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THE UNRESOLVED STRUCTURE OF PROPERTY RIGHTS IN THE VIRGINIA SHORE

DENIS J. BRION*

Numerous actions of the Virginia Assembly dating back to 1672 have affected property interests in the Virginia shore, the strip of land between high and low water mark. Although Virginia courts have construed these actions several times, the meaning of the statutes remains unclear. In September 1982, the Virginia Supreme Court announced its decision in *Bradford v. The Nature Conservancy*,¹ in which the court further construed several of these actions affecting the Virginia shore, but also fell short of achieving an adequate interpretation. The Conservancy, a private foundation, had purchased all or part of thirteen of the Virginia barrier islands to protect them from development and use inconsistent with their ecological function.² One of the principal issues on appeal was the nature of public and private rights to the marshes and beaches in the tidal shore of one of these barrier islands, Hog Island. The court's resolution of this issue affects property rights in the shore not only of the barrier islands, but also of all Virginia lands located on tidewater.

The purpose of this Article is to recount and analyze the legislative actions affecting Virginia's shore and, through a critical analysis of the judicial opinions which have interpreted them, including *Bradford*, to suggest how these Assembly actions ought to be read to determine the private and public property interests in the Virginia shore.

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1. 224 Va. 181, 294 S.E.2d 866 (1982).

2. W. COLE, F. COOPER & J. PARTRIDGE, *A GUIDE TO THE NATURE CONSERVANCY PRESERVES IN VIRGINIA* (2d ed. 1982).

ECOLOGICAL FUNCTIONS OF THE TIDAL SHORE

Before proceeding with the principal analysis, it might be worthwhile to consider briefly the ecological functions of the tidal marshes and the barrier islands.³ The value of these functions is considerable, whether it is stated narrowly in terms of the market value of the real property and the commerce which they protect, or broadly in terms of natural genetic diversity.⁴

Since colonial times, the coastal salt marshes of the eastern seaboard have provided bountiful opportunities for hunting and fowling. Until recently, however, we have not understood the value of these marshes beyond the exploitation of their bounty. Instead, we have ditched and filled these marshes to eliminate the disease-carrying insects that they support. In the last generation, attracted by misleadingly low market prices, we accelerated this process of destruction for second homes and recreational development.

Concurrently, however, scientists have deepened our understanding of the intrinsic natural value of the Virginia coast. They have shown that the coastal wetlands of the Atlantic flyways are an essential element of the natural systems upon which migratory waterfowl depend. Research has also revealed the mechanical function of the tidal marshes as a protective buffer to the adjacent fastlands. The marshes not only absorb floodwater from upland rains and storm-driven tides, but also cleanse pollutants from fastland runoff.⁵

Perhaps the most important function of the tidal marshes is their role in the complex webs of marine life of the estuaries and nearby ocean. These webs begin with microbes that break down the marsh grasses as they die off seasonally, extend to tiny orga-

3. The discussion of the biotic function of the tidal marshes is based on MARYLAND STATE PLANNING DEP'T, *WETLANDS IN MARYLAND—TECHNICAL REPORT* (1970) [hereinafter cited as *WETLANDS IN MARYLAND*]; J. Gosselink, E. Odum & R. Pope, *The Value of the Tidal Marsh* (undated) (La. State Univ. Sea Grant Pub. 74-03) [hereinafter cited as *The Value of the Tidal Marsh*]; M. Wass & T. Wright, *Coastal Wetlands of Virginia* (1969) (Va. Inst. of Marine Science) [hereinafter cited as *Coastal Wetlands of Virginia*]. The discussion of the barrier islands is based on I. McHARG, *DESIGN WITH NATURE* 7-17 (1969).

4. For an explanation of the function of genetic diversity, see R. DAWKINS, *THE SELFISH GENE* (1976). Several authors present various ethical arguments. *E.g.*, M. BERMAN, *THE REENCHANTMENT OF THE WORLD* (1981); D. EHRENFELD, *THE ARROGANCE OF HUMANISM* (1978); P. SINGER, *THE EXPANDING CIRCLE* (1981).

5. *The Value of the Tidal Marsh*, *supra* note 3, at 9-14.

nisms that feed on the decayed vegetable matter, and continue through increasingly interlinked ecological chains to a variety of fin and shellfish. An estimated seventy to ninety percent of the shellfish and finfish of the Virginia tidal waters and the nearby ocean that have commercial or recreational value spawn or spend at least one stage of their life in the tidal marshes or feed on marine life that depends on the marshes. Without the tidal marshes, these fish would disappear.⁶

Scientific investigation of the barrier islands also has led to a more sophisticated understanding of their function as the principal protection of the mainland from Atlantic storms. The integrity of the barrier islands depends on fragile vegetation, especially the dune grasses that are essential to dune formation. Although remarkably tolerant of the harsh island conditions, these grasses are almost totally intolerant of human activity. Mere trampling on the dune grasses destroys them, thus ultimately destroying the dunes themselves.⁷ Island marshes are similarly important. Alteration of the island marshes lessens their storm buffering effectiveness, thereby exposing the narrow island body to erosion.

Most importantly, Virginia's barrier islands are not fixed. The ocean current slowly erodes the islands at the southern ends and accretes them at the northern ends. Consequently, the islands imperceptibly but constantly move north.⁸ Thus, the intensive development of a barrier island is ultimately incompatible with its natural functions.

ACTIONS OF THE COLONIAL VIRGINIA ASSEMBLY

"Olde Englishe" Common Law

American courts and treatise writers typically preface their analysis of property rights in tidal lands by stating the English common law as it had developed by the late sixteenth and early seventeenth centuries. These contemporary statements almost invariably contain a common core of principles: at English common law, title to and dominion over the coastal sea, tidal waters,

6. Coastal Wetlands of Virginia, *supra* note 3, at 74-81.

7. I. McHARG, *supra* note 3, at 13.

8. See, e.g., I. McHARG, *supra* note 3; Marinelli, *Swept Away*, ENV'TL ACTION 17 (Sept. 1979); Powledge, *Gone With the Wind*, Wash. Post, July 29, 1979 (Magazine), at 14.

and lands under them to the high water mark, were originally vested in the King. The term *jus privatum* denoted his title to the lands under tidal waters, while *jus publicum* denoted his dominion over the tidal waters.⁹ There was a presumption that a grant of land with tidal waters as a boundary ran only to the high water mark. The grant, however, could expressly include lands below high water mark. Title to those lands also could arise from long usage. If the *jus privatum*, or title, of the tidal beds left the King, he nevertheless retained the dominion, the *jus publicum*, over them. The King exercised this dominion to protect the common right of his subjects to navigate and fish in the tidal waters and the waters of the sea.¹⁰ Typically, American jurists and commentators accord this statement of English common law its proper ancestral status.¹¹

Although the English common law formed the broad context in which rights in land evolved in the Virginia colony,¹² this Article will not assume that the actions of the Virginia Assembly which created or recognized property rights in the Virginia tidal shore were meant to be consistent with the contemporaneous English common law doctrine for several reasons. The first of these reasons recognizes practicalities. Although present statements can describe

9. See, e.g., *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894); *Miller v. Commonwealth*, 159 Va. 924, 929-31, 166 S.E. 557, 558-59 (1932); 1 R. CLARK, WATERS AND WATER RIGHTS 190-91 (1967).

10. *Shively v. Bowlby*, 152 U.S. 1, 11-13 (1894); *Miller v. Commonwealth*, 159 Va. 924, 929-31, 166 S.E. 557, 558-59 (1932); 1 R. CLARK, WATERS AND WATER RIGHTS 190-91 (1967).

11. See *Shively v. Bowlby*, 152 U.S. 1, 14 (1894):

The common law of England upon this subject, at the time of the emigration of our ancestors, is the law of this country, except so far as it has been modified by the charters, constitutions, statutes or usages of the several Colonies and States or by the Constitution and laws of the United States.

12. Indeed, the Virginia Assembly in 1776 "ordained, That the common law of England . . . shall be the rule of decision, and shall be considered as in full force . . ." 9 W. HENING, THE STATUTES AT LARGE 127 (1779) [hereinafter cited as HENING'S STATUTES] (now codified, as amended, at VA. CODE § 1-10 (1979)). The Virginia Grand Assembly in its March 1661 session made a substantial bow in the direction of English law: "This assembly . . . have also endeavoured in all things (as neere as the capacity and constitution of this country would admit) to addhere to those excellent and often refined laws of England, to which we profess and acknowledge all *due obedience and reverence* . . ." 2 HENING'S STATUTES, *supra*, at 42-43. In his preface to volume 2 of the STATUTES AT LARGE, William Waller Henning stated that in the 1661 "code the *Common Law* of England is for the first time expressly adopted in Virginia . . ." *Id.* at iv.

accurately the common law in the 1600's, such statements do not thereby describe the law as it appeared to seventeenth century courts, practitioners, and legislators. The leading treatise of the day, *Coke on Littleton*,¹³ did not address property interests in the shore. The first systematic legal treatise on the English tidal shore, which is the foundation of most present statements of that law, was Lord Chief Justice Matthew Hale's *De Jure Maris*.¹⁴ Written in the 1660's but not published until 1786,¹⁵ *De Jure Maris* post-dates the founding of Virginia and the emergence of patterns of property interests. Additionally, an American commentator has made a convincing case that in the 1600's the doctrines in *De Jure Maris* were emergent rather than settled.¹⁶ Thus, it appears that contemporary statements of the English common law of shore rights are anachronistic.

Whatever may have been the legal currency in England, however, was not necessarily legal currency in Virginia. The relevant materials probably would not have been available in a colony that remained close to the subsistence level until well after the middle of the seventeenth century.¹⁷ More importantly, for a long period after 1645, Virginia did not always welcome lawyers. That year, the Grand Assembly "enacted [t]hat all mercenary attorneys be wholly expelled from such office"¹⁸ The Assembly did not perma-

13. E. COKE, *FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND: OR, COMMENTARIE UPON LITTLETON* (1628). Thomas Jefferson, recalling the 1760's when he was reading for the bar, said "*Coke Lyttleton* was the universal elementary book of law students." A. Smith, *Virginia Lawyers, 1680-1776: The Birth of An American Profession* 75 (1967) (unpublished Ph. D. dissertation, Johns Hopkins Univ.).

14. *Reprinted in* S. MOORE, *A HISTORY OF THE FORESHORE* 370-413 (3d ed. 1888).

15. According to 1 W. MAXWELL & L. MAXWELL, *A LEGAL BIBLIOGRAPHY OF THE BRITISH COMMONWEALTH OF NATIONS* 32-33 (1955), *De Juris Maris* was first published in F. HAR- GRAVE, *COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND* (1787).

16. H. FARNHAM, *THE LAW OF WATERS AND WATER RIGHTS* 180-86 (1904).

17. See generally E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* (1975). That legal materials were lacking is suggested by a 1666 Virginia statute directing that the English statutes at large be purchased "for the better conformity of the proceedings of the courts of this country to the lawes of England" 2 HENING'S STATUTES, *supra* note 12, at 246.

