany renewals of those leases. Various other procedural changes were made, but the registration provision pertaining to claims to titles to underwater lands was not affected. Brunswick County was exempted from the revised leasing regulations, thus leaving this single county outside of lease controls applicable to other coastal areas. The constitutionality of this exemption may be vulnerable to attack as an exclusive or separate emolument or privilege under Article I, Section 7 of the North Carolina Constitution, or conceivably as a forbidden type of special or local legislation under Article II, Section 29 of the North Carolina Constitution.

THE NAVIGABILITY DOCTRINE AND ESTAURINE LAND OWNERSHIP

Introduction

Throughout the preceding discussion of estuarine land grants

[79] *Id.* at 780, 19 S.E. at 96.

[80] N.C. GEN. STAT. § 113-205 (1966). This statute may be subject to attack as having the effect of taking property without due process of law. Registration statutes do not usually make unregistered deeds void as between the grantor and grantee, but only preclude assertion of title by a grantee against creditors and purchasers for value. *See, e.g.,* N.C. GEN. STAT. § 47-18 (1950) and Patterson v. Bryant, 216 N.C. 550, 5 S.E.2d 849 (1939). It has, moreover, been held under pre-1965 statutes that a grant from the State is not void if not registered even where the action concerns the claim of a junior grantee who has recorded his grant. North Carolina Mining Co. v. Westfeldt, 151 F. 290 (4th Cir. 1907). The retroactive operation of the new statute conjures up recollections of the court's decision in State v. Spencer, 114 N.C. 770, 19 S.E. 93 (1894).

in North Carolina, there has been repeated reference to the prohibition upon private ownership of lands beneath navigable waters. It has been seen that the English common law is the source of the rule reserving title to *jus publicum* land to the State as trustee for its citizens and that the *jus publicum* lands of England were those lying beneath royal waters, those waters in which the tide ebbed and flowed. This section traces the history of the *jus publicum* land concepts as an element of the land law of this State in order to provide a greater understanding of the refinements of the common law principles for those who may be faced with the necessity of evaluating claims of title to submerged North Carolina lands.

Early Development of the Law

The basic distinction between *jus privatum* and *jus publicum* title of the Crown was well established prior to the settlement of North America. Lands beneath waters in which the tide ebbed and flowed belonged to the people of England as common owners and the King held title to such lands in trust for his subjects. In *The Royal Fishery of the Banne,*[81] the court indicated that this basic principle applied to rivers and other arms of the sea in which the tide ebbed and flowed as well as to the coastal waters of the Kingdom and, in 1805, the leading early American case of *Palmer v. Mulligan*[82] relied heavily upon the *Royal Fishery* case in holding that the ebb and flow, or tidal, rule applied in a controversy concerning the lands and waters of the Hudson River in New York. Chancellor Kent, however, was careful to note in his opinion that though the land beneath the waters of the river might be privately owned, the waters themselves were public so far as they were actually navigable. The decision was completely in accord with the law of England[83] as were the early North Carolina cases.[84]

Although there were no decisions in North Carolina prior to 1828 in which the court clearly articulated the navigability doctrine of the State, recent estuarine land decisions have suggested that the common law tidal rule was followed at one time.[85] This theory is at

[81] Davis 55, 80 Eng. Rep. 540 (P.C. 1610) (Ire.).
[82] 3 Caines 207, 2 Am. Dec. 270 (N.Y. 1805).
[83] *See, e.g.,* Blount v. Layard, [1891] 2 Ch. 681; Leconfield v. Lonsdale, L.R. 5 C.P. 665 (1870).
[84] *See, e.g.,* Hodges v. Williams, 95 N.C. 331, 335 (1886); State v. Glen, 52 N.C. 321, 333 (1859).
[85] Swan Island Club, Inc. v. White, 114 F. Supp. 95, 98 (E.D.N.C. 1953),

least impliedly supported by the analysis of the earliest cases, none of which suggests that the court even considered modifying or abandoning the common law rule. Though none of them expressly articulated the tidal rule, the use of language reminiscent of that employed in the English cases and in *Palmer v. Mulligan* was not uncommon.[86] All of these cases, however, involved lands beneath tidal waters so that it was not necessary for the court to consider the broader implications of adopting the ebb and flow navigability doctrine until 1828. *Wilson v. Forbes*,[87] raised for the first time a dispute over ownership of land covered by non-tidal waters commonly used for navigation by sea vessels. In his opinion for the court, Judge Henderson spoke to the problem in stating that:

> It is clear that by the rule adopted in England, navigable waters are distinguished from others, by the ebbing and flowing of the tides. But this rule is entirely inapplicable to our situation, arising both from the great length of our rivers, extending far into the interior, and the sand-bars and other obstructions at their mouths. By that rule, Albemarle and Pamlico sounds, which are inland seas, would not be deemed navigable waters, and would be the subject of private property. What general rule shall be adopted, this case does not require me to determine. . . . But I think it must be admitted that a creek or river, such as this appears to be, wide and deep enough for sea vessels to navigate, and without any obstruction to this navigation from its mouth to the ocean . . . is a navigable stream within the general rule.[88]

