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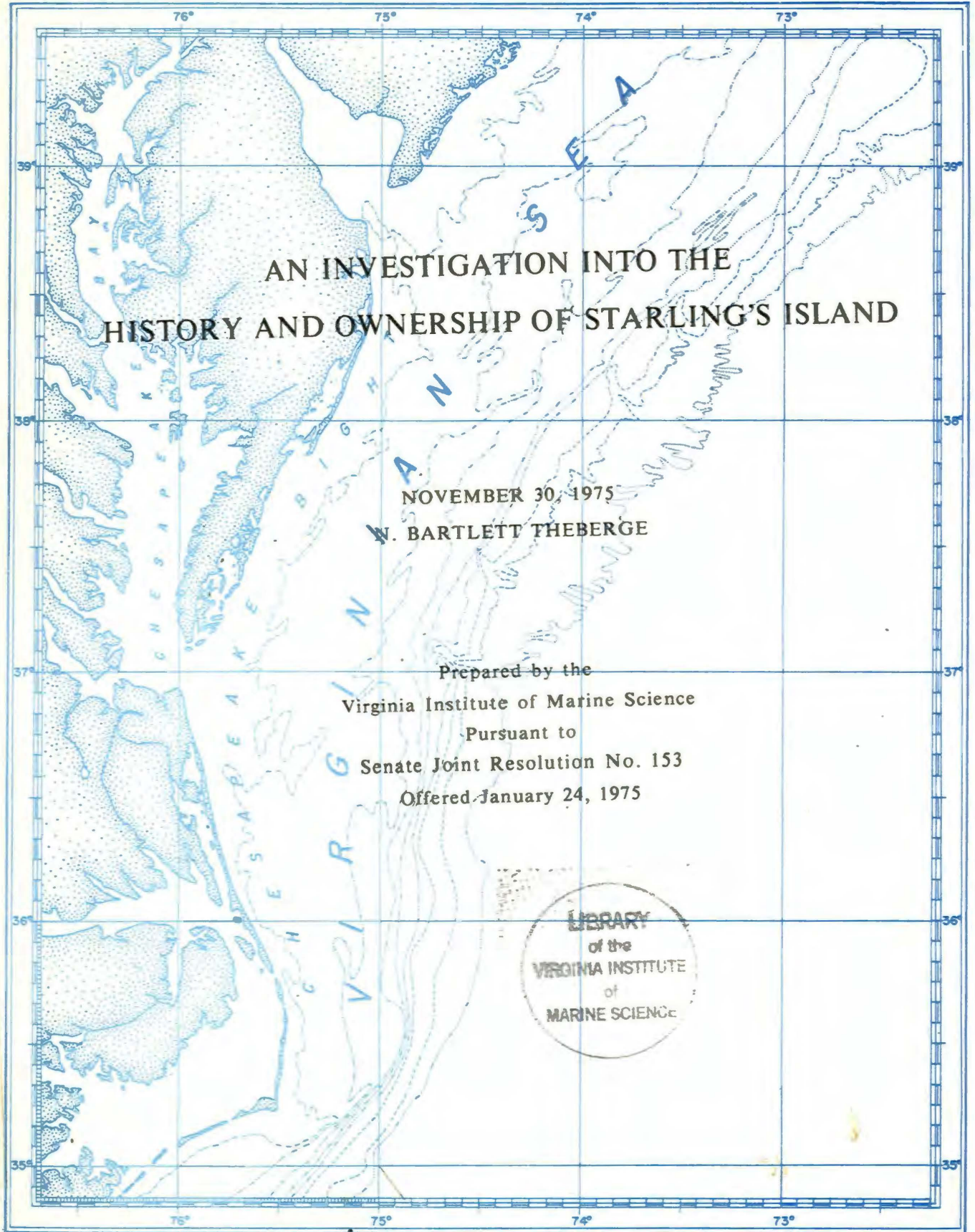
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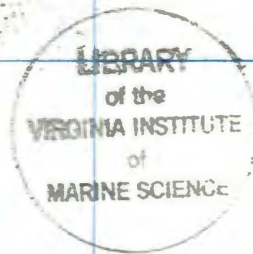