18. 1 HENING'S STATUTES, *supra* note 12, at 302, 313, 330, 349. Although lawyers in every era have failed to engender the undying affection of the lay populace, the vituperation heaped upon seventeenth century Virginia practitioners in the 1645 statute is especially colorful: "Whereas many troublesom suits are multiplied by the unskillfullness and covetousness of attorneys, who have more intended their own profit and their inordinate lucre then the good and benefit of their clients" 1 HENING'S STATUTES, *supra* note 12, at 302.

nently establish a licensing system for attorneys until 1732.¹⁹ It was a matter of happenstance then when anyone in colonial Virginia's courts had any formal legal education.²⁰

A second matter, apart from whether the members of or those practicing before the rights-determining colonial institutions were aware of English common law principles, is whether those principles would have been relevant to the circumstances of the Virginia colony. Extensive Crown rights in land were characteristic of the feudal era, when governance was a principal function of holding an interest in land. By the time of the founding of the colony, however, the nexus between land holding and governance had long since been undermined.²¹

England established the Virginia colony for intensive exploitation of its natural resources.²² The institutional form chosen for this enterprise is itself suggestive of England's purpose. James I granted to the London Company, a group of private investors, a rather full interest in Virginia's lands: "[T]hey shall have all the lands, woods, soil, grounds, havens, ports, rivers, mines, minerals, marshes, waters, fishings, commodities, and hereditaments, whatsoever. . . ."²³

The first immigrants to the colony did not hold land as individuals. Instead, the London Company initially established a communal system of landholding. Under this system, however, the colony chronically failed to become self-sufficient,²⁴ and in 1618 the London Company replaced the communal system with a "head-

19. 4 HENING'S STATUTES, *supra* note 12, at 357, 360-62.

20. *E.g.*, O. CHITWOOD, *JUSTICE IN COLONIAL VIRGINIA* 123 (1905); *COUNTY COURT RECORDS OF ACCOMACK-NORTHAMPTON, VIRGINIA 1632-1640*, at xxxix (S. Ames ed. 1973).

21. Just a sampling of the events that undermined this nexus would include the early twelfth century royal practice of accepting a money payment in lieu of knight service, the political compromise in 1153 by which Henry II became the successor to Stephen, and the Magna Charta. *See generally* R. DAVIS, *KING STEPHEN* 111-28 (1967); T. PLUCKNETT, *LEGISLATION OF EDWARD I* (1962); J. SCHLIGHT, *MONARCHS AND MERCENARIES: A REAPPRAISAL OF THE IMPORTANCE OF KNIGHT SERVICE IN NORMAN AND EARLY ANGEVIN ENGLAND* (1968); F. STENTON, *THE FIRST CENTURY OF ENGLISH FEUDALISM, 1066-1166*, at 112-14 (1961); W. WARREN, *HENRY II* 47-53 (1973).

22. *See* E. MORGAN, *supra* note 17, at 44-46.

23. 1 HENING'S STATUTES, *supra* note 12, at 57, 59.

24. E. MORGAN, *supra* note 17, at 80-82; W. ROBINSON, JR., *MOTHER EARTH — LAND GRANTS IN VIRGINIA, 1607-1699*, at 15-17 (1957).

right" system under which individuals held land.²⁵ The headright system entitled each person who came to the colony to fifty acres.²⁶ That the London Company intended these land rights to represent private land-holding in a present-day sense is suggested by the fact that the Company included special provisions for public lands.²⁷

The Crown revoked the Company's charter in 1624²⁸ and took direct control of the colony. Although the system of public lands fell into disuse under the Crown,²⁹ apparently the headright system remained intact.³⁰ After the Crown took control of the colony, individuals held land under a relatively modest quitrent assessed on the basis of acreage.³¹ The principal revenues to support the indigenous government and to enhance the Crown treasury came from a poll tax and from taxes on the yield of the land, rather than from exactions on landholding itself.³²

For all these reasons, a presumption that government policy was to parcel out as much Virginia land as possible for private exploitation is as valid as a presumption that government policy was to hold specified categories of land in the public domain. Rather than assuming the Colonial Assembly intended its actions to be consistent with contemporary English common law doctrines concerning tidal lands, this Article will analyze these actions on their own terms to try to educe what land rights the colonists thought they were creating.

25. The reorganization of the Virginia enterprise is described in E. MORGAN, *supra* note 17, at 92-98.

26. *Id.* at 93-94.

27. *Id.* at 96-97. The Company assigned considerable tracts to the governor, to each of the four boroughs established at that time, to the several parishes, and to the college to be established on the James River a short distance below the fall line. The London Company reasoned that the yield from these tracts, worked by indentured servants, would support the religious and secular officials, thereby obviating the need to raise tax revenues for that purpose. The instruction of the London Company to the governor of the colony establishing these land assignments and the headright system are set out in A. EMBREY, *WATERS OF THE STATE* 9-16 (1931).

28. E. MORGAN, *supra* note 17, at 101-02.

29. A. BROWN, *THE FIRST REPUBLIC IN AMERICA* 627 (1898).

30. At least, the headright still formed the basis of the land grant system when the Assembly set it out in statutory form in the next century. See 3 HENING'S *STATUTES* *supra* note 12, at 304.

31. Even at its modest level, the quitrent rarely was collected. W. ROBINSON, JR., *supra* note 24, at 54-59.

32. E. MORGAN, *supra* note 17, at 193-94, 209.

*Colonial Legislation**The Wetlands Enactments*

The colonial land grant system developed a patchwork pattern of private land ownership in eastern Virginia.³³ Because of the exploitative, boom-town attitude among colonial planters,³⁴ patented land was primarily arable tracts, pasture, and woodland, leaving salt marshlands and freshwater swamps in Colony ownership. These areas were not without value, however, because they afforded excellent hunting and fowling.

A measure adopted in 1672 by the Grand Assembly reveals that colonists were beginning to obtain patents for wetlands.³⁵ The mere fact that the Assembly legislated on the matter suggests that this patenting of wetlands caused political controversy, as the preamble to the 1672 enactment recounts:

WHEREAS many inconveniences may arise to severall inhabitants of this country who have land adjoining to swamps, marshes, and suncken land unpattented if any others who are disjoyned from the same may be admitted presently to take up and patent them, This grand assembly takeing the same into their consideration and being willing [that] mens very conveniences be preserved to them, from which in this case they need not depart but by their owne default. . . .³⁶

Apparently, controversy arose because individuals who did not own fastland nearby sometimes obtained patents to the wetlands, thereby denying to owners of land adjacent to the marshes and swamps hunting preserves for which they formerly had not been burdened by the principal responsibility of ownership, the quitrent.³⁷ The 1672 enactment addressed the problem by giving an

33. The headright itself was not an entitlement to specific land. Rather, it entitled the holder to locate 50 acres of unappropriated land, title to which he then obtained in exchange for the headright. The procedure, as ultimately developed, is described in VA. CODE §§ 7, 8, 17, 24, 29-32, 37, 38, 48, 53-55 (1819). For a historical discussion, see W. ROBINSON, JR., *supra* note 24, at 33-43.

34. J. DAVIDSON & M. LYTLE, *AFTER THE FACT: THE ART OF HISTORICAL DETECTION* 17-27 (1982); E. MORGAN, *supra* note 17, at 108-30.

35. 1672 Va. Acts ch. 9, 2 HENING'S STATUTES, *supra* note 12, at 300.

36. *Id.*

37. Responsibilities of ownership included quitrents, which were fixed rents payable by a freeholder to his feudal superior in commutation of services.

adjacent owner what amounted to a one-year right of first refusal whenever an outsider sought to obtain a patent for wetlands.³⁸

In 1705, the Assembly first put into statutory form the procedures which had evolved for obtaining a patent for land, and for satisfying the seating³⁹ and planting requirements following the issuance of the patent.⁴⁰ This land grant statute incorporated, and added considerable detail to the preemption right created in 1672, and encouraged the patenting of wetlands.⁴¹ The seating and planting requirements were waived for "swamps, marshes or other uninhabitable grounds."⁴² Additionally, the statute provided for damages and criminal penalties for individuals who "shall at any time hereafter shoot, hunt or range upon the lands and tenements, or fish or fowl *in any creeks or waters included within the lands of any other person or persons* without lycence for the same, first obtained of the owner and proprietor thereof. . . ."⁴³

The "Infill" Enactments

These first-refusal provisions remained in effect virtually unchanged throughout the colonial period, despite major revisions to

38. 2 HENING'S STATUTES, *supra* note 12, at 300-01.

[I]t shall not be lawful for any person whatsoever to take any marshes, swamps, or suncken lands, adjoyning to any mans land but shall first give notice to the owner or owners of the land to which it adjoyneth, who shall have one yeares tyme to resolve whether he or they will take up the same or noe, and in case, at the expiration of that terme, the owner or owners of the land adjoyning to the said marshe, swampe, or suncken land shall then refuse to survey and pattent the same, it shall then be lawful for the first person who gave notice as aforesaid to survey and pattent the same according to law.

Id.

39. "Seating" means erecting buildings, pasturing livestock, or otherwise occupying the land.

40. 3 HENING'S STATUTES, *supra* note 12, at 304. The seating and planting requirements are set out *id.* at 313.

41. The person proposing to take up these wetlands now was required to give notice, in the presence of two witnesses, to any owners of adjacent high land before the one-year period was to commence. *Id.* at 306-07.

42. In any controversy over such lands arising within five years of a person entering into possession, the burden of proving that statutory notice had been given was placed on the person required to give the notice. Exempted from patent were any such wetlands "lying adjacent to the highlands of any *feme covert*, infant under the age of one and twenty years, or any person not being *compos mentis*." *Id.* at 307.

43. *Id.*

the land grant statute in 1710⁴⁴ and 1748.⁴⁵ These provisions, however, apparently did not resolve the problem of patches of unpatented land, probably because the statutory mechanism operated only when an outsider attempted to obtain a patent for wetlands. The preamble to a statute enacted at the 1712-1713 session of the General Assembly graphically describes the problem:

And whereas, great part of the lands now to be taken up in this colony, are so barren, that the same cannot be cultivated and tended, with any profit to the owner, until first improved and manured; and others are so stony and rocky, that no person will patent the same, except upon the prospect of the mines and quarries which may be found therein; and many other tracts are full of marshes, swamps, and sunken grounds, unfit, either for cultivation or pasturage, without being first cleared and drained: To the end therefore, that sufficient encouragement may be given for taking up, as well the unprofitable as profitable lands within this dominion, for the encrease and advancement of her Majesty's revenue of quit-rents, and for the benefit of her Majesty's subjects. . . .⁴⁶

This enactment prohibited the gerrymandering of a survey to

44. *Id.* at 517.

