O/G 5-6-85

IN THE SUPREME COURT OF FLORIDA

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND and COASTAL PETROLEUM COMPANY, a Florida corporation,

Petitioners,

vs.

CASE NO. 66,565

AGRICO CHEMICAL COMPANY, a Delaware corporation,

Respondent.

_____/

On Discretionary Review from the District Court of Appeal, Second District

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PETITIONER'S REPLY BRIEF

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STATEMENT OF THE CASE AND FACTS

The three questions certified by the district court of appeal presume that at least some portion of the lands in question are coursed by the Peace or Alafia Rivers or a navigable tributary thereof. Indeed, as the Trustees and Coastal asserted in the trial court as an affirmative defense supported by affidavits, these river systems were navigable at statehood, and thus were then and remain now SOVEREIGN LANDS of the State of Florida. The trial court's summary judgment foreclosed litigation of this issue.

Agrico, which brought the quiet title action below, has sought to obscure the Trustees' claims by quieting title to much land over which there is no dispute. Most of the lands involved in this action are, as Agrico contends, swamp and overflowed lands not coursed by navigable waters. But not all. The fact that those at issue were not meandered at statehood does not conclusively establish them as swamp and overflowed lands. In Odom v. Deltona, 341 So.2d 977 (Fla. 1977), this Court held that the absence of meandering raises only a presumption of non-navigability. The trial court, however, denied the Trustees an opportunity to rebut that presumption.

Unfortunately, the ramifications of the lower court rulings extend far beyond this case and the lands here at issue. The Trustees have deeded out some 22 million acres as swamp and

overflowed lands in Florida. Many of these lands may well be coursed by rivers or other waterbodies arguably navigable but not meandered in the 1850s. The difficulties the early surveyors faced have been explored in the initial briefs. The loss of unmeandered though obviously navigable waterbodies has begun. See, Board of Trustees v. Paradise Fruit Co., 414 So.2d 10 (Fla. 5th DCA 1982) ("thousands of acres" under Lake Poinsett through which flows the St. Johns River held subject to private claim).

The decisions below foreclose both the state's title interest in assertedly navigable waters of the state and the public rights vouchsafed under the Public Trust Doctrine. For Agrico to try to deflect the question to one of proprietary rights in minerals is disingenuous in the extreme because the trial court quieted title in the real property, not just the mineral rights. Moreover, for Agrico to say that the rivers in question are adequately protected by the police power and pollution laws is simply to ignore the whole issue of public rights which it is the fundamental purpose of government to ensure. Regardless of whether the rulings below so indicated, the public may be excluded from these and all other navigable waters coursing lands conveyed by swamp and overflowed lands deeds once title is quieted in private hands.

Increasingly today, the protection afforded under the police power seems illusory. We are now confronted in Florida

with the specter of the taking question nearly every time a dredge and fill permit is denied. If to protect its river systems the state must purchase these submerged, and now private, lands at the value set on their "highest and best use," how much environmental protection can we really expect? There are limits even to the public purse.

ARGUMENT

I. DO THE 1883 SWAMP AND OVERFLOW LANDS DEEDS ISSUED BY THE TRUSTEES INCLUDE SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS?

Agrico argues the question before this Court is not the one above which the district court of appeal certified. Rather, it suggests the real question is whether the Trustees may now contend that lands they once "determined" were swamp and overflowed lands were, in fact, bottoms of navigable streams--hence, sovereign lands. Agrico relies on this language of the district court of appeal:

> Here, the Trustees conveyed the lands in question to private individuals as swamp and overflowed lands in 1883, without any reservation of rights in the deeds. The contemporaneous findings made by the Trustees when they executed their conveyances and the decisions by the government surveyors not to meander any of these watercourses are not now open to question.

Coastal Petroleum Co. v. American Cyanamid, 454 So.2d 6, 8 (Fla. 2d DCA 1984).

Phrased as it is, Agrico's question almost answers itself. A factual determination actually made 100 years ago should not be open to question.

Agrico's argument, and the attempt to restate the certified question, necessarily avoids key issues in this case. First, the Trustees held no title to sovereignty lands in 1883 and thus had no reason or right to "reserve" sovereignty interests from these conveyances--the grantee was charged with knowing that no such interests could be conveyed. Second, there is no actual evidence of "contemporaneous [1883] findings" of the Trustees on the navigability or non-navigability of the Peace and Alafia Rivers or their tributaries. Dean Julin's affidavit (AA 61), though seemingly scholarly, does not establish that the procedures created for identifying swamp and overflowed lands were intended to do other than survey their outer boundaries for purposes of conveyance. Certainly these identification procedures could not have been intended to set <u>boundaries</u> between swamp and overflowed lands and navigable waters coursing them because that would have required ordinary high water line surveys or mean high water line surveys on rivers, lakes and tidal areas throughout the state before conveyances could have been made--an obviously impossible pre-condition, or one which at the least would have delayed the sale of most of the swamp and overflowed lands in Florida for many decades.