AN INVESTIGATION INTO THE
HISTORY AND OWNERSHIP OF STARLING'S ISLAND

NOVEMBER 30, 1975

W. BARTLETT THEBERGE

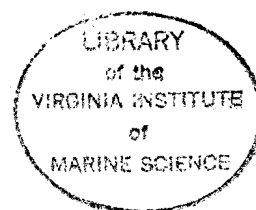
Prepared by the
Virginia Institute of Marine Science
Pursuant to
Senate Joint Resolution No. 153
Offered January 24, 1975



AN INVESTIGATION INTO THE
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A debt of appreciation is owed not only to J. Claiborne Jones, Research Assistant in Ocean and Coastal Law, for his aid in research, but also to those in charge of public records in the County of Accomack, to those in charge of special collections at the Library of the College of William and Mary, and to the archivists at the Virginia State Library for their kind cooperation.

INTRODUCTION

This study of the ownership of Starling's Island was commenced by the Virginia Institute of Marine Science pursuant to a directive expressed in Senate Joint Resolution No. 153. (See Appendix Page 19). The resolution best summarizes the controversy in that "an island, known as Starling's Island, located in Accomac (sic) County near Saxis, Virginia, has for many years been used by the public for various purposes..... certain private parties have recently asserted claims of ownership in Starling's Island, which claims are not supported by recorded deeds or other muniment of title.....it is deemed to be in the best interest of the Commonwealth and its citizens who have customarily used Starling's Island as a common area that the lawful ownership of the island be determined....." In addition, section 62.1-1 of the Code of Virginia states that "all the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the state for the purpose of fishing and fowling....." (see Appendix, Page 21 for full text).

Section 41.1-4 of the Code of Virginia also states that "all unappropriated marsh or meadowlands lying on the Eastern Shore of Virginia, which have remained ungranted, and which have been used as a common by the people of this state, shall continue as

such common and remain ungranted....." (see Appendix Page 22 for full text). Pursuant to the directive expressed in the resolution, an examination of maps, patents, deeds, wills, inventories, surveys and other records spanning four centuries has been made.

After receipt of the resolution, it was discovered that no current map could be found with a "Starling's Island" depicted. A Starling's Creek was found and through examination of tax records and with the help of local citizens, Starling's Island was identified as a small island of approximately 23 acres off the southwestern end of Saxis adjacent to what is currently known as Starling's Creek. To the South lies a much larger island now known as Tunnel's Island (for map see Appendix, Page 23). At low tide charts indicate water depths of as little as six inches in a channel between the two islands.

Tax records show that several individuals from Maryland mistakenly claimed and paid taxes on Starling's Island for a number of years. In 1970 the U. S. Army Corps of Engineers received permission from one of the "owners" to deposit dredge spoil on the island. Shortly thereafter several of the "owners" apparently discovered their mistake. This prompted a visit to Accomack officials and a change in the tax records to reflect their true ownership of an island near the Virginia-Maryland line. This left the Starling's Island unclaimed and untaxed as far as the tax records were concerned. In 1974 Danny Ewell Marshall and his wife made out a deed from themselves to

themselves for Starling's Island and commenced paying taxes on the island.

MAP AND CHART ANALYSIS

Some evidence exists that Starling's Island may have been a part of what is now known as Tunnel's Island at one time. However, due to crude and unstandardized mapping techniques in the seventeenth, eighteenth, and the first part of the nineteenth centuries, it would be impossible to make a conclusive statement based on map analysis. Current charts show a channel between Tunnel's Island and Starling Island in which the water depth is six inches at low tide. Since the late nineteenth century it has been estimated that a net increase of approximately nine inches in sea level has occurred due to subsidence of land in the area in combination with a general increase in sea level. Since the late seventeenth century, a net increase in sea level of approximately two feet has been estimated to have occurred.¹ This could explain the discrepancy between acreage in the original patent and the present acreage of the tract. It also may mean that Starling's Island was once a part of what is now Tunnel's Island. None of this, however, is truly conclusive. Many other factors such as currents, erosion, accretion, severe storms, and man-made changes could be operative factors affecting the relationships of these land masses.