45. 5 HENING'S STATUTES, *supra* note 12, at 408. After Independence, the Assembly repealed the 1710 land grant statute and established a Commonwealth land office through the 1779 Land Office Act. 10 HENING'S STATUTES, *supra* note 12, at 50. This Act replaced the wetlands provisions of the 1748 statute with a simplified version, giving the contiguous highland owner a more limited preemption for one year from the enactment of the 1779 statute. *Id.* at 61-62. A 1784 statute repealed these wetland provisions, however, "for the want of a due promulgation" of the 1779 statute, and all entries made for wetlands pursuant to the 1779 provisions were "declared null and void." 11 HENING'S STATUTES, *supra* note 12, at 371. The 1784 statute reestablished the contiguous owner's preemption, but with a fixed expiration date of May 1, 1786. The exception for wetlands contiguous to the lands of persons under disability continued, but with a proviso that the exception would be in effect only for the fixed period of three years after removal of any such person's disability. *Id.* The Assembly made a final attempt to encourage the taking up of waste land in the eastern part of Virginia in a 1785 enactment which removed for such lands the upper limit that could be obtained in a single patent. 12 HENING'S STATUTES, *supra* note 12, at 100. Under the 1779 Land Office Act, this limit was 400 acres. 10 HENING'S STATUTES, *supra* note 12, at 50, 54. The 1849 Code deleted the wetlands provisions; the Revisors Report noted that "[a]fter sixty-two years it is scarcely possible that all such disabilities should not have ceased more than three years." J. PATTON & C. ROBINSON, REPORT OF THE REVISORS' OF THE CIVIL CODE OF VIRGINIA 582 (1847-1849) [hereinafter cited as 1849 REVISORS' REPORT].

46. 4 HENING'S STATUTES, *supra* note 12, at 37, 38.

avoid "unprofitable" lands:

[N]o survey of lands shall hereafter be made, in order to the obtaining a patent, unless . . . in all such surveys, the breadth of the tract or dividend so laid out, bear at least the proportion of one third part of the length, except where the course thereof shall be interrupted by rivers, creeks, or unpaſſable swamps, or by the bounds of lands theretofore taken up or patented. . . .⁴⁷

The 1748 revision of the land grant statute incorporated this restriction,⁴⁸ and succeeding revisions continued it.⁴⁹

These early enactments are much more consistent with a policy of putting the maximum amount of land into private ownership than with a policy of duplicating the pattern of land rights in the coastal areas of England. The legislative decision to give adjacent landowners a preemptive right to the marshlands likely was a political choice that favored the large established tidewater landowners over newcomers that tended to settle inland.⁵⁰ By making this choice, however, the Assembly implicitly rejected a third alternative—retaining the disputed marshlands in colony ownership.

Significantly, the wetlands preemption provisions do not distinguish between freshwater swamps and tidal marshes. Although salt marsh flora occur both above high water mark and below low water mark, the great bulk of these marshes lie in the intervening tidal shore. The wetlands provisions suggested the transfer of a large portion of the shore to private hands, and the primary political question was the identity of those private hands. Equally significant, the wetlands provisions recognized that tidal beds, as well as the tidal shore, were being granted out to private ownership.

Colonial Adjudication

Although there was a mid-seventeenth century hiatus in the practice of law, a substantial court system existed.⁵¹ Unfortunately,

47. *Id.* at 38.

48. 5 HENING'S STATUTES, *supra* note 12, at 408, 424.

49. *See, e.g.*, 10 HENING'S STATUTES, *supra* note 12, at 50, 57.

50. For a description of the emergence, in the 1670's, of a wide gulf between the political attitudes of the Tidewater landowners and those of the frontiersmen of the Piedmont, see E. MORGAN, *supra* note 17, at 250-70.

51. Two bodies, the general court and the Grand Assembly, exercised colony-wide original

only fragments of records⁵² from these courts survive and apparently only two extant adjudicatory statements address property interests in the shore. These records, however, are consistent with the legislation of that same period in treating private ownership of the tidal shore and tidal beds the same as for adjacent fastland.

The Robert Liny Order (1679)

In 1679, the Grand Assembly entered the *Robert Liny* order,⁵³ the earliest extant public action expressly addressing property interests in the tidal shore.⁵⁴ Robert Liny represented to the Grand

and appellate jurisdiction over the county courts during the colonial period. Although the general court exercised its jurisdiction for the entire colonial period, its records are extant only for the periods 1622-1632 and 1670-1676, with fragments for the period 1677-1683. These records are collected in *MINUTES OF THE COUNCIL AND GENERAL COURT OF COLONIAL VIRGINIA* (H. Mellwaine ed. 1924). A fire destroyed the remaining records during the evacuation of Richmond in 1865. *Id.* at v.

The Grand Assembly exercised appellate jurisdiction from 1642 to 1683. *See* HENING'S STATUTES, *supra* note 12, at 270; 2 HENING'S STATUTES at 65; 3 HENING'S STATUTES at 543, 550. The records of the Grand Assembly for this period consist of its final enactments, orders, and resolutions. They are collected in 1-3 HENING'S STATUTES.

52. *See supra* note 51.

53. ROBERT Liny haveing complained to this grand assembly, that whereas he had cleared a fishing place in the river against his owne land to his greate cost and charge supposing the right thereof in himselfe by virtue of his pattents, yett neverthelesse severall persons have frequently obstructed him in his just priviledge of fishing there, and in despight of him came upon his land and hale their sceanes on shore to his greate prejudice, aledging that the water was the kings majesties, and not by him granted away in any subjects to fish in and hale their sceanes on shore, and praying for reliefe therein by a declaratory order of this grand assembly; *it is ordered and declared by this grand assembly* that every mans right by virtue of his pattent extends into the rivers or creekes soe farre as low water marke, and it is a privilege granted to him in and by his pattent, and that therefore no person ought to come and fish there above low water marke or hale their sceanes on shoare (without leave first obtained) under the hazard of committing a trespasse, for which he is sueable by law.

2 HENING'S STATUTES, *supra* note 12, at 456.

54. Curiously, the nature of the *Liny* order has received significantly more attention than the meaning of the order. Unfortunately, Virginia courts have been inconsistent in interpreting the order's effect. Between 1881 and 1925, the Virginia Supreme Court rendered six decisions involving ownership rights in the Tidewater Virginia shore: *Steelman v. Field*, 142 Va. 383, 128 S.E. 558 (1925); *Whealton & Wisherd v. Doughty*, 112 Va. 649, 72 S.E. 112 (1911); *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875 (1904); *Waverly Water-Front & Improv. Co. v. White*, 97 Va. 176, 33 S.E. 534 (1899); *Groner v. Foster*, 94 Va. 650, 27 S.E. 493 (1897); *Garrison v. Hall*, 75 Va. 150 (1881). In each of these decisions, the court treated

Assembly that he had cleared a "fishing place" in the tidal river that bounded his land.⁵⁵ He complained that "severall persons" had obstructed the fishing place that he had cleared, and that they "came upon his land and hale their sceanes on shore."⁵⁶ The dispute appears to represent a clash between the colonial policy of maximizing private landholding and the ancient common right of the people to fish in the tidal waters. The Assembly's resolution of the dispute accommodated both sides. By saying nothing of the obstruction of Liny's fishing place in the river, the Grand Assembly implicitly rejected Liny's contention that he had exclusive rights below low water mark. Above that mark, however, the Assembly established that Liny and similarly situated individuals held exclusive rights. Others who fished above the low water mark at high tide or hauled seines on the tidal shore at low tide committed a trespass.

the *Liny* order as the statutory ancestor of the 1819 Act which expressly recognized that the title of a riparian landowner on tidal waters runs to the low water mark. See *infra* text accompanying notes 76 & 86-93.

In 1932, however, the court held that the *Liny* order "was not a legislative enactment which changed the rules of the common law relative to crown grants of land on tidal waters." *Miller v. Commonwealth*, 159 Va. 924, 940, 166 S.E. 557, 562 (1932). In 1965, the Virginia Supreme Court rendered its next, and most recent, decision mentioning the *Liny* order in *Thurston v. City of Portsmouth*, 205 Va. 909, 140 S.E.2d 678 (1965). In that case, the court again cited *Liny* as the original statutory source for private ownership of the shore. The court in *Thurston*, however, did not mention the *Miller* case.

A detailed consideration of the Virginia judicial decisions reveals neither an explanation for the inconsistency in the outcomes nor a convincing rationale for either of the results. The seven decisions of the Virginia Supreme Court that treat the *Liny* order as a valid statutory enactment merely mention the order without examining the peculiar fact that the order is not cast in traditional legislative language. The federal courts also appear to treat the *Liny* order as a statutory provision. See *Shively v. Bowlby*, 152 U.S. 1, 24-25 (1894). See also 5 OP. ATT'Y GEN. 412 (1851).

Aside from a dissent in *Commonwealth v. Garner*, 44 Va. (3 Gratt.) 655 (1846), the only Virginia Supreme Court discussion of the *Liny* order occurs in *Miller*, where the court concluded that the order was of no effect. The opinion focused narrowly on the issue of whether the order was a valid legislative enactment, and concluded that it was not. 159 Va. at 939, 166 S.E. at 562. The court rejected, without discussion, consideration of the order as an adjudicatory action by the Grand Assembly. 159 Va. at 940, 166 S.E. at 562.

The form and substance of the order, however, are entirely consistent with its being a valid exercise of the appellate jurisdiction of the 1679 Grand Assembly. The court in *Miller* implicitly recognized the adjudicatory power of the Assembly. 159 Va. at 943, 166 S.E. at 563.

55. 2 HENING'S STATUTES, *supra* note 12, at 456.

56. *Id.*

Curle v. Sweney (1740)

The decision of the Virginia General Court in *Curle v. Sweney* survives only in plaintiff's counsel's notes of the arguments advanced by counsel for each party.⁵⁷ Those notes do not describe, however, the reasoning of the judges.⁵⁸ If the decision of the court responded to the arguments of counsel, however, something of the basis of the decision can be reconstructed.

Sweney "upon a suggestion that he had by Industry gained some land out of the River obtained a grant from the Crown of a small parcel of land in the bed of the [Hampton] River" and there built "a House upon Posts . . . under which House the Water ebbs & flows so that . . . the Ground it stands upon is between high & low Water Mark."⁵⁹ Sweney's parcel of land abutted Curle's riparian lot which was bounded by the Hampton River. In a unanimous decision, Curle prevailed in an action of ejectment to recover Sweney's house.

Sweney's counsel argued that Curle's title ran only to the high water mark because the surveyor's lines on which the patent was based ran only that far. Sweney apparently had intended to obtain a grant of the tidal bed opposite Curle's land, and then lay claim to the adjacent tidal shore on the basis that his title extended up to the high water mark because Curle's patent did not expressly run below the high water mark. Sweney's counsel apparently did not attempt to support the grant from the Crown.⁶⁰ Evidently, Sweney's ultimate position was that a grant of riparian land not expressly including the adjacent tidal shore would not support a private action of ejectment against an occupier of the shore.