Although it is apparent that Judge Henderson did not intend to formulate a rigid rule in *Wilson v. Forbes*, the phrase "wide and deep enough for sea vessels to navigate" was echoed fourteen years later in *Collins v. Benbury*[89] when the court announced the rule that "any waters, which are sufficient to afford a common passage for all people in sea vessels, are to be taken as navigable. . . ."[90] Both *Wilson* and *Collins* were cases dealing with non-tidal waters so that even after 1842 there might have been some doubt as to the applicability

aff'd sub nom., Swan Island Club, Inc. v. Yarborough, 209 F.2d 698 (4th Cir. 1954); Development Co. v. Parmele, 235 N.C. 689, 695, 71 S.E.2d 474 (1952).

[86] *See, e.g.*, Tatum v. Sawyer, 9 N.C. 226 (1822); McKenzie's Ex'rs v. Hulet, 4 N.C. 613 (1818).

[87] 13 N.C. 30 (1828).

[88] *Id.* at 34-35.

[89] 25 N.C. 277 (1842).

[90] *Id.* at 282.

of the new sea vessel rule to tidal waters. The distinction, however, cannot explain the 1846 decision in *Hatfield v. Grimsted.*[91] There the court, without reference to any supporting precedents including *Wilson* and *Collins,* sustained an 1839 grant of lands lying beneath the non-tidal waters of Currituck Sound by employing the ebb and flow concept of navigable waters which arguably it had previously discarded. Subsequent decisions of the court have limited the *Hatfield* case on the ground that the court had resorted to the common law rule because of the General Assembly's failure in 1837 to retain those provisions of the prior laws pertaining to the method for survey of lands lying on navigable waters. The subsequent 1847 amendment of the 1837 entry and grant laws effectively limited the applicability of *Hatfield* to grants made by the State between the effective dates of the 1837 revisal and the 1847 statutory amendment.[92]

The *Wilson* formulation of the navigability doctrine was relied upon once again in *State v. Glen.*[93] Glen's conviction under an indictment charging him with failure to remove a dam obstructing the passage of fish in the Yadkin River was reversed by the Supreme Court which held that (1) the Yadkin River was non-navigable under the sea vessel rule, (2) Glen's claim of title to the river bottom was valid and entitled him to construct the dam, and (3) the State could not force Glen to remove his dam absent just compensation from the State for his attendant losses. In reaching the first of these conclusions, the court examined the facts of the case in light of the rule that:

> . . . any waters, whether sounds, bays, rivers, or creeks, which are wide enough and deep enough for the navigation of sea vessels, are navigable waters, the soil under which is not the subject of entry and grant under our entry law. . . . In streams not navigable the bed of the river may be, under the general entry law, the subject of a grant to a private individual. . . .[94]

This suggests that the sea vessel rule of *Wilson* and *Collins* was, as to grants not made between 1837 and 1847, to be applied at least in those cases involving non-tidal waters. It may be implied from the

[91] 29 N.C. 139 (1846).
[92] *See, e.g.,* Development Co. v. Parmele, 235 N.C. 689, 695, 71 S.E.2d 474, 479 (1952); Bond v. Wool, 107 N.C. 139, 149, 12 S.E. 281, 285 (1890).
[93] 52 N.C. 321 (1859).
[94] *Id.* at 325.

language used by the court that the North Carolina sea vessel doctrine of navigability applied to tidal as well as non-tidal waters, but a subsequent summary of the State law in *Glen* clearly raised some doubt about whether the common law tidal rule had been completely discarded. In its summary, the court stated in part that "[a]ll the bays and inlets on our coast, where the tide from the sea ebbs and flows, and all other waters, whether sounds, rivers, or creeks, which can be navigated by sea vessels, are called navigable, in a technical sense, are altogether *publici juris,* and the soil under then cannot be entered and a grant taken for it under the entry law."[95] Neither *Wilson, Collins* nor *Glen* involved the application of the navigability doctrine to tidal waters and tidelands; each applied the sea vessel rule to controversies over title to lands beneath non-tidal waters. Thus, in 1859, the State was still without an explicit judicial statement of the doctrine of navigability applicable to grants purporting to convey title to land beneath tidal waters.

Development, 1859-1967

The court was not faced with another title controversy involving the navigability doctrine until 1886. Holding that lands lying beneath the non-tidal waters of Mattamuskeet Lake had been lawfully entered and granted, the court reaffirmed the sea vessel navigability doctrine in *Hodges v. Williams.*[96] The decision was based upon the triad of cases discussed in the preceding section, but reference was made to *State v. Glen* for its statement of the sea vessel rule rather for its summary of the law.[97] *Hodges,* however, still left the law without a decision as to the rule to be applied in determining the navigability of tidal waters, a void which remained until 1938.