¹ Personal communication from Dr. Robert Byrne, Senior Marine Scientist, Geological Oceanography

Maps of the seventeenth,² eighteenth,³ and early nineteenth centuries⁴ consistently show only one large island off of what is now known as Saxis and no island in the present location of Starling's Island. An island in the location of Starling's Island is depicted on a map issued in this area to be found.

The large island off of what is now Saxis is called "Sicoce" Island on seventeenth century maps.⁶ This name was also used on a map dated 1799.⁷ Maps of 1820,⁸ 1825⁹ and

²Two maps predating 1673 and the Augustin Herman Map of 1673--located in Manuscript Department, Division of Special Collections, College of William and Mary.

³A 1787 map of Virginia; a 1799 map in a Marine Atlas published in London in 1804--in the Collection of the College of William and Mary.

⁴An 1807 "correct map of Virginia"--in the Collection of the College of William and Mary; an 1820 survey of Accomack County--in the Virginia State Library; an 1825 map of Virginia and Maryland--in the Collection of the College of William and Mary.

⁵An 1825 map corrected in 1859--in the Collection of the College of William and Mary.

⁶Supra, note 2

⁷A 1799 map in a Marine Atlas published in London in 1804--in the Collection of the College of William and Mary.

⁸An 1820 survey of Accomack County--in the Virginia State Library.

⁹An 1825 Map of Virginia and Maryland--in the Collection of the College of William and Mary.

1855¹⁰ depict this large island off of present day Saxis as "Sykes" Island. However, a map issued in 1859 shows this large island to be "Tunnel's Island" and what is now known as Saxis is shown as "Sykes" Island. This same map shows a small unnamed island in the location of present day Starling's Island.¹¹ All maps found after this date consistently show an island in this location.

Unfortunately, none of the maps before the late nineteenth century are helpful in identifying creek names. A comparison of names used on maps and names of these areas found in existing records demonstrates much confusion about locations and names that apparently persist to this day (see Appendix, Page 24).

PATENTS

The original patents granted in this area in the seventeenth century were examined in the hope that it would be possible to determine if Starling's Island was in existence at that time and was granted or ungranted. In the late seventeenth century (and into the late nineteenth century) controversy raged over the precise boundary between Virginia and Maryland. Virginia issued in rapid succession many patents in the area of controversy.¹²

¹⁰An 1855 experimental railroad survey--in the Virginia State Library.

¹¹An 1825 map corrected in 1859--in the Collection of the College of William and Mary.

¹²All patents cited are indexed and on file at the Virginia State Library.

Many of these areas were marshlands then perceived to be of little value and were unlikely, therefore, to be surveyed or described with precision.

To gain a more realistic understanding and, indeed, even a feeling for the lands that were granted, it is important to read and compare all of the original patents in this area. The earliest patents found were granted on November 9, 1666 to a George Parker and a Robert Sikes. From the descriptions both grants appear to be for land in what is now the town of Saxis. An additional grant for 200 acres of land in the same area was made to a John Parker on March 29, 1672. Lands in these grants were described as being on "St. Georges Island." On October 3, 1672, Captain John West and Colonel Scarbrough received 2500 acres which was described as being partly bounded by "ye lands of ye hummock vizt--St. Georges hummock or island and John Parkers 200 acres on ye nearest hummocks to the southwestern end of St. Georges Island." (This land was repatented to West on November 25, 1679.) A grant was made on November 3, 1686 to William Anderson of "two hundred acres of land...part thereof being hummock on ye marsh between Pocomoke and Messongo, and is ye two marsh hummocks to ye western end of St. Georges Island and bounded on all sides by ye conjunction of woodland ground with marsh, except ye western end of ye westernmost of ye two Hummocks, and from that western end running westward toward ye western end of