Curle's counsel cited two propositions gleaned from the English reports:⁶¹ that a grant of riparian land validly can include the

57. Virginia judicial decisions were not regularly reported until 1790. See *infra* note 89 and accompanying text. *Curle v. Sweney* survived because the careful case notes of Edward Barradall, counsel for one the parties, survived. 2 VIRGINIA COLONIAL DECISIONS B117 (R. Barton ed. 1909).

58. As might be expected, Barradall's notes of his own eloquence are copious, those of his opponent's eloquence rather sketchy, and those of the court's decision terse to the vanishing point—"Judgm't Fr. Plt. Fr. tot. Cur." *Id.* at B119.

59. *Id.* at B117.

60. *Id.* at B119.

61. From the way in which Barradall handled the English materials, his library of English

shore,⁶² and that land gained by alluvion belongs not to the Crown but to the adjoining riparian owner.⁶³ From these propositions, Curle's counsel argued that land gained from the sea by industry, regardless whose, also belongs to the riparian owner, and that granting the adjacent shore to another person would deny the riparian owner access to the water.⁶⁴

Since Curle prevailed in ejectment against Sweney, *Curle v. Sweney*⁶⁵ must stand for the principle that a grant of land bounded by tidal waters, but not expressly including the adjacent tidal shore, nevertheless passes title to that shore. Thus, *Curle v. Sweney* upholds the conclusion of the *Liny* order that "every mans right by virtue of his patent extends into the rivers or creekes soe farre as low water marke. . . ."⁶⁶ Additionally, *Curle v. Sweney* is significant because of what is absent from the report: no dispute arose over the fact that Sweney's patent consisted solely of a portion of a navigable tidal bed.⁶⁷ Surely, had such a patent been in any way questionable, Curle's attorney would have argued on that basis rather than on the rather arcane doctrine of alluvion.

That only two relevant adjudicatory actions survive from the colonial period is regrettable. Significantly, however, both actions are entirely consistent with the implication of the legislative enactments that the colony routinely granted private title both to the tidal shore and to portions of the beds below the low water mark.

ACTIONS OF THE GENERAL ASSEMBLY (1779-1819)

The Syntax of the Enactments

Soon after Independence, the Virginia General Assembly began

law probably contained the reports, collected by Chief Justice Sir James Dyer, of King's Bench cases decided in the period 1513-1582 (reprinted, in a later edition, as part of volume 73 of the English Reports), and, perhaps, Sir Edward Coke's reports for the period 1598-1611 (reprinted, in a later edition, as volumes 76-77 of the English Reports). See *id.* at B118-19.

62. *Id.* at B118. Barradall based this proposition on Sir Henry Constable's Case, 77 Eng. Rep. 219 (K.B. 1601).

63. 2 VIRGINIA COLONIAL DECISIONS, *supra* note 57, at B118. This proposition is contained in a *Quaere* which appears at 3 Dyer 326, 73 Eng. Rep. 737.

64. 2 VIRGINIA COLONIAL DECISIONS, *supra* note 57, at B118.

65. *Id.* at B119.

66. 2 HENING'S STATUTES, *supra* note 12, at 456.

67. 2 VIRGINIA COLONIAL DECISIONS, *supra* note 57, at B117.

to adopt measures expressly addressing public rights in the tidal shore. The need for these measures arose from the enactment in 1779 of a comprehensive statute⁶⁸ replacing the 1705-1748 land patent statutes.⁶⁹ The General Assembly adopted the 1779 Land Office Act because of the "large quantities of waste and unappropriated lands within the territory of this commonwealth, the granting of which will encourage the migration of foreigners hither, promote population, increase the annual revenue, and create a fund for discharging the publick debt. . . ."⁷⁰ Although this Act primarily concerned land beyond the Alleghenies, substantial amounts of waste and unappropriated lands existed in eastern Virginia. The Land Office Act set no limit on the quantity of "waste and unappropriated" lands that any one person could take up, provided only that the person paid a fee of forty pounds per hundred acres to the Commonwealth.⁷¹

This attempt to encourage patenting of "waste and unappropriated" land caused an urgent conflict with a land grant policy of the late colonial government, and required immediate legislative action. At its May 1780 session, the General Assembly amended the new Land Office Act to prohibit the grant of "all unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek in the eastern parts of this commonwealth, which have remained ungranted by the former government, and which have been used as common to all the good people thereof. . . ."⁷²

68. 10 HENING'S STATUTES, *supra* note 12, at 50.

69. *See* 5 HENING'S STATUTES, *supra* note 12, at 304, 408, 517.

70. 10 HENING'S STATUTES, *supra* note 12, at 50.

71. *Id.* at 50, 52.

72. The 1780 Act reads in full:

WHEREAS certain unappropriated lands on the bay, sea, and river shores, in the eastern parts of this commonwealth, have been heretofore reserved as common to all the citizens thereof, and whereas by the act of general assembly entitled "An act for establishing a land office, and ascertaining the terms and manner of granting waste and unappropriated lands," no reservation thereof is made, but the same is now subject to be entered for and appropriated by any person or persons; whereby the benefits formerly derived to the publick therefrom, will be monopolized by a few individuals, and the poor laid under contribution for exercising the accustomed privilege of fishing: *Be it therefore enacted by the General Assembly, That all unappropriated lands on the bay of Chesapeake, on the sea shore, or on the shores of any river or creek in the*

In the ensuing years, the Assembly amended other provisions of the 1779 Land Office Act several times. In 1792, the Assembly consolidated the original statute and these various amendments into a replacement statute.⁷³ Section 6 of the 1792 statute incorporated the 1780 amendment prohibiting the granting of certain commons with one substantial addition: it prohibited granting "the bed of any river or creek in the eastern parts of this commonwealth."⁷⁴ In 1802, the Assembly further amended section 6 to extend the prohibition throughout the Commonwealth.⁷⁵

At its session beginning in December 1818, the General Assembly comprehensively addressed the extent of the rights of riparian landowners in Tidewater Virginia:

Whereas doubts exist, how far the rights of owners of shores on the Atlantic ocean, the Chesapeake bay and the rivers and creeks thereof, within this commowealth, extend; for explanation whereof, and in order effectually to secure said rights;

1. *Be it enacted by the General Assembly*, That hereafter the limits or bounds of the several tracts of land lying on the Atlan-

eastern parts of this commonwealth, which have remained ungranted by the former government, and which have been used as common to all the good people thereof, shall be, and the same are hereby excepted out of the said recited act, and no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law, to pass any estate or interests therein.

Id. at 226. The 1780 Act does not define the term "eastern parts" nor, despite the frequent use of "eastern" and "western" in other statutes, did the General Assembly define it elsewhere. Apparently, "eastern" denoted the watersheds of streams ultimately flowing to the Atlantic Ocean, and "western" denoted the watersheds of streams ultimately flowing to the Mississippi River. This is the conclusion of an exhaustive discussion in A. EMBREY, *supra* note 27, at 279-302.

73. 1792 Va. Acts ch. 24.

74. *Id.*

75. 1802 Va. Acts. ch. 7. This enactment provided:

1. Whereas it hath been represented to this present general assembly that many persons have located, and lay claim in consequence of such location to the banks, shores, and beds of the rivers and creeks in the western parts of this commonwealth, which were intended and ought to remain as a common to all the good people thereof:

2. *Be it therefore enacted*, That no grant issued by the register of the land office for the same, either in consequence of any survey already made, or which may hereafter be made, shall be valid or effectual in law to pass any estate or interests therein.

Id.

tic ocean, the Chesapeake bay, and the rivers and creeks thereof within this Commonwealth, shall extend to ordinary low water mark; and the owners of said lands shall have, possess and enjoy exclusive rights and privileges, to, and along the shores thereof, down to ordinary low water mark: *Provided*, That nothing in this act contained shall be construed to affect any creek, or river, or such part thereof, as may be comprised within the limits of any survey: And provided, also, That nothing in this section contained shall be construed to affect any creek, or river, or such part thereof, as may be comprised within the limits of any survey: And provided, also, That nothing in this section contained shall be construed to prohibit any person or persons from the right of fishing, fowling and hunting on those shores of the Atlantic ocean, Chesapeake bay, and the rivers and creeks thereof, within this Commonwealth, which are now used as a common to all the good people thereof; not to repeal [Section 6 of the 1792 Land Office Act]. . . .

. . . .

And be it enacted, That every person, acting contrary to the provisions of this act, shall be deemed a trespasser.⁷⁶

An Analysis of the 1779-1819 Enactments

Between 1672 and 1819, the Virginia Assembly passed several measures creating or recognizing property interests in Virginia's tidal lands. These acts tended to address specific political problems rather than establish broad and comprehensive rules.

76. 1819 Va. Acts ch. 28. The second section of the 1819 Act provides:

2. *And be it further enacted*, That, when any ship or other vessel shall be stranded, or foundered, or shall be in danger of being stranded, or foundered or where, from any other cause, any wares, goods or merchandize from such ship, or other vessel, shall be lodged upon, or floating along any of the shores aforesaid, above low water mark, the right of property in and to such goods, wares and merchandize, shall be in the owner of the land, upon, or over which, they may be found: *Saving, however*, to the former owner or owners of such goods, wares, or merchandize, all the rights, in and to such goods, wares and merchandize, which he or they hath or have under the existing laws of this Commonwealth: *Provided*, That nothing in this act contained shall be construed to affect, or abridge any of the rights, or powers given to the commissioners of wrecks by the act, passed the twentieth of June, seventeen hundred and eight-two, entitled, "an act concerning wrecks."

Id. § 2.

Some of the acts, such as the wetlands preemption provisions,⁷⁷ defined rights of individuals who already held title to lands bordering tidewater. Other acts, such as the 1713 "anti-gerrymandering" Act⁷⁸ and the 1779 Land Office Act,⁷⁹ addressed the impact on public revenue of a patchwork pattern of land grants. Still others⁸⁰ attempted to define access rights of individuals who did not own land riparian to tidal waters.

These enactments, taken together, are complex. Their language is not always simple, they appeal to several distinct policies, and they attempt to create a mix of public and private interests. Because of this complexity, the structure of property interests created in Virginia tidelands is unclear. The following discussion will attempt to define these property interests by considering the stated legislative policy of the act and the uses for which the legislature created common rights.

Legislative Policy

As stated in its preamble, a principal function of the 1779 Land Office Act was to transfer into private hands the "waste and unappropriated" lands in the Commonwealth. Although the General Assembly did not expressly define what constituted "waste and unappropriated" lands, a common-sense meaning in the context of the land patent system would be "land eligible to be patented."⁸¹

Similarly, no act defines the term "commons," which first ap-

77. 2 HENING'S STATUTES, *supra* note 12, at 300.

78. 4 HENING'S STATUTES, *supra* note 12, at 37.

79. 10 HENING'S STATUTES, *supra* note 12, at 50.

80. *Id.* at 226; 1801-1802 Va. Acts ch. 7; 1818-1819 Va. Acts ch. 28.