Dean Julin's affidavit does not prove, or even suggest, that it was the practice of the Trustees in the late nineteenth century to identify and reserve sovereignty interests--navigable waters--coursing swamp and overflowed lands. Nor, for that matter, does the affidavit explore the legal conundrum created by the reservation of title to land the Trustees did not own. Extant case law, closer to that time and far more convincing on the point, shows it was not the practice of the Trustees to reserve title to sovereign land when conveying swamp and overflowed lands. State ex rel. Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927); Pierce v. Warren, 4 So.2d 857 (Fla. 1950), cert. denied, 341 U.S. 914 (1951).

We are left then with the stark fact that this Court has never held that swamp and overflowed lands deeds can convey title to sovereignty lands. Thus, unless this Court decides to overturn a century of precedent, the certified question must be answered in the negative.

Agrico tries to avoid the factual issues that should have precluded summary judgment by arguing that the rivers and tributaries at issue here were not meandered and should be considered non-navigable as a matter of law just as were the small ponds in Odom v. Deltona, 341 So.2d 977 (Fla. 1977). In

Odom, however, this Court relied on section 197.228(2), Florida Statutes, in concluding non-meandered ponds were non-navigable as a matter of law:

> Navigable waters in this state shall not extend to any permanent or transient waters in the form of so-called lakes, ponds, swamps or overflowed lands, lying over and upon areas which have heretofore been conveyed to private individuals by the United States or by the State without reservation of public rights in and to said waters.

This subsection does not apply to rivers and their tributaries. To suggest, as Agrico does, that the term "swamps and overflowed lands" includes navigable rivers below the ordinary high water mark is simply to beg the question certified to this Court. Nor does its argument begin to explain why a tax statute should be used to overturn a century of Public Trust law. It also makes a mockery of this Court's unequivocal statement in Odom that unmeandered waterbodies are rebuttably presumed non-navigable. Odom, supra, at 989.

Finally, under Point I, Agrico argues that the Trustees' "reconsideration" of the character of the lands conveyed is precluded by Pembroke v. Peninsular Terminal Co., 108 Fla. 46, 146 So. 249 (1933). Pembroke involved a suit between two private parties one of whom sought to challenge the Trustees' determination (some eight years earlier) that the submerged lands in question were covered by water exceeding three feet in depth

at high tide. (The Trustees had no authority to convey submerged lands covered by more than three feet of water at high tide.) The Court said there was a presumption that the Trustees had correctly determined the facts, and the "presumption is to all intents and purposes a conclusive one when attempted to be put in issue between private parties." Id. at 258. (E.S.) The suit was therefore an impermissible collateral attack upon administrative action. Id. at 257.

The Court's holding in Pembroke does not purport to modify the line of authority beginning with State ex rel. Ellis v. Gerbing, supra. Moreover, in Pembroke, the Trustees clearly were vested with authority to convey lands submerged up to three feet in depth. It was appropriate there for the Court to assume the Trustees had adhered to the statutory criteria and directives. But under the line of cases beginning with Ellis, where the Trustees held no title to sovereignty lands, the presumption was that such lands could not, as a matter of law, be conveyed by swamp and overflowed lands deeds. Pembroke provides no basis for departing from that line of authority. Indeed, Pierce v. Warren, supra, decided in 1950, disposes of that argument.

II. DOES THE DOCTRINE OF LEGAL ESTOPPEL OR ESTOPPEL BY DEED APPLY TO THE 1883 SWAMP AND OVERFLOW DEEDS BARRING THE ASSERTION OF TITLE TO SOVEREIGNTY LANDS?

Agrico contends, chiefly on the basis of two cases, Odom v. Deltona, supra, and Trustees of the Internal Improvement Fund v.

Lobean, 127 So.2d 98 (Fla. 1961), that legal estoppel bars the Trustees' present claim to sovereignty lands. Neither case commands or even supports such a conclusion.

As the Trustees demonstrated in their initial brief, no case has applied the doctrine of estoppel by deed either to navigable rivers or to other sovereignty lands which the Trustees had no authority to alienate. In Odom, the ponds involved were held to be non-navigable--and thus non-sovereignty--as a matter of law. In Lobean, legal estoppel was applied, but to tidal submerged lands the Trustees were statutorily empowered to alienate. In this case, no such authority existed.

Agrico completely misreads Lobean in arguing that the Trustees had no legal authority to convey the tidal lands in question since the lands were separated from the shore by a channel "at least six feet deep" according to the First District Court of Appeal's opinion (118 So.2d at 226). Citing to Chapter 7304, Laws of Florida, 1917, Agrico argues the Trustees were only authorized to convey submerged lands separated from the shore by a channel--and here it purports to quote the statute--"not more than five feet deep at high tide."

Agrico has misquoted Chapter 7304. That chapter authorized the Trustees to convey tidal submerged land separated from the shore "by a channel or channels not less than five feet deep at high tide . . . ." Hence, since the channel was six feet deep,

the Trustees were empowered to convey the lands. The opinions of both the district court of appeal (118 So.2d at 226) and the Florida Supreme Court (127 So.2d at 103) stated that title to the land was vested in the Trustees at the time of the original conveyance to Lobean in 1946 and both are indisputably correct. Agrico is wrong.[1]

III. DOES THE MARKETABLE RECORD TITLE ACT, CHAPTER 712, FLORIDA STATUTES, OPERATE TO DIVEST THE TRUSTEES OF TITLE TO SOVEREIGNTY LANDS BELOW THE ORDINARY HIGH-WATER MARK OF NAVIGABLE RIVERS?