another hummock, the said land being formerly granted to John Parker by patent bearing the date of 29th of March 1672 and by him deserted and was granted to ye said Mr. William Anderson by order of ye governor and court bearing date of 20th of April 1685....." On October 26, 1699 a Francis Mackemie received a grant of "850 acres of wood and marshy land situate in Accomack County lying lying between Messongo and Pocomoke beginning near the head of Fishing Creek and a marked cedar and from the said creek running by a right line with the said marked cedar south fifty poles into a branch of Back Creek then over and down the said branch its several courses into Black Creek; then down the said creek its several courses into Messongo Sound then down the said sound its several courses into Pocomoke Sound then up the said sound its several courses into Fishing Creek then up the said creek its several courses into the first beginning two hundred acres hereof being formerly granted unto Mr. William Anderson by patent dated the 16th day of November 1686.....[no evidence of any such patent has been found and this could be a reference to the November 3, 1686 patent to William Anderson] and is surrounded and contained within the aforesaid bounds...."

Due to the compass directions given it is unlikely that the Fishing Creek mentioned in the patent is what is now known as Fishing Creek (see Map, Appendix, Page 23). It is

more likely that what is now known as Starling's Creek was once known as Fishing Creek¹³. In 1702 and 1704 grants were made to Samuel Sandford of land that would later become known as Sandford's Charity or Free School Marsh. The western bounds for this 2970 acre tract are described in the 1704 patent running from "Pocomoke Bay then down its several courses to two marked cedars and the first hummock of St. Georges alias Sickes Island then along the marshes of that island south-westerly twenty degrees five hundred and fifty poles to a marked cedar on the land of Mr. Francis Mackemie then south forty eight poles to Back Creek then down the said creek its several courses to Messongo Creek then up its several courses to the first beginning two thousand and five hundred acres hereof was formerly granted to Lt. Col. John West by Patent dated the 25th of November 1679 and by him assigned to Mr. Samuel Sandford by conveyance dated the 16th day of February 1679 and acknowledged in open court in the County of Accomackand four hundred and seventy acres the remaining part being found within the afore expressed bounds....." The Sandford patents are the keys to understanding the locations of the original grants. A careful reading of the original patents would lead one to conclude that the location of what is now known as Starling's Island was included in the grant to Francis Mackemie and tracing the history of the

¹³ Whitelaw, author of Virginia's Eastern Shore concurs with this analysis, see volume 2, page 1277.

Mackemie tract and the Sandford tract supports this conclusion.

THE MACKEMIE TRACT

The history of the Mackemie tract begins, of course, with a patent for 850 acres to Frances Mackemie in 1699. In 1708 Mackemie willed this land to his daughter Elizabeth describing it as "850 acres of marshes and hummock taken up and patented by myself and lying, being and situate upon the south part and contiguous to Sykes Island."¹⁴ Elizabeth died shortly thereafter and the land passed to his other daughter Anne. Until 1778 Anne (then married to a George Holden) held the entire tract.

In 1778 Anne conveyed to a William Selby (Sr) "100 acres of land and marsh, chiefly marsh....lying between Messongo Creek and Fishing Creek and below a ditch heretofore cut from one of said creek to the other."¹⁵ Upon Anne Holden's death in 1778 she willed the balance of her marshland to John Milligan and Mary Milburn.¹⁶ In the following year John Milligan conveyed to William Selby (Sr) "all that tract of land and marsh, chiefly marsh, devised to the said John Milligan by Anne Holden due and supposed to be 280 acres more or less lying between Free School Marsh and the sand bar"¹⁷

¹⁴ Wills, 1708, Page 302

¹⁵ Deed Book 5, 1777-1783, Page 66.