81. This definition is not necessarily circular. The dictionary defines "waste" as "barren land worthless for cultivation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2580 (1969). This definition is consistent with the way in which holders of headrights would gerrymander their surveys. "Unappropriated" connotes a purposeful official act. The most ready example of lands officially appropriated other than by patent would be the "public lands" established by the 1618 reorganization of the colony, discussed *supra* note 27. That the 1779 Land Office had no power to patent such lands is also suggested by the fact that these lands seem to have been granted out not through the executive powers of the government, but instead by a series of special legislative enactments. See, e.g., 4 HENING'S STATUTES *supra* note 12, at 180; 12 HENING'S STATUTES at 499-96; 10 HENING'S STATUTES at 279, 285; 12 HENING'S STATUTES at 97. Additionally, land which had once been patented but had escheated for failure to pay land taxes apparently could not be granted out again through the processes of the Land Office. See 1792 Va. Acts ch. 24, § 5; VA. CODE ch. 86, § 5 (1819).

pears in the preamble to the 1780 Act. The language of that preamble, however, strongly indicates what was meant by the term. It refers to "waste and unappropriated lands" and "certain unappropriated lands . . . [which] have been heretofore *reserved* as commons to all the citizens" ⁸² The body of the 1780 Act explains in further detail the meaning of commons by "all unappropriated lands . . . which have remained ungranted by the former government, and which have been used as a common to all the good people thereof" ⁸³ This statute establishes two criteria for lands to be reserved from grant: the land must have been as yet ungranted, and the land must have been used as a public common. The preamble in the 1802 amendment extending the 1780 Act to waters in western Virginia suggests that in fact the colonial government had followed a policy of withholding certain lands from grant for common use. ⁸⁴ The preamble to the 1802 Act describes "banks, shores, and beds . . . which were *intended* . . . as a common" ⁸⁵

The preamble to the 1819 Act recites that "doubts exist, how far the rights of owners of shores on the Atlantic Ocean, the Chesapeake bay and rivers and creeks thereof, within this commonwealth, extend" ⁸⁶ Two factors may have contributed to these doubts. First, *De Jure Maris*, published in the British Isles in 1787, may have achieved currency among Virginia attorneys and judges. This treatise stated there was a presumption that grants to tidal uplands did not run below the high water mark. Second, because the judicial doctrine in several of the other colonies held that the property rights of tidal riparian owners extended only to the high water mark, ⁸⁷ doubts may have arisen over the validity of the doctrine followed in the 1679 *Liny* order ⁸⁸ and the decision in 1740 in *Curle v. Sweney*. ⁸⁹ Alternatively, this doctrine may have enjoyed

82. 10 HENING'S STATUTES, *supra* note 12, at 226 (emphasis added).

83. *Id.* at 227.

84. *Id.* at 226 (emphasis added).

85. 1801-1802 Va. Acts ch. 7. The preamble refers to "banks, shores, and beds . . . which were *intended* . . . as a common" *Id.* (emphasis added).

86. 1818-1819 Va. Acts ch. 28.

87. *Shively v. Bowlby*, 152 U.S. 1, 18-26 (1894).

88. 2 HENING'S STATUTES, *supra* note 12, at 456.

89. *See supra* note 57.

continued formal validity, but may not have reflected the way people actually used the tidelands. The 1819 Act suggests the second alternative.

The 1819 Act contains three distinct provisos:

1. "That nothing in this act contained shall be construed to affect any creek, or river, or such part thereof, as may be comprised within the limit of any survey. . . ."⁹⁰

2. "That nothing in this section contained shall be construed to prohibit any person or persons from the right of fishing, fowling and hunting on the shores of the Atlantic ocean, Chesapeake bay, and the rivers and creeks thereof, within this Commonwealth, *which are now used as a common* to all the good people thereof."⁹¹

3. "That nothing in this section contained shall be construed to . . . repeal the sixth section of" the 1792 Land Office Act.⁹²

The first proviso confirms the strong implication of the wetlands preemption acts, that patents to lands in Tidewater Virginia often extended by their express terms below the low water mark to include the beds of tidal creeks and inlets.⁹³ This proviso also makes clear that the Assembly did not intend that the 1819 enactment work both ways: that is, it was meant to confirm that patents which described a body of tidal water only in general terms as a boundary extended, subject to exceptions, to low water mark. It was not meant, however, to establish that patents to riparian land that, by their terms, extended *below* the low water mark now extended only *down to* the low water mark.

The second and third provisos preserve common lands. The second proviso preserves lands "*now used as a common*;" thus, lands that in 1819 were being used as common lands were preserved even if such lands had not previously been identified or used as commons. The third proviso similarly preserves common lands by reserving from grant those common lands identified in the 1780 Act as reenacted in the 1792 Land Office Act.

90. 1818-1819 Va. Acts ch. 28.

91. *Id.* (emphasis added).

92. *Id.*

93. The language in the wetlands preemption acts impliedly corroborated this fact. See *supra* notes 35-50 and accompanying text.

The treatment of the lands described by the second and third provisos is substantially different. The lands described by the third proviso are exempt from grant and thus remain in the public domain. Common lands described in the second proviso, however, were not exempt from grant. The General Assembly could have provided that the boundary of riparian land ran only to high water mark "on the shores . . . which are now used as a common to all the good people," thus enabling the Commonwealth to retain title to these shores. Instead, the second proviso reserved to the public only certain uses of these shores the title to which was otherwise confirmed by the 1819 Act as being in the adjacent riparian owner.

Looking beyond the syntax of the 1819 Act to practicalities, the General Assembly's approach in the second proviso appears peculiar. Riparian landowners in Tidewater Virginia, which would include the owners of the major plantations, undoubtedly were well represented in the 1818-1819 Assembly. Yet, the second proviso confirms that these landowners had the burden of the land taxes for certain shores and simultaneously confirms that the public shared the principal benefits associated with those shores, the right to fish, fowl, and hunt.

The whiff of political compromise emerges from the second proviso. As tobacco farming exhausted the lands of eastern Virginia, these lands tended to fall into disuse.⁹⁴ This process accelerated where the land was touched by the ravages of the War of Independence. As more lands became exhausted and abandoned, it could be expected that lands on the shore, apart from those traditionally reserved as commons, would be used by more people and more frequently. The 1819 Act ratified the common law holding that riparian patents extended to the low water mark and simultaneously preserved this more recent public use of private portions of the shore, thereby accommodating two important segments of the eastern Virginia constituency.

According to this interpretation, the 1780 and 1819 Acts effectively created three kinds of tidal shores: (1) shores that had been reserved from grant by the Colony government, that were being used as commons in 1780 and that, therefore, were reserved from grant; (2) shores, other than the 1780 commons, that were used as

94. H. MAY, *THE ENLIGHTENMENT IN AMERICA* 135-36 (1976).

commons in 1819 and, although they were privately owned, were subject to a specified common right of use; and (3) all other shores, which were privately owned if the adjacent riparian land was privately owned.

The Uses of the Shore

Although the various acts repeatedly refer to Virginia's "shores," the Assembly did not define that term. The shore commons legislation would not be so complex if "shores" in the "eastern parts" simply denoted the common definition of shore, the intertidal strip.⁹⁵ Because of the common uses the Assembly was attempting to protect, however, "shores" must have a more complex meaning.

The tidal shore itself can be classified roughly into either salt marsh or unvegetated sand and mud flats.⁹⁶ The salt marsh extends from below low water mark to a point beyond the high water mark, where it shades into salt meadows. It affords bounteous fowling in its lower reaches and bounteous hunting and trapping higher up. The salt marsh, however, was a mixed blessing to the colonists. They enjoyed fowling and trapping in it, but they also ditched, poisoned, and filled it in an attempt to control its clouds of disease-carrying insects.⁹⁷

The colonists used tidal flats for both fishing and navigation. The local inhabitants found certain portions of the shore were especially suitable for launching boats or hauling seines, and, along the sea, for surf fishing. Additionally, before custom houses were finally established in Virginia,⁹⁸ many Tidewater plantations boasted a wharf or pier for direct ocean commerce.⁹⁹ The plantation wharf represented an exclusive appropriation of the shore.¹⁰⁰

95. Both at English common law and in the law of many of the American states, "shore" meant the strip between high and low water. See, e.g., *French v. Bankhead*, 52 Va. (11 Gratt.) 136, 160 (1854); *Commonwealth v. Garner*, 44 Va. (3 Gratt.) 655, 711, 730 (1846).

96. This classification, and the ensuing discussion of the physical characteristics of the tidal lands, are based on *WETLANDS IN MARYLAND* *supra* note 3, at V-1 to V-11.

97. The 1973 Wetlands Act allows local governments to pass ordinances to maintain existing drainage ditches provided that the ditches do not extend to additional wetlands. VA. CODE § 62.1-13.5 (1982).

98. For a discussion of the controversy over the establishment of an effective system for collecting tobacco duties in Virginia, see E. MORGAN, *supra* note 17, at 197.

99. See *id.* at 285.

100. Because a plantation wharf also typically served the smaller farms in the vicinity, it

A seine-haul, as a series of statutes dating from 1838 testifies,¹⁰¹ also was an exclusive appropriation. Both seine-hauling and boat-launching, however, required land above the high water mark. Thus, a landholder who exploited marshes and flats could not confine his activities within the boundaries determined by tidal ebb and flow.

According to the preamble to the 1780 Act, the Assembly passed that statute to protect the recognized privilege of the general public, especially the poor, to fish from certain "unappropriated lands on the . . . shores."¹⁰² Use of the shore for fishing involves launching boats, hauling seine nets, and casting lines into the surf. These activities, however, require land above the high water mark. The language of the 1780 Act referring to "lands on the . . . shores" must mean, then, that the commons to be reserved consisted of shore and a portion of the adjoining uplands. Moreover, shores used for fishing likely would have been tidal flats and not marshes.

The second proviso of the 1819 Act addresses a broader range of issues: fishing, fowling, and hunting. Tidal marshes, generally of little value for fishing, afford excellent opportunities for fowling and hunting. Thus, the language of the 1819 Act seems to establish common use rights in both tidal marshes and tidal flats and portions of the adjoining uplands necessary for fishing.

Based on this analysis, the definitions of the three kinds of tidal shores created by the 1780 and 1819 Acts may be restated more precisely: (1) tidal flats and adjacent upland that the colonial government had reserved from grant and in 1780 were being used as commons for fishing, and which thereafter remained in Commonwealth ownership; (2) tidal flats, tidal marshes, and adjacent upland (other than the 1780 commons), that were being used in 1819 as a common for fishing, fowling, or hunting, and that were then privately owned by the adjacent upland owner subject, however, to a common right for these uses; and (3) all other shores, which were now owned privately if the adjacent riparian upland was privately

generally consisted of a large complex of structures including warehouses, like the restored landing at Mount Vernon.