Since *Glen* and *Hodges,* in a series of decisions involving the right of navigability in non-title cases the court has applied a test of navigability in fact for any legitimate purpose of travel or trade—including use by fishing boats and freight batteaux or rafting of logs or produce.[98] Indeed, the court has gone so far as to quote with favor language from other jurisdictions accepting a pleasure boating

[95] *Id.* at 333.
[96] 95 N.C. 331 (1886).
[97] *Id.* at 334.
[98] Taylor v. West Virginia Pulp & Paper Co., 262 N.C. 452, 137 S.E.2d 833 (1964); State v. Twiford, 136 N.C. 603, 48 S.E. 586 (1904); State v. Baum, 128 N.C. 600, 38 S.E. 900 (1901); Broadnax v. Baker, 94 N.C. 675 (1886).

test of navigability.[99] *Insurance Co. v. Parmele*[100] finally compelled the court to decide whether or not the waters of a tidal sound were navigable within the meaning of the law pertaining to land titles. In finding that two tracts of salt marsh in Myrtle Grove Sound were properly conveyed under a 1930 deed from the State Board of Education, the court rejected the common law ebb and flow test and followed the sea vessel test developed in *Wilson, Collins, Glen* and *Hodges.*[101] The decision of the court became the first clear repudiation of the English doctrine in a case concerning waters subject to the ebb and flow of the tides; it was reaffirmed just seven years later in *Kelly v. King,*[102] a trespass case which again involved lands lying beneath the waters of Myrtle Grove Sound.

The apparent clarity of the navigability doctrine after the decisions in *Insurance Co.* and *Kelly* lasted only until 1952 when the decision in *Development Co. v. Parmele*[103] produced great confusion in the law. Rather than discuss the navigability doctrine as evolved in estuarine land title cases, the court quoted freely and at random from both the title cases and the obstruction of navigation cases and concluded that all water courses are "navigable" that are navigable in fact.[104] The common law distinction between the meaning of "navigable waters" as used in the two types of cases has already been pointed out in the discussion of *Palmer v. Mulligan.*[105] Prior to *Development Co. v. Parmele,* the North Carolina courts carefully articulated and adhered to the common law principles which distinguished between the two types of cases, extending the easement for navigation to all waters usable by any boats in commerce while confining the application of the doctrine preserving *jus publicum* lands to the smaller class of waters capable of navigation by sea

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[99] State v. Twiford, 136 N.C. 603, 608, 48 S.E. 586, 588 (1904).

[100] 214 N.C. 63, 197 S.E. 714 (1938).

[101] Alternate formulations of the test of navigability in this case included: "commerce of a substantial and permanent character," and waters which are "navigable in fact and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the states." *Id.* at 68.

[102] 225 N.C. 709, 36 S.E.2d 220 (1945).

[103] 235 N.C. 689, 71 S.E.2d 474 (1952). The case involved marsh lands in the Town of Wrightsville Beach which were bounded by a causeway on one side and shallow sloughs on the remaining three sides.

[104] *Id.* at 695, 71 S.E.2d at 479. Some of the principal "obstruction of navigation" cases are State v. Twiford, 136 N.C. 603, 48 S.E. 586 (1904); State v. Baum, 128 N.C. 600, 38 S.E. 900 (1901); Commissioners v. Lumber Co., 116 N.C. 731, 21 S.E. 941 (1894).

[105] *See* notes 26, 27, 83 *supra,* and accompanying text.

vessels.[106] *Development Co. v. Parmele* overlooked this distinction, applied the broader rule, and concluded that the water covering the marsh only at high tide was navigable water.

After *Development Co. v. Parmele,* there was at least no longer any real question about whether the North Carolina navigability doctrine was the ebb and flow rule or some other judicially developed refinement of the common law. As a matter of fact, the courts agreed on one point in all of the tide-flow estuarine land cases beginning with *Insurance Co. v. Parmele.* That one point of agreement concerned the inapplicability of the common law tidal rule of navigable waters. But *Development Co. v. Parmele* introduced a new point for debate through its random reference to the land title and the navigation case-law doctrines; the confusion thereby brought to the law was compounded when the court failed to indicate which of the rules it applied in concluding that the waters covering the salt marshes at high tide were navigable. The ensuing confusion in the law is readily apparent in the two estuarine land cases decided in the two years immediately following *Development Co. v. Parmele.* Neither *Swan Island Club v. White*[107] nor *Parmele v. Eaton*[108] in any way mentioned the sea vessel navigability rule of *Wilson v. Forbes.* Instead, they relied solely upon the obstruction of navigation quotations and references appearing in the *Development Co. v. Parmele* opinion in their discussions of the North Carolina navigability doctrine. *Swan Island* is the more instructive of the two cases as to the potential impact of the new line of cases for in that case the Federal District Court held that the shoal land around an island in the shallow waters of Currituck Sound were navigable waters in the real property sense even though the waters could be used at high tide only by small boats; the water was so shallow that it could not be used even by small boats at high tide when there was a strong and steady northeast wind. Nevertheless, after rejecting the applicability of the ebb and flow rule, the court held that the waters were "navigable in fact" and concluded that the lands beneath them had been unlawfully granted. The "navigable in fact" approach of *Swan Island* was brought to bear again in *Parmele v. Eaton* wherein the court (finding a portion of the marsh involved in the previous