¹⁶ Wills, 1788

¹⁷ Deed Book 7, 1788-93, Page 329

William Selby (Sr.) now owned 380 acres more or less of the land originally patented to Francis Mackemie. At William Selby's (Sr.) death in 1793 he willed all the marsh lands purchased of John Milligan and Anne Holden to his son William Selby (Jr.)¹⁸ In 1809 Elijah Milburn (the husband of Mary Milburn) conveyed to William Selby (Jr.) "all that tract of hummocks and marsh which was devised by the will of Anne Holden to Mary Milburn (former wife of Elijah).....being a moiety of a large tract which was devised by the will of Anne Holden to John Milligan and Mary Milburn and described by the words 'all her marsh and land at or near Saxis Island' the whole of such moiety so devised to said Mary is hereby intended to be conveyed except so much thereof as lies on the northeast sides of Fishing Creek and Back Creek."¹⁹ After this conveyance William Selby (Jr.) owned all of the lands originally patented to Francis Mackemie except those to the northeast of Fishing and Back Creek. William Selby (Jr.) died in 1821 and willed "all my salt marsh and hummocks" to his nephews William S. Tunnel and Samuel S. Tunnel.²⁰ William and Samuel Tunnel each became seized of an undivided one half interest in the tract as a result.

¹⁸ Wills, 1793

¹⁹ Deed Book 12, 1807-10, Page 327

²⁰ Wills, 1819-21, Page 383

At Samuel S. Tunnel's death in 1827, his undivided one half interest passed to his son John W. Tunnel.²¹

At John W. Tunnel's death in 1856 this undivided one half interest passed to his son William S. Tunnel and was described in the will as "a tract of land on Tunnel's Island which is a part of Sykes Island containing by estimation 500 acres." ²² William S. Tunnel conveyed this interest to a Frank Fletcher in 1882. The significance of this conveyance is that the interest conveyed is described as "an undivided one half of Tunnels Island containing 480 acres of arable and marsh land.....bounded on the east by Back and Sterling Creek, south by Messongo Creek, west and north by Pocomoke Sound."²³

After Samuel Tunnel's death in 1827 the other undivided one half interest in the tract belonging to Samuel's brother, William, remained in his hands until his death in 1831. As a result of the provisions in his will²⁴ and as a result of a suit to divide his lands, four of his heirs received an undivided one quarter interest in his one half interest in the tract. The tract is referred to in court records as "the Sixes Island land" and "the Sex's Island land"²⁵

²¹ cite Order Book, 1826-39, Page 187

²² Wills, 1846-82, Page 237

²³ Deed Book 54, Page 708

²⁴ Wills, 1828-46, Page 85

²⁵ Orders - 1829-32, Page 363

Tunnel's heirs, through a series of conveyances, sold their interests in the tract to a John Custis or a Spencer D. Fletcher (Sr.)

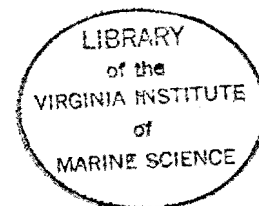
In 1831 Spencer D. Fletcher (Sr.) died intestate but seized of a portion of the undivided one half interest which passed from William S. Tunnel to his heirs (the other portion being purchased from the heirs by John Custis). Spencer D. Fletcher was survived by two sons, Spencer D. Fletcher (Jr.) and John R. Fletcher. In 1849 a suit was brought for a division of lands between the two sons. As a result of this suit Spencer D. Fletcher (Jr.) was assigned "the land on Six's Island.....erroneously called Tunnells Island, held jointly with the heirs of John Custis and John W. Tunnel..." The same court records also describe the land as "Tunnells Island or Sexes Island."²⁶ In 1874, Spencer D. Fletcher's (Jr.) interest was purchased at public auction by Albert S. Matthews and was described as a "1/4 interest in Tunnel Island."²⁷

At the death of John Custis in 1849 the interest he purchased from the Tunnel heirs passed to his son, James W. Custis. This interest is described in court records as "a tract of land on the south end of Saxes Island" and as "high land and marsh on the south end of Sexe's Island."²⁸

²⁶ Orders - 1840-72, Page 297

²⁷ Deed Book 66, Page 216

²⁸ Land Causes, 1849- , Page 19.