101. See 1838 Va. Acts ch. 118, as amended by 1840-1841 Va. Acts ch. 80 and 1857-1858 Va. Acts ch. 147 (codified, most recently, as VA. CODE §§ 28-256 to -258 (1950), and repealed by 1962 Va. Acts ch. 406).

102. 10 HENING'S STATUTES, *supra* note 12, at 226-27.

owned.

Judicial Interpretation

The General Assembly enacted its commons legislation between 1780 and 1819. Until it decided *Bradford v. The Nature Conservancy*¹⁰³ in 1982, however, the Virginia Supreme Court had decided only two cases interpreting these enactments. The dispute in *Garrison v. Hall*¹⁰⁴ in 1831 involved a 2390-acre tract of land near Cape Henry Lighthouse in what then was Princess Anne County.¹⁰⁵ Garrison sought to enjoin Hall and Frazier from trespassing on and cutting timber from the tract. Garrison traced his title to a patent issued in 1809 to Swepson Whitehead. Hall and Frazier claimed that the 1809 Whitehead patent was invalid because, at the time it was issued, section 6 of the Land Office Act prohibited the Commonwealth from granting this land to private parties. Hall and Frazier also asserted that they had title to the land under a grant made pursuant to an 1866 statute authorizing the Commonwealth to sell the shore commons.¹⁰⁶

The Virginia Supreme Court decided in favor of Garrison, holding that Whitehead's patent did not include any lands reserved from grant by the Land Office Act.¹⁰⁷ The court based its holding on its interpretation of the 1780 Act as reenacted in section 6 of the Land Office Act, and on its interpretation of Whitehead's 1804 survey on which his 1809 patent was based.

In interpreting the 1780 Act, the court applied several propositions: that the *Liny* order declared the extent of a patent of tidal riparian land;¹⁰⁸ that the public had a common right to fish on shores adjacent to unappropriated land;¹⁰⁹ and that the General Assembly intended the 1780 Act to protect the "common right of fishing, which the people had been accustomed theretofore to en-

103. 224 Va. 181, 294 S.E.2d 866 (1982).

104. 75 Va. 150 (1881).

105. A detailed map of this area is included in A. EMBREY, *supra* note 27, at 226-27.

106. 75 Va. at 151. The authorizing act upon which the defendants relied is discussed *infra* notes 145-46 and accompanying text.

107. 75 Va. at 163-64.

108. *Id.* at 159.

109. *Id.*

joy.”¹¹⁰ The court concluded that in the 1780 Act, the phrase, “lands on the bay . . . or on the shores of any river or creek,” not only included the tidal shore, but also “embraced the shores and the lands adjacent to them, so far as necessary for the enjoyment of” the common right of fishing.¹¹¹ The court also concluded that the 1780 Act reserved from grant “only such lands . . . as had been used as a common by the people”¹¹²

The court then described in detail the boundaries of Whitehead’s survey.¹¹³ Because the boundaries carefully excluded the Cape Henry shore and a considerable portion of the adjacent upland, the court concluded no lands were exempted by the 1780 Act and was therefore valid. The later grant to Hall and Frazier of the same lands was invalid, because it was made under the authority of a statute that authorized the sale of unappropriated lands, and the land in question was patented by Whitehead.¹¹⁴ Thus, the court in *Garrison* interpreted the 1780 Act consistently with legislative syntax.¹¹⁵

When the shore commons enactments again came before the Virginia Supreme Court, the court’s construction was considerably less responsive to the legislative language. The 1932 decision, *Miller v. Commonwealth*,¹¹⁶ was an appeal from a criminal trespass

110. *Id.* at 159-60.

111. *Id.* at 163.

112. *Id.* at 161.

113. *Id.* at 162-63. The boundaries of Whitehead’s survey had

the starting point [at] a pine near the junction of Long creek and Broad bay, thence along Hubbard’s line to a point in what is known as the bushy ground in the rear and nearly opposite the centre of Fishery No. 6; thence along the bushy ground and the forest in the general direction of Cape Henry lighthouse to a point in the rear of Cape Henry lighthouse; from thence along the edge of the forest to a point in the rear of the sand hills covering the ocean shore, and about one mile or three-quarters of a mile from the shore; thence along the lines of other private owners in a zig-zag line, generally westerly, to the point of beginning.

Id. at 163-65.

114. See *infra* notes 145-46 and accompanying text.

115. That is, the court concluded that the criterion for determining which lands were exempted from patent—whether the land had been used in common — was not independent, and that the statutory language, “lands on the bay . . . or on the shores,” comprehended something more than lands only within the intertidal shore. *Id.* at 160-65.

116. 159 Va. 924, 166 S.E. 557 (1932).

conviction in Chesterfield County Circuit Court.¹¹⁷ The case arose when Thomas Miller rowed across the James River at high tide from the Shirley Plantation pier, anchored his board, set out decoys, and commenced duck hunting in an intertidal marsh on the shore of a farm on Turkey Island owned by A. D. Williams.¹¹⁸

The Virginia Supreme Court affirmed Miller's conviction. Although Williams had produced at trial neither patent nor grant for his farm, the court held that he could trace his title to a grant made prior to 1760.¹¹⁹ Because a river formed the boundary of Williams' farm above and below the point where Miller hunted,¹²⁰ the court said that the 1819 Act extended the boundary of Williams' farm to the low water mark, thereby including the marsh in which Miller had hunted.¹²¹ Additionally, Miller had produced "no evidence tending to show that the land lying between high and low-water marks which is here involved was ever 'used as a common to all the good people' of the Colony or Commonwealth within the meaning of that language as used in" the 1819 Act.¹²³

As an exercise of appellate jurisdiction over a criminal conviction, the *Miller* opinion is curious in several respects. The court did not address the principal issue on appeal, namely, that the Commonwealth's case was insufficient for convicting Miller.¹²⁴ In-

117. *Id.*

118. When Dr. Williams died in 1952, he devised Turkey Island to the National Fish and Wildlife Service. It is now the Presquile National Wildlife Refuge. *Richmond Times-Dispatch*, Nov. 29, 1981, at C-1, col. 1.

119. 159 Va. at 928, 166 S.E. at 558.

120. *Id.*

121. *Id.* at 951, 166 S.E. at 566.

123. *Id.* at 928, 166 S.E. at 558.

124. Both at trial and on appeal, Miller's principal contention was that he had not walked or put his portable blind on the bed above low water mark and thus had not trespassed on Williams' land. Record No. 1180, Appellant's Petition for Appeal and Opening Brief at 15-22, 31-33, 65-66. The point is not without merit. At least since 1819, the riparian landowner in Tidewater owns the soil down to low water mark. 1819 Va. Acts ch. 28. The Virginia Supreme Court, however, also has held that the Commonwealth holds title to the waters of a navigable stream, holding them in trust for the navigation and fishing uses of the people. *Commonwealth v. City of Newport News*, 158 Va. 521, 164 S.E. 689 (1932). The question that Miller posed, then, is whether "the people" can navigate, as Miller had, above low water mark over privately owned beds of a riparian landowner. The General Assembly, by implication, has answered this question in the affirmative. See 1819 H.D.J. 41 (petition of Thomas Meaux); 1819 Va. Acts ch. 62 (enactment authorizing Thomas Meaux to dam Ware Creek). Interestingly, the court in *Miller* made reference to Meaux's petition, but did not

stead, the opinion consists largely of a protracted discussion of an issue that Miller effectively had conceded. Further, in considering whether Miller had hunted in a marsh that was a commons, the court inquired only whether the marsh was a commons by operation of the 1819 Act, even though the 1849 Virginia Code had repealed the relevant provisions of the Act.¹²⁵ By focusing only on the 1819 Act, the court overlooked the possibility that the marsh in which Miller had hunted could have been reserved commons under the 1780 Act.¹²⁶ Additionally, the court tacitly assumed that Miller had the burden of showing that the marsh in which he had hunted was subject to common rights, even though the Commonwealth arguably should have had the burden of showing that the marsh was not subject to common rights.¹²⁷

The *Miller* opinion is less than successful as a judicial interpretation of the various Assembly actions defining shore rights. The court correctly concluded that the *Liny* order "neither had, nor was intended to have, the force and effect of the enactment of a law."¹²⁸ The court's conclusion, however, that the *Liny* order "was plainly of no force and effect" as an adjudicatory action does not seem correct.¹²⁹

discuss its significance. 159 Va. at 945, 166 S.E. at 564.

Although this question seems to be settled as a legislative matter, it remains open in Virginia jurisprudence. The Virginia decisions involve rights of the riparian landowner below low water mark rather than the rights of the public above that mark. *E.g.*, *Taylor v. Commonwealth*, 102 Va. 759, 47 S.E. 875 (1904); *Norfolk City v. Cooke*, 68 Va. (27 Gratt.) 430 (1876). The Virginia Supreme Court came close to this issue in *Boerner v. McCallister*, 197 Va. 169, 89 S.E.2d 23 (1955), when it held that a member of the public cannot float for recreational purposes on a non-navigable inland stream, the beds of which are owned by the adjacent riparian landowner. The fact that other state courts have split on the issue raised in *Boerner* suggests that Miller did not raise a trivial issue. *Compare* *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961) (holding for the public) *with* *People v. Emmert*, 198 Colo. 137, 597 P.2d 1025 (1979) (holding in favor of riparian landowner). Ironically, the *Liny* order, the validity of which the court in *Miller* rejected, supports the result in *Miller* because it is stated broadly enough to preclude the right of the public to fish above low water mark (although it appears that the specific dispute at hand was over the hauling of a seine, which necessarily involved intrusion onto the bed as well as the water).

125. 159 Va. at 949-52, 166 S.E. at 566-67. The 1849 repeal of those provisions is discussed *infra* notes 140-43 and accompanying text.

126. *See supra* note 72.

127. 159 Va. at 928-29, 166 S.E. at 558.

128. *Id.* at 939, 166 S.E. at 562.

129. *Id.* at 940, 166 S.E. at 562.

The court's interpretation of the purpose of the 1780 Act also is questionable. Fifteen of the twenty-six pages of the opinion discuss the headright system for settling land in the Virginia Colony¹³⁰ and the public lands system established by the London Company in 1618 to support the public officials in Virginia.¹³¹ The court concluded that the 1780 Act reserved these public lands as commons if such lands had not been granted by 1780.¹³² This conclusion seems unsupportable for several reasons. The 1780 Act protected unappropriated lands. The public lands set aside in 1618, however, were appropriated to the use of certain public officials.¹³³ Moreover, the Commonwealth set aside these public lands to produce revenue for public officials, a purpose that is inconsistent with the unrestricted public access that the term commons connotes. Finally, a series of legislative acts conveying specific portions of these public lands suggests that the Land Office was not authorized to transfer them.¹³⁴

The court's reading of the 1780 Act may have other difficulties. The 1780 Act reserved from grant "all unappropriated lands . . . which have been used as common to all the good people thereof"¹³⁵ The court in *Miller* read these two phrases in the disjunctive: lands deliberately reserved from grant or lands actually used as commons.¹³⁶ The court did not explain why it read "or" where the General Assembly had used "and." As a matter of syntax, the court's reading expands an exception which on its face reserves only those lands actually used as commons that were a portion of lands that were deliberately reserved from grant.