[106] Cases cited note 84 *supra.*
[107] 114 F. Supp. 95 (E.D.N.C. 1953).
[108] 240 N.C. 539, 83 S.E.2d 93 (1954).

case of *Development Co. v. Parmele* to be non-navigable) declared that the applicable rule in estuarine land title cases "is that all water courses are regarded as navigable in law that are navigable in fact," and that the practical test is "whether, in its ordinary state, the water has capacity and suitability for the usual purpose of navigation by vessels or boats as are employed in the ordinary course of water commerce, trade and travel."[109] Essentially the same definition—"navigable in fact"—appears again in the 1959 State Land Acts where for the first time the definition of "navigable waters" is made a part of the statutes;[110] this statement of the rule conforms, at least in verbal formulation, more closely than does the sea vessel rule to the rule applied in the majority of states.[111]

It may be that, by a combination of the enactment of this statute and the gradual evolution of judicial decisions, a single test of navigability in North Carolina has now become the law: navigability in fact by any form of vessel or water transport common to the times. In its most recent decisions the court may have sounded the death knell of the seagoing vessel test for all practical purposes, just as it previously abandoned the ebb and flow rule—albeit, in its customary reluctance to expressly overrule prior decisions, it has not explicitly abandoned the seagoing test. However, the exact meaning of the statutory standard will probably not be known until it is clarified by further legislation or, more likely, by judicial interpretation of the statute.

MISCELLANEOUS LEGAL PRINCIPLES OF ESTUARINE OWNERSHIP AND USE

Ownership and Use of Estuarine Resources

Fish and wildlife resources in their natural state are owned by the state in trust for its citizens.[112] Shellfish are among these resources and along with other fish and game are classified in law as *ferae naturae*.[113] There is, however, an exception made concerning

[109] *Id.* at 548, 83 S.E.2d at 99.
[110] N.C. GEN. STAT. § 146-64(4) (1964).
[111] *See, e.g.,* CLARK §§ 41.2(B) n.72, 42.2(B) n.27 and cases cited therein. North Carolina was recognized in 1904 as being the only state with the sea vessel limitation on the "commercial usage" doctrine of navigability. FARNHAM § 23g, at 118.
[112] Shively v. Bowlby, 152 U.S. 1 (1893).
[113] State v. Taylor, 27 N.J.L. 117 (Sup. Ct. 1858); People v. Morrison, 194 N.Y. 175, 86 N.E. 1120 (1893); Coos Bay Oyster Co. v. State, 219 Ore. 588, 348 P.2d 39 (1959).

planted shellfish which are *domitae naturae.* This exception to the general rule arises because the *ferae naturae* classification results primarily from the migratory character and the natural habitat of wild fish and game. Shellfish are not, however, migratory so that when they are planted in artificial beds they do not satisfy either of the primary requisites of *ferae naturae* treatment at law.[114] *Ferae naturae* fish and animals are, as noted above, owned by the people of the state and the state holds title to them in trust for the public. Domestic fish and animals (*domitae naturae*) are, on the other hand, the private property of the owner, *e.g.*, the planter of shellfish, and interference with that personal property right will form the basis for a legal cause of action.[115] Thus, unlike wild fish and game which become private property only when reduced to possession, *domitae naturae* are always private property and are not subject to claim by the state on behalf of the public absent appropriate compensation to the individual owner.

Bottoms in which private persons plant shellfish in North Carolina may be obtained by leases from the state or may be salt marshes owned by the individuals planting the shellfish. The lease situation is an example of the General Assembly's power to grant a fishery in public waters to a private person.[116] The shellfish lease statutes, along with several other statutes creating and preserving private rights of fishery,[117] provide the sole means for acquiring a private fishery in the public waters of North Carolina. Despite the language in *Collins v. Benbury* indicating that a several or exclusive fishery may be claimed either by the owner of the soil of a watercourse or by one who has a grant of fishery from the owner of the soil,[118] it is now clear that the public waters of North Carolina extend to watercourses whose beds are privately owned. Thus, the statutes preserve and regulate the common right of fishery in all waters within the State except private ponds.[119] Although, as already noted above, a private right of fishery in the public waters of the State