When James W. Custis died in 1879 his interest passed to his heirs and they jointly conveyed their "one quarter interest in Tunnels Island" to Albert S. Matthews in 1886.²⁹

By 1886 Albert S. Matthews had purchased a "one quarter interest" from the heirs of James W. Custis and a "one quarter interest" at public auction in 1874. Matthews then conveyed a "one quarter interest" to Frank Fletcher in 1888.³⁰ With the one half interest Fletcher received from William S. Tunnel in 1882, this gave him a three quarter interest in the tract. In September of 1893, Albert S. Matthews conveyed his remaining "one quarter interest" to a George W. Martin and the bounds of the tract were described as being Pocomoke Sound, Sterling Creek, Back Creek and Messongo Creek.³¹ Frank Fletcher, in October of 1893, conveyed to George W. Martin an "undivided three quarter interest in a tract or parcel of land containing by estimation 480 acres of arable and marsh land known as Tunnel's Island and bounded as follows, to wit, by Messongo Creek, Pocomoke Sound, Sterling's Creek and Back Creek.³² Thus, as of October 1893, George W. Martin was the putative owner of the entire tract of land west of Sterling's Creek and

²⁹ Deed Book 59, Page 220

³⁰ Deed Book 59, Page 515

³¹ Deed Book 66, Page 216

³² Deed Book 66, Page 217

Back Creek. Martin's ownership, however, was short-lived in that he conveyed his interest in the tract to Frank Fletcher in 1895.³³ Frank Fletcher, in turn, conveyed the tract to parties by the name of Lewis in 1906 describing it as being bounded by Messongo Creek, Pocomoke Sound, Sterling's Creek, and Back Creek.³⁴ This same description is used in contemporary conveyances.³⁵

A reasonable interpretation of such a description would be that Starling's Island is included in the tract. Tax records indicate, however, that the owners of Tunnel's Island do not claim and pay no taxes on Starling's Island. The impression that Starling's Island is a part of Tunnel's Island is supported not only by descriptions of the Mackemie tract but also by an examination of descriptions in the chain of title in the adjacent tract, Free School Marsh tract.

FREE SCHOOL MARSH

Descriptions in the chain of title to the Free School Marsh tract were analyzed to see if there was any possibility that Starling's Island could be included within the bounds of the tract. This tract is now owned by the Commonwealth and the chain of title has undoubtedly been carefully scrutinized.

³³ Deed Book 68, Page 286

³⁴ Deed Book 86, Page 315

³⁵ Deed Book 189, Page 485

This area was patented to Samuel Sandford in 1702 and 1704. Upon Sandford's death in 1712, his will provided that the profits from this tract be used for the education of the poor and described the western bounds as "adjoining to Sixess Island and Messongo Creek and Pocomoke Bay"³⁶ The land was used for the purposes set forth in the will for almost 200 years. In 1873, however, the County School Board ordered the sale of the tract. The lands were surveyed and divided into several lots or parcels.³⁷ A public auction was held and Albert S. Matthews purchased lot number seven, the western portion of the tract.³⁸ Neither the description in the deed nor the survey indicate that Starling's Island is included in the tract. By deed recorded in 1905 Albert S. Matthews conveyed this tract to Edward Martin describing it as being "bounded on the south and west by Messongo Creek and Back Creek and a narrow creek running from Back Creek to Starlings Creek and on the north and west by Starling Creek"³⁹ This description clearly rules out the possibility of Starling's Island being included in the tract. All further conveyances contain similar descriptions in conveyances or contain references to plats which rule out the possibility

³⁶ Whitelaw, Virginia's Eastern Shore, Page 1275.

³⁷ Survey Book 7, Page 18

³⁸ Deed Book 83, Page 125

³⁹ Deed Book 83, Page 402

of Starling's Island being included in the tract.

CONCLUSION

A study of the history and ownership of Starling's Island indicates that the island was originally granted as a part of the Mackemie tract and has continued to be included and conveyed as a part of that tract. The fact that the island is apparently unclaimed by the present owner of Tunnel's Island (the remainder of the Mackemie tract) may be explained by the confusion persisting over place names and the geography of the region or by the fact that other claims (although erroneous) to Starling's Island existed at the time Tunnel's Island was conveyed to the present owner. In an analysis of maps, plats, surveys, patents, deeds, wills, inventories, tax records and court records spanning four centuries, no evidence of legitimate ownership of Starling's Island by Danny Ewell Marshall or any other party currently laying claim to this property has been found. In addition, by being part of a tract originally granted in 1699, Starling's Island is not subject to claim by the Commonwealth under Section 62.1-1 or Section 41.1-4 of the Code of Virginia.