Beyond syntax, the 1780 Act was a small amendment to the lengthy Land Office Act of 1779. The 1779 Act embodied a policy that strongly encouraged the patenting of unappropriated lands to enhance public revenue. The 1780 Act, on its face, advances the policy of the 1779 Act by limiting the amount of land exempted from grant to those lands that the public had actually found useful

130. *Id.* at 931-47, 166 S.E. at 559-65.

131. For a discussion of "established commons," see *supra* note 8 and accompanying text.

132. 159 Va. at 946-47, 166 S.E. at 565.

133. See *supra* note 27.

134. See *supra* note 81 (special acts granting out certain lands).

135. 10 HENING'S STATUTES, *supra* note 12, at 226.

136. 159 Va. at 948, 166 S.E. at 565.

for fishing. To replace the "and" with "or" would appear to exempt lands that experience had not shown to be useful for fishing, thereby disserving one policy without advancing the other.

The Court in *Miller* interpreted the 1819 Act as follows:

Wherever the land granted was bounded by a tidal water so as, under the common law, to pass title to high-water mark, this act extended the limits of the grant to ordinary low-water mark; granted to the grantee, or his successor in title, the fee simple title to the strip of land along his tidal water frontage which lay between high and low-water marks . . . subject only to the right of the public to use the waters covering it at high tide for purposes of navigation [Except] [w]here the extension of any such grant to low-water mark would include therein any land lying between low and high water marks which was *at that time* "used as a common," the public should continue to have and enjoy the right of fishing, fowling and hunting thereon.¹³⁷

Two problems exist with this interpretation. First, it assumes that until 1819 the English common law rather than the principles followed in the *Liny* order and *Curle v. Sweney* determined the extent of private title on tidal waters. The second problem involves the italicized language, "*at that time*." This language appears to mean "at the time of this enactment." There is, however, an alternative meaning: "at the time of the original grant." This alternative meaning conflicts with other language in the 1819 Act that refers to "the right of fishing, fowling and hunting on those shores . . . which are *now* used as a common." This second meaning, however, appears to be the construction that the court in *Miller* followed.¹³⁸ Additionally, it is clearly the construction that the Virginia Supreme Court followed in *Bradford v. The Nature Conservancy*.¹³⁹

137. *Id.* at 951, 166 S.E. at 566 (emphasis added).

138. *See id.* at 952, 166 S.E. at 567 ("we express no opinion with reference to . . . the effect of the act of February 16, 1819 in so far as it relates to grants made after May, 1780.").

139. *See infra* notes 157-82 and accompanying text.

ACTIONS OF THE GENERAL ASSEMBLY (1849-1972)

The language of the shore commons legislation remained unchanged for thirty years after enactment of the 1819 provisions. When the Assembly recodified statutory law in Virginia in 1849, however, it consolidated the 1780 Act, the 1819 Act, and the 1802 Act that applied to waters in western Virginia. In this consolidation process the original statutory language was substantially altered. The 1849 revision was the first of a long series of legislative changes, extending to the 1972 session of the Assembly, which radically altered the nature of common rights in Virginia tidal lands and the definition of the lands on which these rights may be exercised.

A Canvass of the Later Legislation

In 1849, the General Assembly adopted a new Code of Virginia which repealed all prior legislation¹⁴⁰ and the shore commons provisions were substantially rewritten.¹⁴¹ Unfortunately, the Report of the Revisors did not discuss the reasons for the changes.¹⁴² The 1849 Code did not include, and thus effectively abolished, the common right of use on privately owned shores created by the 1819 Act. The 1849 Code, however, expanded the definition of the commons reserved from grant by the 1780 Act. Under the 1780 and 1792 Acts, the reserved commons included uplands, shores, and tidal beds which, by design, the colonial government had reserved from grant and which the public had used for fishing. The 1849 Code expanded these reserved commons to include *any* unappropriated lands, whether they had remained unappropriated by government policy or by happenstance. Additionally, the 1849 Code included as reserved commons unappropriated lands used for fowling or hunting as well as for fishing.¹⁴³

In 1851, the Assembly amended the Land Office provisions to make explicit that any attempted Land Office grant of statutory commons was void.¹⁴⁴ In 1866,¹⁴⁵ however, the Assembly authorized

140. VA. CODE ch. 216 (1849).

141. *Id.* ch. 62, §§ 1-2.

142. See 1849 REVISORS' REPORT, *supra* note 45, at 366.

143. VA. CODE ch. 62, § 1.

144. 1850-1851 Va. Acts ch. 41, § 10.

the Board of Public Works, a statutory body created in 1816 to assist financially canal and highway projects,¹⁴⁶ to sell the tideland commons. In 1867, the Assembly expanded the Board's authority to include the power to lease these commons.¹⁴⁷ In 1871, the Assembly prohibited the Land Office from making grants of any natural oyster beds.¹⁴⁸

In 1873, the General Assembly adopted a comprehensive statute which consolidated and revised a substantial body of oyster regulations.¹⁴⁹ One section of this statute narrowed the authority of the Board of Public Works to sell the tidal commons by excluding commons on the shores of the sea or in any of the tidal beds. Additionally, the new Oyster Act regulated the rights of the public to use these commons, and continued restrictions on the power of the Land Office to make grants of the tidelands commons or of natural oyster beds. The power of the Board of Public Works to sell or lease tideland commons within the Virginia Capes, however, remained intact.¹⁵⁰

In 1887, the General Assembly again enacted a new code, on terms similar to the adoption of the 1849 Code.¹⁵¹ The statutory definition of the tidelands commons, as modified in 1873, remained the same,¹⁵² but the 1887 Code abolished the power of the Board of Public Works either to lease tidelands commons or to sell certain tidelands which no longer were commons because of the narrowing of the statutory definition in 1873.¹⁵³

This series of acts substantially eroded the extensive system of common rights in the Virginia tidelands existing in 1819. The common right to use certain privately owned shores had been abolished in 1849. After 1873, the lands to be retained in Commonwealth ownership and reserved for public use included only the tidal beds in Tidewater Virginia and the tidal shores on the ocean

145. 1865-1866 Va. Acts ch. 44.

146. 1815-1816 Va. Acts ch. 17.

147. 1867 Va. Acts ch. 34 (Ex. Sess.).

148. 1870-1871 Va. Acts ch. 79. The 1871 Act prohibited all grants of natural oyster beds, regardless of whether the beds were used as commons.

149. 1872-1873 Va. Acts ch. 333.

150. *Id.*

151. The authorizing act was 1883-1884 Va. Acts ch. 523; VA. CODE §§ 4202-4205 (1887).

152. VA. CODE § 1338 (1887).

153. *See id.* §§ 1338-1339, 4202-4205.

that had not been validly granted by the Land Office or sold or leased by the Board of Public Works. Moreover, a comprehensive oyster regulation scheme restricted the public's right to use publicly owned tidal beds.¹⁵⁴

In 1888, the Assembly adopted a final major commons act that further restricted Land Office powers:

Be it enacted by the general assembly of Virginia, That all unappropriated marsh or meadow lands 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, shall remain ungranted, and no land warrant located upon the same. That any of the people of this state may fish, fowl, or hunt on any such marsh or meadow lands. . . .¹⁵⁵

This provision has continued, without amendment, to the present. With this provision, the General Assembly came full circle. Like its first commons act in 1780, the 1888 Act contains the potentially ambiguous "and" between the two phrases describing which marsh and meadow lands are exempted from grant.¹⁵⁶ Additionally, the statute fails to define marsh and meadow lands. As the following discussion of the Hog Island litigation will show, property interests in Tidewater Virginia commons remain uncertain.

BRADFORD V. THE NATURE CONSERVANCY

In 1982, the Virginia Supreme Court in *Bradford v. The Nature Conservancy*¹⁵⁷ interpreted commons legislation for the third time. The Nature Conservancy owned substantial portions of Hog Island, one of the Virginia barrier islands.¹⁵⁸ A hunting club, how-

154. The oyster regulation scheme was codified as VA. CODE §§ 2131-2178 (1887).

155. 1887-1888 Va. Acts ch. 219.

156. See *supra* notes 135-36 and accompanying text.

157. 224 Va. 181, 294 S.E.2d 866 (1982).

158. The Virginia Supreme Court described the island's physical characteristics:

Hog Island is one of a number of barrier islands located off the eastern coast of Virginia. It is approximately six miles long and ranges in width from one mile near the northern end to an estimated 300 yards at the southern end. The island has been greatly affected over the years by the forces of nature. Since 1930, the dimensions of the two ends of the island have virtually reversed themselves.

ever, owned a small tract at the northern end of the island. The dispute arose when the resident manager for the Conservancy attempted to deny the club members access to any of the portions of the islands owned by the Conservancy.¹⁵⁹

If *Bradford* is confined to the issues directly relating to the statutory tidelands commons, the case may be stated succinctly. The hunting club members obtained an injunction prohibiting the Conservancy from denying the club members access to the Hog Island marshes and beaches.¹⁶⁰ Both parties appealed, the Conservancy challenging the trial court's ruling that the marshes were commons, and the club members contending that the uplands, as well as the beaches and marshes, were commons. The Virginia Supreme Court held that all of the Hog Island marshes are commons; any original Commonwealth grants of portions of the beach, if made after 1780, were void; any such grants made before 1780 passed valid title, subject, however, to a public right of use for fishing, fowling, and hunting; and no rights of commons extended to the uplands of Hog Island.¹⁶¹

In arriving at these conclusions, the court, as in *Miller* in 1932, explored the 1780 Reserved Commons Act and the 1819 Low Water Mark Act extending grants to the low water mark. Additionally, for the first time the Court interpreted the 1888 Eastern Shore Commons Act.

The 1888 Eastern Shore Commons Act

In *Bradford*, the court's reasoning as to the marshes started

....
The island is characterized by three distinct ecological features. The eastern portion consists of sand beaches. These beaches lead to a series of sand dunes and grass areas, commonly known as the uplands. Adjacent to the uplands on the west side of the island, extending towards the mainland, are marshes.

Id. at 181, 189, 294 S.E.2d at 866, 869.

159. The dispute was first litigated in the federal district court. On appeal, however, the court of appeals ordered the district court to stay its judgment pending the outcome of litigation in the Virginia courts. See *The Nature Conservancy v. Machipongo Club, Inc.*, 419 F. Supp. 390 (E.D. Va. 1976), *aff'd in part, rev'd in part*, 571 F.2d 1294 (4th Cir.), *aff'd in part, rev'd in part, and remanded with instruction*, 579 F.2d 873 (4th Cir.), *cert. denied*, 439 U.S. 1047 (1978).

160. 224 Va. at 190-91, 294 S.E.2d at 870.