[114] Cases cited note 113 *supra.*
[115] Cases cited note 113 *supra.*
[116] *See* Shively v. Bowlby, 152 U.S. 1 (1893) (succession of state legislatures to the powers of Parliament in this area). *See also* Collins v. Benbury, 25 N.C. 277, 283 (1842); N.C. GEN. STAT. § 113-202 (1967) (oyster and clam leases).
[117] *See, e.g.*, N.C. Laws 1874-75, ch. 183, § 3.
[118] 25 N.C. 277, 283 (1842).
[119] N.C. GEN. STAT. §§ 113-129, -182, -292 (1966).

may still be acquired in accordance with specific statutory exceptions to the general prohibition against such rights, the interests obtained pursuant to the provisions of the statutory exceptions are circumscribed by both statutes and judicial decisions. Under common law principles, one who has a right under the statutes to an exclusive fishery around his fishing pier can effectively protect that right only in an action for trespass upon the area but may not claim an enforcible or protectable interest in the fish as such, since *ferae naturae* fish and game belong to no single citizen of the State until such time as they are in his physical possession and control.[120] This principle does not, however, apply to shellfish leases due to the combined effect of two other principles, one statutory and one common law, concerning the acquisition of this particular exclusive interest.

The statutes providing for the issuance of shellfish leases expressly prohibit the acquisition of a lease to natural oyster or clam beds by a private party.[121] It is, therefore, necessary for the lessee to plant oysters within his leased bed. The protectable interest in such a situation is two fold: the lessee, (1) like the possessor of any other private right of fishery has a real property interest which is protectable against trespass and, (2) because of the *domitae naturae* legal classification of shellfish, has a personal property interest in the oysters which is protectable at law. In other words, the lessee of a shellfish bed may bring an action for injury to his planted oysters as well as an action for trespass to his leasehold[122] even though the holder of an exclusive grant of fishery does not generally have legal recourse for damages based upon the value of the fish taken from his fishery.

Ownership of Land Between the High and Low Water Marks

McKenzie's Executors v. Hulet[123] upheld a deed which granted oyster rocks lying between the high and low water marks of a shallow tidal sound in connection with a grant of adjacent land. As a result of the decision an early precedent was established in North Carolina supporting the proposition that such lands could be conveyed by a grant which clearly expressed an intention to do so. *McKenzie,*

[120] *See, e.g.,* State v. Glen, 52 N.C. 321, 327 (1859).

[121] *E.g.,* N.C. GEN. STAT. § 113-202 (Supp. 1967). *See aso* N.C. Laws 1858-59, ch. 33, § 2 (first oyster bed licensing statute).

[122] Cases cited note 113 *supra.*

[123] 4 N.C. 613 (1818).

however, has never been cited or relied upon as precedent for any subsequent decision even though the issue of ownership of land between the high and low water marks has since been considered by the court. Moreover, the U. S. Supreme Court has held that the states are powerless to grant a fee simple title to lands beneath navigable waters even where the grantee, a public utility, is itself "affected with a public interest."[124] Although *McKenzie* has never been relied upon by the court as authority for the proposition that land between the high and low water mark could be conveyed by specific state grant, the decision of the court in *Ward v. Willis*[125] in 1858 indicated that even though the plaintiff in that case could not claim such land as an incident of riparian ownership land between the high and low water marks could be conveyed by a specific grant. This dictum was reflected in the summary of North Carolina law set forth in *State v. Glen*[126] which has been quoted in subsequent opinions of the court.

Ward v. Willis did, however, indicate in a dictum that even though the land between high and low water could not be entered, it could have been validly conveyed by a specific grant from the State. The court, in support of this dictum, made reference to *Sir Henry Constable's Case,*[127] the English common law precedent relied upon by the *McKenzie* court. The legal validity of this statement has neither been questioned nor relied upon by the court, but its present vitality is somewhat questionable. It has been said time and time again in the decisions of the court that lands beneath navigable waters of this State could not be entered[128] and, until 1959, the exclusive means for acquiring title to all but marsh lands and tax title lands was through compliance with the provisions of the entry and grant laws. The 1959 statute prohibits the acquisition of anything but an easement in lands lying beneath navigable waters.[129] Thus, although the General Assembly succeeded to the powers of Parliament and could grant title to land below the high water mark of navigable waters,[130] the statutes which it has enacted specifically

[124] Illinois Cent. Ry. Co. v. Illinois, 146 U.S. 387 (1892).
[125] 51 N.C. 183 (1858).
[126] 52 N.C. 321 (1859).
[127] 5 Co. Rep. 106a, 77 Eng. Rep. 218 (K.B. 1601).
[128] *See, e.g.,* Development Co. v. Parmele, 235 N.C. 689, 71 S.E.2d 474 (1952); Insurance Co. v. Parmele, 214 N.C. 63, 197 S.E. 714, (1938).
[129] N.C. GEN. STAT. §§ 146-3, -12 (1964).
[130] Note 17 *supra.*

preclude its delegates in the agencies of the State from the exercise of that power. However, since the ultimate limitation upon the power of the legislature, the North Carolina Constitution, does not foreclose the exercise of that power by the General Assembly, it would be possible under the rationale of *Sir Henry Constable's Case, McKenzie v. Hulet,* and *Ward v. Willis* for the General Assembly to grant lands beneath navigable waters, including land between the high and low water marks of a tidal water, if the deed of grant specifically expressed an intention to convey such land.