APPENDIX

SENATE JOINT RESOLUTION NO. 153

Offered January 24, 1975

Directing the Virginia Institute of Marine Science to include the question of the ownership of Starling's Island in their current study on common lands of the Commonwealth.

Patron - Mr. Fears

Referred to the Committee on Rules

WHEREAS, the Virginia Institute of Marine Science is currently engaged in research relative to the existence and location of coastal lands known as common lands, which lands are ungranted lands of the Commonwealth held in trust for the use and benefit of the people of the Commonwealth; and,

WHEREAS, an island known as Starling's Island, located in Accomac (sic) County near Saxis, Virginia, has for many years been used by the public in general for various purposes, including public bathing, fishing, the hauling of fish nets and recreation; and

WHEREAS, certain private parties have recently asserted claims of ownership in Starling's Island, which claims are not supported by recorded deeds or other muniment of title; and

WHEREAS, it is deemed to be in the best interest of the Commonwealth and its citizens who have customarily used Starling's Island as a common area that the lawful ownership

of the island be determined; now, therefore, be it

RESOLVED, by the Senate, the House of Delegates concurring, That the Virginia Institute of Marine Science is directed to study the question of ownership of Starling's Island in connection with and as a part of its current study of common lands of the Commonwealth and shall report its findings and conclusions relative thereto, in writing, to the Attorney General, not later than November thirty, nineteen hundred seventy-five.

SECTION 62.1-1

Ungranted beds of bays, rivers, creeks and shores
of the sea to remain in common.

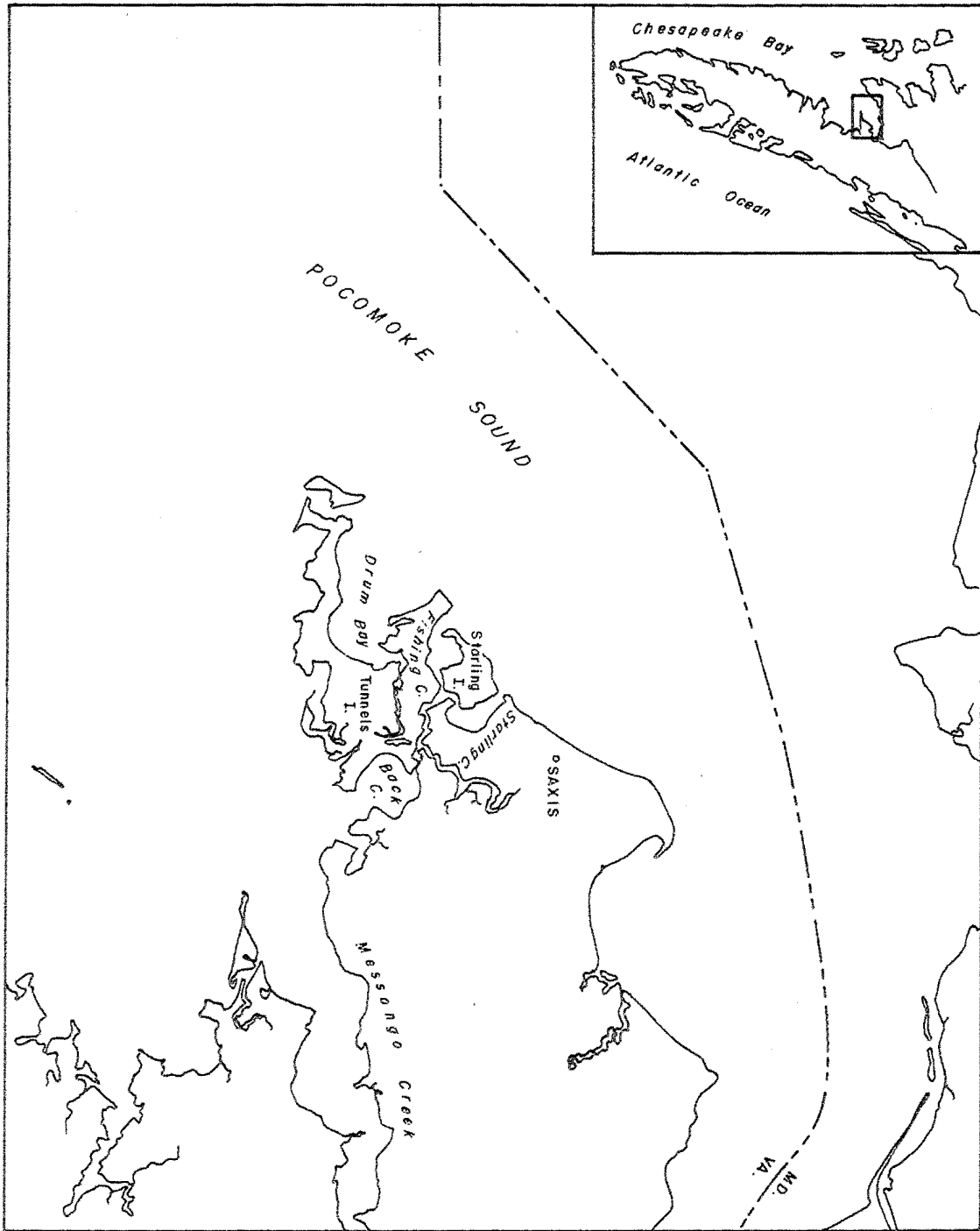
All the beds of the bays, rivers, creeks and the shores of the sea within the jurisdiction of this Commonwealth, and not conveyed by special grant or compact according to law, shall continue and remain the property of the Commonwealth of Virginia, and may be used as a common by all the people of the State for the purpose of fishing and fowling, and of taking and catching oysters and other shellfish, subject to the provisions of Title 28.1, and any future laws that may be passed by the General Assembly. And no grant shall hereafter be issued by the State Librarian to pass any estate or interest of the Commonwealth in any natural oyster bed, rock, or shoal, whether the bed, rock or shoal shall ebb bare or not.