161. 224 Va. at 197, 294 S.E.2d at 875-76.

with the finding at trial "that for many years prior to 1888 the marshes had been used by the public at will for fishing, fowling and hunting."¹⁶² The court reasoned that because "the 1888 statute only applies to land used as a common,"¹⁶³ the 1888 act prohibited the granting of this land.¹⁶⁴ If all of the original grants from the Commonwealth postdated 1888, this holding is correct. Unfortunately, the Conservancy purchased its holding on Hog Island in several parcels, only two of which were traced to original grants from the Commonwealth made after 1888. The Conservancy could not trace its other holdings back to the original grants.¹⁶⁵

In holding that the Hog Island marshes are commons, the court tacitly placed the burden on the defendant Nature Conservancy to show that the Commonwealth had not granted the Hog Island marshes prior to 1888. The court, however, seems to have misplaced the burden because The Nature Conservancy was the defendant at trial. The burden of making a *prima facie* case that the marshes had been granted in 1888 should have been placed on the hunting club, who brought an action challenging a defendant in possession under color of title.

The holding that the marshes are commons also apparently assumes that The Nature Conservancy could satisfy its burden only by showing a complete chain of title back to an original grant from the Commonwealth that predated 1888. The statutory language, "all unappropriated marsh or meadow lands . . . which have remained ungranted," seems to require a lesser showing. This language establishes two criteria: that the marsh not be appropriated to an exclusive use in 1888, and that prior to 1888 the marsh never had been granted out of state ownership. Under these criteria, the Conservancy could have satisfied its burden by showing any grant or patent for the marsh that predated 1888; even a grant or patent outside The Nature Conservancy's chain of title would have sufficed.

The court's further conclusion that the statutory terms "marsh" and "meadow lands" are synonymous rested only on a citation to

162. *Id.* at 192, 294 S.E.2d at 871.

163. *Id.*

164. *Id.* at 193, 294 S.E.2d at 872.

165. *Id.* at 190, 294 S.E.2d at 870.

an 1898 decision of the New York Court of Appeals.¹⁶⁶ The definitions of marsh and meadow land, however, were not in issue before the New York court, nor did that court support its definition with any authority. Had the Virginia court relied on recent scientific literature, it would have found abundant support for a different conclusion. For instance, the *Guidelines for Activities Affecting Virginia Wetlands*,¹⁶⁷ which has authoritative status under the Virginia Wetlands Act,¹⁶⁸ makes a clear distinction between cordgrass-dominated salt marsh, which ranges *up to* mean high water, and saltgrass-dominated salt meadow, which ranges *above* mean high water.

The 1780 Reserved Commons Act

The court's conclusion in *Bradford* on the question of title to the Hog Island beaches is open to criticism, depending upon the time of issue of the original grant from the Commonwealth of adjacent uplands. The court's analysis began with the holding in *Miller* that in colonial Virginia the English doctrine prevailed so that "it was presumed a grant of high lands did not convey the adjoining shore, unless a specific contrary intention was shown."¹⁶⁹ This holding is, of course, inconsistent with the *Liny* order¹⁷⁰ and *Curle v. Sweney*.¹⁷¹ Additionally, the Court in *Bradford* concluded that, prior to the enactment of the 1779 Land Office Act, "no statute existed for disposing of . . . land [vested in the Crown or Commonwealth], and grants could only be made by special act of the General Assembly."¹⁷² Unless the court meant this statement to apply only to the short period between 1775 and the adoption of the 1779 Land Office Act, the court overlooks the series of detailed land grant statutes that began in 1705.

The court also concluded that the 1871 enactment repealed the authority given by the Reconstruction Assembly to the Board of

166. *Lawrence v. Town of Hempstead*, 155 N.Y. 297, 49 N.E. 868 (1898).

167. G. SILVERHORN, G. DAWES & T. BARNARD, JR., *GUIDELINES FOR ACTIVITIES AFFECTING VIRGINIA WETLANDS* 5-8 (1974).

168. VA. CODE §§ 62.1-13.3, -13.4 (1982).

169. 224 Va. at 194, 294 S.E.2d at 872.

170. 2 HENING'S STATUTES, *supra* note 12, at 456.

171. 2 VIRGINIA COLONIAL DECISIONS B117 (R. Barton ed. 1904).

172. 224 Va. at 194, 294 S.E.2d at 872.

Public Works to sell tidelands commons created by statute.¹⁷³ The 1871 Act, however, addressed only the powers of the Land Office. The Assembly did not restrict the power of the Board of Public Works until the 1873 Oyster Act¹⁷⁴ and did not fully abolish that power until the 1887 Code.¹⁷⁵ Thus, the trial court finding adopted by the Virginia Supreme Court that none of the Hog Island beaches had been granted between 1865 and 1871 was too limited. The Board of Public Works could, until 1873, convey Atlantic beaches that were reserved commons under the 1780 Act.

Finally, and most seriously, the court held that any Land Office grant of the Hog Island beaches after 1780 was void.¹⁷⁶ This holding is based on the trial court's finding that the "beaches of Hog Island had been used as a common for over 200 years,"¹⁷⁷ and on the construction in *Miller* that, as of 1780, commons could exist either by government designation or because of public use, an interpretation that is inconsistent both with the syntax of that Act and with its underlying policy.¹⁷⁸

A careful reading of the eighteenth and nineteenth century legislation would reveal that a grant of any upland adjacent to the Hog Island beaches before 1780 also would have passed title to the beaches. Between 1780 and 1849, a grant of uplands would have been valid for any tracts that in 1780 were not reserved from grant by the colonial government or used by the public.¹⁷⁹ Since 1849, the Land Office could not grant previously ungranted tracts on the Hog Island shore, regardless of whether these tracts were commons in 1780. Between 1866 and 1873, however, the Board of Public Works validly could sell any commons reserved under the 1780 Act.¹⁸⁰

173. *Id.* at 196, 294 S.E.2d at 874.

174. *See supra* note 150 and accompanying text.

175. *See supra* note 153 and accompanying text.

176. 224 Va. at 195-96, 294 S.E.2d at 874.

177. *Id.*

178. *See supra* notes 130-35 and accompanying text.

179. Between 1819 and 1849, any privately owned beaches that came under the second proviso of the 1819 Low Water Mark Act were subject to a common right of use. *See supra* note 91 and accompanying text.

180. *See supra* notes 145, 150 & 153 and accompanying text.

The 1819 Low Water Mark Act

The court's reading in *Bradford* of the 1819 Act also has serious analytical problems. The court read the *Miller* opinion to mean that the 1819 Act reserved a public use right on tidal shores used as commons in 1780.¹⁸¹ Applying this reading of *Miller*, the court concluded that, because the public had used the Hog Island beaches for more than 200 years, any of these beaches that had become privately owned before 1780 were now subject to the common right of use established by the 1819 legislation.¹⁸²

Regardless whether the court in *Bradford* correctly read the *Miller* opinion, the decision in *Bradford* is inconsistent with the language of the 1819 Act that refers to "those shores . . . which are now used as a common"¹⁸³ More importantly, regardless of the precise terms of the public right of use created by the 1819 Act, the 1849 Code abolished this right.¹⁸⁴ Thus, any of the Hog Island beaches that validly had passed into private ownership before 1849 should now be exclusively private, as would any of the Hog Island beaches that the Board of Public Works conveyed between 1866 and 1873.

CONCLUSION

The foregoing analysis attempts to show that the present applicability of the shore acts to property interests in the tidal shore is different from, and generally narrower than, the Virginia Supreme Court's construction in *Miller* and *Bradford*. Given the extensive holdings of The Nature Conservancy in the barrier islands, however, and the increasing awareness of the biotic significance of the shore generally, Virginia courts likely again will be asked to interpret the shore enactments.

The shore statutes also speak to interests in land outside the tidal shore, and courts may be asked to interpret them in that context as well. The 1780 Act, for instance, creates public interests above the high water mark,¹⁸⁵ and the 1672 and 1819 Acts tacitly

181. *Bradford v. The Nature Conservancy*, 224 Va. 181, 194, 294 S.E.2d 866, 874 (1982).

182. *Id.*

183. 1819-1819 Va. Acts ch. 28.

184. See *supra* notes 140-42 and accompanying text.

185. 1780 Va. Acts ch. 2, 10 HENING'S STATUTES, *supra* note 12, at 226. See *supra* notes

recognize that patents routinely had created private interests below the low water mark.¹⁸⁶ The Commonwealth now has pending before the Virginia Supreme Court a challenge to the validity of patents issued in 1642 and 1663 to beds below the low water mark of a Lancaster County creek.¹⁸⁷ Although the court has already addressed this issue,¹⁸⁸ treating the issue fully will require some consideration of the shore acts.

Despite the fact that the shore acts inevitably will be litigated again, this Article nevertheless represents a strictly limited enterprise: to parse the shore acts and criticize the handful of judicial attempts to interpret them. No implication should arise from this effort, however, that these acts, when they apply to a shore dispute, should be determinative. Rather, these acts properly constitute only a starting point in the analysis of the structure of property interests in Virginia tidelands. Other elements should weigh in the analysis as well. The Virginia Supreme Court itself recognized in its *Bradford* opinion one further element: "the Commonwealth's policy for over 200 years to protect and preserve the common lands."¹⁸⁹ In 1973, the Assembly ratified that policy in the Virginia Wetlands Act¹⁹⁰ by subjecting even private interests in tidal marshes to the constraints of the police power.

Beyond the constraints that the police power can impose on the exercise of private rights in land, however, lies a further issue: whether the concept of private interests in land is different if the land is extrinsically significant. The pioneering analysis in 1872 by the Wisconsin Supreme Court illustrates one facet of this issue.¹⁹¹ That analysis suggests that the webs of property interests in tracts of land shrink in proportion to the significance of the webs of biotic functions in the land. Another facet of this issue is the willingness of a growing number of courts to treat what people do with

104-14 and accompanying text.

186. 2 HENING'S STATUTES, *supra* note 12, at 300, discussed *supra* at text following note 50; 1818-1819 Va. Acts ch. 28, discussed *supra* at text accompanying note 93.

187. *Morgan v. Commonwealth*, No. C-105-1979 (Cir. Ct. Lancaster County, July 10, 1980), *appeal awarded*, Apr. 14, 1981.

188. *See, e.g., James River & Kanawha Power Co. v. Old Dominion Iron & Steel Corp.*, 138 Va. 461, 474-75, 122 S.E. 344, 348 (1924).

189. 224 Va. at 194, 294 S.E.2d at 874.

190. VA. CODE §§ 62.1-13.1 to .20 (1982).

191. *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

tidelands as a more important determinant of private rights than formal rules of law.¹⁹² In the *Bradford* opinion, the court repeatedly referred to the uses people generally made of marshes and beaches of Hog Island. The parsing within this Article of the shore acts is a necessary prelude to a deeper analysis into the appropriate content of private interests in extrinsically significant land.

192. See Roberts, *Beaches: The Efficiency of the Common Law and Other Fairy Tales*, 28 U.C.L.A. L. REV. 169 (1980).