Accretion, Reliction, Avulsion and Erosion

It was firmly established in North Carolina by 1820 that the owner of land is entitled to the land built up at the edge of his property by the gradual and imperceptible deposit of soil carried by an adjacent watercourse.[131] At common law this rule, and the corollary rule that accretions resulting from sudden storm or flood-wrought changes did not vest in the riparian owner, applied to both navigable and non-navigable waters.[132] Similarly, the converse of each of these principles, *i.e.,* gradual erosion divesting title and sudden erosion allowing reclamation, applied to lands situated on navigable and non-navigable waters.[133] The law relating to land situated on navigable waters was, however, changed somewhat by the 1959 State Lands Act so that "[i]f any land is, by any process of nature . . . , raised above the high water mark of any navigable water, title thereto shall vest in the owner of that land which, immediately prior to the raising of the land in question, directly adjoined the navigable water."[134] In the case of erosion, the statute provides for reclamation of lands lost as a result of any natural cause,[135] although all other lands raised from navigable waters by any other means vest in the state if an application to fill the area occupied by the raised land has not obtained prior approval from the Department of Administration, Governor and Council of State.[136]

[131] Murray v. Sermon, 8 N.C. 56 (1820).
[132] *Id.*
[133] *See* Jones v. Turlington, 243 N.C. 681, 684, 92 S.E.2d 75, 77 (1956), quoting with approval from 56 AM. JUR. *Waters* § 477, at 892 (1947).
[134] N.C. GEN. STAT. § 146-6(a) (Supp. 1967).
[135] N.C. GEN. STAT. § 146-6(b), (c) (Supp. 1967).
[136] N.C. GEN. STAT. § 146-6(b) (Supp. 1967).

Adverse Possession

Although title to real property normally passes by deeds and grants, title may also be acquired by adverse possession. The statutes of North Carolina provide that the state may not assert a claim of title to lands against one who bases a claim of title on (1) adverse possession by the claimant, or those under whom he claims, for thirty years if the claim is to land having known or visible lines or (2) adverse possession by the claimant, or those under whom he claims, under color of title for twenty-one years if the claim is to land having known or visible lines or boundaries.[137] Proof of title by adverse possession requires actual possession of the land which is open, visible and hostile to the interest of the title holder.[138] Occasional use or occupancy of the land will not suffice[139] nor will listing and payment of taxes satisfy the legal requirements,[140] but possession accompanied by clearing and improving the land,[141] cutting and hauling away of timber and posting notices against trespass to a swamp,[142] or the annual keeping of fish traps and the erection and repair of a dam in non-navigable waters[143] is sufficient to satisfy the requirements of actual and open possession. This is true regardless of whether the alleged title is based upon the absolute thirty year limitation or the twenty-one year color of title provision, since color of title is relevant only with regard to fixing the applicable time limitation.[144] For purposes of the statute, color of title is defined as "a paper-writing (usually a deed) which professes and appears to pass title, but fails to do so."[145] Note, however, that a post-1893 grant of lands previously granted by the State or its predecessors does not, under any circumstances, constitute color of title.[146]

The case law permits the State, along with any other persons,

[137] N.C. GEN. STAT. § 1-35 (1953).

[138] Newkirk v. Porter, 237 N.C. 115, 74 S.E.2d 235 (1953).

[139] Chisholm v. Hall, 255 N.C. 374, 121 S.E.2d 726 (1961).

[140] *Id.*

[141] Smith v. Bryan, 44 N.C. 180 (1852).

[142] Alexander v. Richmond Cedar Works, 177 N.C. 137, 98 S.E. 312 (1919); Tredwell v. Redwick, 23 N.C. 56 (1840). *Cf.* Price v. Whisnant, 236 N.C. 381, 72 S.E.2d 851 (1952); McLean v. Smith, 106 N.C. 172, 11 S.E. 184 (1890). In the latter cases, frequency of use of the land was held insufficient.

[143] Williams v. Buchanan, 23 N.C. 535 (1841).

[144] Cothran v. Motor Lines, 257 N.C. 782, 127 S.E.2d 578 (1962); Farabow v. Perry, 222 N.C. 21, 25 S.E.2d 173 (1943).

[145] Smith v. Proctor, 139 N.C. 314, 51 S.E. 889 (1905).