SECTION 41.1-4

Unappropriated marsh or meadowlands on Eastern Shore;
common for fishing and hunting.

All unappropriated marsh or meadowlands lying on the Eastern Shore of Virginia, which have remained ungranted, and which have been used as a common by the people of this State, shall continue as such common, and remain ungranted. Any of the people of this state may fish, fowl, or hunt on any such marsh or meadowland. (Code 1950 (Repl. Vol. 1953), 41-8.1; 1970, c. 291.)

Applied in *Powell v. Field*, 155 Va. 612,
155 S.E. 819 (1930).



A CHRONOLOGICAL LISTING OF PLACE NAMES
USED IN THE GENERAL AREA IN QUESTION

- pre 1673 Map - "Sicoce I"
- 1673 Map - "Sicoce I"
- 1702 Patent to Samuel Sandford - "St. Georges alias Sickis
Island"
- 1704 Patent to Samuel Sandford - "St. Georges alias Sickes
Island"
- 1708 Will of Francis Mackemie - "Sykes Island"
- 1712 Will of Samuel Sandford - "Sixess Island"
- 1788 Will of Anne Holden - "Saxis"
- 1799 Map - "Sicoce I"
- 1809 Deed - "Saxis Island"
- 1820 Survey of Accomac - "Sykes I"
- 1825 Map - "Sykes Island"
- 1830 Deed - "Six's Island"
- 1831 Deed - "Sixes Island"
- 1831 Order - Sex's Island"
- 1831 Inventory - "Sexes Island"
- 1849 Land Cause - "Saxes Island"
- 1849 Order - "Sex's Island"
"Sexes Island"
"Tunnels Island"
- 1855 Railroad Survey - "Sykes I"
- 1856 Will of J. W. Tunnel - "Tunnels Island which is a part
of Sykes Island"
- 1859 Map - "Tunnels Island" and "Sykes I"

AN OUTLINE OF THE MACKEMIE TRACT HISTORY
 (see text, page 10 for a more complete explanation)