[146] N.C. GEN. STAT. § 146-39 (1964). *See also* N.C. Laws 1893, ch. 490.

to acquire title by adverse possession under the provisions of the statutes fixing the time limitations for actions between private persons. A recent case confirming the capacity of the State to assert such a claim, *Williams v. State Board of Education*,[147] stated that:

> . . . we know of no authority or reason by which the State of North Carolina or its agencies are excluded from the right to assert title by adverse possession when the circumstances would permit a private litigant to do so.[148]

The circumstances of which the court speaks are established by a section of the General Statutes which creates a twenty year limitation for cases in which there is no color of title and a seven year limitation for cases where possession is under color of title.[149] In addition, of course, the State must be able to prove that its possession was actual as well as open, notorious and hostile to that of the title holder.

Deed Construction and Legal Proceedings

The first question of an adverse party in a title controversy may very well be "Is the deed valid?" In this regard, the substantive provisions of the State land laws have already been examined. Deeds or grants issued for lands other than those that could be lawfully conveyed under the statutes were declared null and void by those same statutes.[150] In controversies over land purportedly conveyed, it has been held that the original invalidity of a deed may be raised in the legal proceedings.[151] Assuming, however, that the deed appears on its face to be valid other issues of deed construction or, in a very few cases fraud in procuring the deed, may present themselves for consideration. The issue of fraud also pertains to the validity of the deed or grant although the facts creating invalidity arise from the actions of the parties rather than from the subject matter of the conveyance. The statutes of this state provide limited remedies for both the Attorney General and private parties so far

[147] 266 N.C. 761, 147 S.E.2d 381 (1966).

[148] *Id.* at 766. The court stated in addition that "We are of the opinion and so hold that the General Assembly intended that these statutes should apply to any legal entity, including the State of North Carolina and its agencies, capable of adversely possessing land and of acquiring title thereto." *Id.* at 766-67, 147 S.E.2d at 385.

[149] N.C. GEN. STAT. § 1-38 (1953).

[150] *See, e.g.*, N.C. Laws 1777, ch. 1, § VIII (2d Session).

[151] Janney v. Blackwell, 138 N.C. 437, 50 S.E. 857 (1905).

as direct attack upon the validity of a deed or grant is concerned and these remedies are confined to those cases in which fraud can be demonstrated. Thus, for example, the Attorney General may commence an action to have a deed or grant declared invalid only

> (1) When he has reason to believe that such letters patent were obtained by means of fraudulent suggestion or concealment of a material fact . . .; or
>
> (2) When he has reason to believe that such letters patent were issued through mistake, or in ignorance of a material fact; or
>
> (3) When he has reason to believe that the patentee, or those claiming under him, have done or omitted an act in violation of the terms and conditions on which the letters patent were granted, or have by any other means forfeited the interest acquired under the same.[152]

The state may bring an action under this section only on its own behalf and only in cases in which title to the land would revest in the state.[153] Although there has been no case in point, it is probably this statute which provides the State with a legal remedy in situations involving oyster and clam bed interests which were acquired under earlier statutes but never perfected or preserved through compliance with the various statutory provisions relating to the use and staking out of the beds; this should be true at least with regard to the "perpetual franchises" acquired through compliance with the procedures established by the then prevailing entry and grant laws.

Although a deed may not be invalid for issuance in violation of governing statutory provisions or for fraudulent procurement, it may very well present issues concerning its proper construction. It is not possible within the scope of this study to undertake an extensive examination on this point, but it seems appropriate to note some of the most basic principles of law and those particular concepts which pertain directly to estuarine land controversies. In the interpretation of deeds and other conveyances of real property, it has long been the rule that the boundaries of the land are to be determined by reference to natural monuments or marks if any other specific or general description of the land contained in the deed is inconsistent with the boundaries established by references to

[152] N.C. GEN. STAT. § 146-63 (1964).
[153] State v. Bland, 123 N.C. 739, 31 S.E. 475 (1898).

natural markers.[154] This rule is of special importance to marsh land controversies because the surveys of these lands were often tied to natural objects such as trees, streams, etc. The application of this rule and the rule that specific descriptions prevail over general descriptions[155] are illustrated in part by some of the cases discussed below.

A deed to land lying on a non-navigable water conveys, as a general rule, both the land above the water and the bed of the stream to its thread.[156] The specific limitation in a deed setting the boundary on a tidal non-navigable water at the high water mark will, however, operate to rebut the general rule and establish the boundary at the high water mark instead of conveying the land to the thread of a sound or other body of water.[157] And where a plat referred to in a deed conflicts with the deed description of the boundary as the low water mark of a non-navigable tidal sound by showing the boundary to be the high water mark the plat will be incorporated into the deed and establish the boundary at the low water mark.[158]

The case discussed in the preceding paragraph, *Kelly v. King*, highlights the significance of specific descriptions contained in deeds. The principles applied in that case derive from a series of North Carolina cases, many of which involve water-bounded land title controversies. Thus, it has been held that a call to a particular point of reference and "thence down the swamp" established the boundary at the edge rather than the run of the swamp[159] although the term "with the run of the swamp" will convey land to the center of the swamp or the adjacent stream rather than to its banks.[160] These cases, like *Kelly v. King*, involve references to marsh lands which are natural boundaries[161] and the particular phraseology used in the respective deeds demonstrates the need for careful analysis of the language of each individual deed which requires interpretation.

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[154] Batson v. Bell, 249 N.C. 718, 107 S.E.2d 562 (1959); Trust Co. v. Miller, 243 N.C. 1, 89 S.E.2d 765 (1955).

[155] Whiteheart v. Grubbs, 232 N.C. 236, 60 S.E.2d 101 (1950).

[156] Kelly v. King, 225 N.C. 709, 36 S.E.2d 220 (1945); Williams v. Buchanan, 23 N.C. 535 (1845).

[157] Kelly v. King, 225 N.C. 709, 36 S.E.2d 220 (1945).

[158] *Id.*

[159] Rowe v. Cape Fear Lumber Co., 128 N.C. 301, 38 S.E. 896 (1901); Hartsfield v. Westbrook, 2 N.C. 258 (1796).

[160] Rowe v. Cape Fear Lumber Co., 128 N.C. 301, 38 S.E. 896 (1901).

[161] Stapleford v. Brinson, 24 N.C. 311 (1842).

State Power to Regulate the Use of Estuarine Land and Resources

The capacity of the state to control the use of estuarine land and resources varies in degree throughout the spectrum of state and private real and personal property interests in the lands and resources. On the one hand, state-owned land, waters, and the resources therein are protectable to the fullest extent from injury as real and personal property of the state.[162] On the other hand, the existence of a private interest in either estuarine lands or resources will serve to limit, but not preclude, exercise of control by the state.

One example of the limitation upon State authority to regulate the use of estuarine lands has already been highlighted in the earlier discussion of *Oglesby v. Adams* and *State v. Spencer,* the cases restricting the application of statutes impairing leasehold contracts between the State and private parties.[163] A second limitation is based on the constitutional prohibition against taking of property without due process of law. For purposes of this brief synopsis, it may be viewed as the substantive or economic due process bar against the taking of property by the state without payment of just compensation. In the final analysis, that was the problem before the court in *State v. Glen.*[164] Although the state may exercise the police power for the protection or promotion of the public health, safety, morals or general welfare, it may not do so unreasonably or in an arbitrary or discriminatory fashion[165] and the taking of property without just compensation is deemed at law to be unreasonable.[166]

The courts of several states have considered the proper limits of the legislative exercise of the police power in cases where the laws enacted were designed to deal with estuarine resources and land problems. In North Carolina, the statute making it unlawful to discharge any poisonous or deleterious substance harmful to fish

[162] N.C. GEN. STAT. § 146-70 (1964) expressly provides that the Attorney General shall represent the state in all actions brought by it with regard to state lands or any interest therein. *See,* State Highway Comm'n v. Cobb, 215 N.C. 556, 2 S.E.2d 565 (1939) (concerning capacity of state to sue for injury to property) (*dictum*).

[163] *See* 114 N.C. 770, 19 S.E. 93 (1894).

[164] 52 N.C. 321, 327 (1859). The appeal was from a conviction upon an indictment charging failure to remove, at the state's request, a dam built in a non-navigable stream at a point of the stream where Glen owned the banks on both sides.

[165] State v. Glidden Co., 228 N.C. 664, 46 S.E.2d 860 (1948).

[166] Durham County v. Addison, 262 N.C. 280, 136 S.E.2d 600 (1964).

into the waters of the State—a predecessor of the state's present water pollution control legislation—was upheld in the face of a due process of law attack but was found to make an arbitrary discrimination to the extent that all companies chartered prior to the enactment of the statute were exempted from its provisions.[167] In Massachusetts, an act requiring a permit for dredging in marsh lands survived a due process claim of invalidity although the court cautioned that the conditions and restrictions put into the permit by the state could not so limit the use of the property as to amount to its taking without compensation.[168] The kinds of restrictions that may amount to a taking of property are indicated by a recent Connecticut decision, which invalidated a town flood plain zoning ordinance.[169] The land affected by the ordinance was tidal marshland, 91 per cent of which was periodically flooded by a tidal estuary, and the remainder of which had been inundated by extraordinary floods of record. The stricken ordinance would have limited the use of this land to open space uses, such as parks and playgrounds, landings and docks, wildlife sanctuaries, farming, and vehicle parking, unless a special exception was obtained. These restrictions upon profitable use of undeveloped land were held to be unreasonable and confiscatory as to property, some of which was under contract for residential development and some of which had been assessed for a sewer line.

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[167] State v. Glidden Co., 228 N.C. 664, 46 S.E.2d 860 (1948).
[168] Commissioner of Natural Resources v. S. Volpe & Co., 349 Mass. 104, 206 N.E.2d 666 (1965).
[169] Dooley v. Town Zoning Comm'n, 151 Conn. 304, 197 A.2d 770 (1964).