There is little point in reiterating here the arguments made at length in the Trustees' initial brief on the effect to be given MRTA. The question is not resolved, as Agrico thinks it should be, merely by listing opinions of the district courts of appeal. The issue is not whether the district courts have applied MRTA to sovereignty lands, but whether they were right in doing so.

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[1] Agrico apparently borrowed this argument from the briefs of Mobil Oil, Estech and American Cyanamid in the companion cases changing the wording of Chapter 7304 to better fit the facts of Lobean. Those briefs correctly quote Chapter 7304 but their misrepresentation of Lobean is just as reprehensible. They argue the Trustees had no authority to convey the submerged lands in question because they exceeded three feet in depth. The only land exceeding three feet in depth in Lobean was in the channel. Since the channel was "at least six feet deep" the Trustees had authority to convey the land. Chapter 7304 is included in the appendix to this reply brief.

Since the recent district court opinions have relied to such a great extent on Odom, in closing it is appropriate to advert once again to the full scope of this Court's language in that case. Contrary to the conclusions of the district courts and Agrico,[2] this Court did not hold MRTA applicable to all conveyances of sovereignty lands made by the Trustees. By way of dicta, the Court suggested, perhaps improvidently, that claims of the Trustees to sovereignty lands could be extinguished by MRTA, but this statement was expressly limited to "lawfully executed land conveyances." Odom, supra, at 989. The Trustees, not holding title to navigable river bottoms in 1883, could not have lawfully conveyed the sovereignty lands here at issue even had they intended to do so.

Much of the discussion in this case, and in the related cases before this Court,[3] has focused at length upon the Public Trust Doctrine. The navigable waters of this state were impressed with this Trust even before the doctrine attained constitutional status in 1970. The Trust devolved upon Florida

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[2] E.g., Coastal Petroleum Co. v. American Cyanamid Co., 454 So.2d 6 (Fla. 2d DCA 1984); Board of Trustees v. Paradise Fruit Co., 414 So.2d 10 (Fla. 5th DCA 1982), review denied, 432 So.2d 37 (Fla. 1983).

[3] Board of Trustees et al. v. Mobil Oil Corporation, Case No. 65,913; Board of Trustees et al. v. American Cyanamid, Case No. 65,755; Board of Trustees et al. v. Estech, Inc., Case No. 65,696.

at statehood. This Court long ago held that sovereign lands could not be divested from the Trust by mistaken or inadvertent acts of the state's executive officers. Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927); Pierce v. Warren, 47 So.2d 857 (Fla. 1950), cert. denied, 341 U.S. 914 (1951). As to the acts of a legislature respecting the Trust, the United States Supreme Court has observed

> . . .The idea that [a state] legislature can deprive the State of control over its beds and waters, and place the same in the hands of a private corporation . . . is a proposition that cannot be defended.

Illinois Central R. R. v. Illinois, 146 U.S. 387, 454 (1892).

The idea that MRTA can be interpreted to divest the state of its Trust lands is dubious at best. It is certainly inconsistent with longstanding common law rulings that the state could not lose inalienable Trust lands through the inadvertence of its officers, or even by their willful but ultra vires acts. Even the legislatures, according to the Supreme Court, are constrained to act within the limitations of the Trust doctrine. Divestment of sovereign ownership through application of MRTA leaves Trust lands under no restrictions as to use, a result thoroughly at odds with the very concept of an inalienable Trust. See, Hayes v. Bowman, 91 So.2d 795 (Fla. 1957).

In enacting MRTA in 1963, the legislature did not explicitly state that the act applied to sovereignty lands

impressed with the public trust. It is an elementary principle that statutes in derogation of the common law, and especially of state sovereignty, are to be strictly construed; in such cases, the courts will not infer that such a statute was intended to make any alteration other than was specified and plainly pronounced. Carlile v. Game and Fresh Water Fish Commission, 354 So.2d 362 (Fla. 1978). As stated in Carlile

> A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard.

354 So.2d at 362. See also, State ex rel. Davis v. Love, 97 Fla. 333, 126 So. 374 (1933).

It should not be assumed that the legislature ever intended for MRTA to subvert the public trust, especially in the absence of unequivocal language to that effect. If the Trust is inalienable as this Court has frequently stated, MRTA could not legally have applied to sovereignty lands. There is nothing to indicate the legislature ever thought it could. The legislature's corrective action, taken immediately after Odom, is proof of the construction that body itself had given the act.

We are far more concerned in this appeal with questions of basic policy than with the mechanistic application of law to facts. Too much of this state's history has involved the unconscionable exploitation of its resources with no regard for

consequences to the land or to the people. With this case we arrive at a crossroads. A remarkably prescient dissent by former Justice Ervin perhaps best bespeaks the direction this Court should take.

> . . . as to prescriptive public coastal areas, navigable waters, tide lands and sovereignty lands, the judiciary has a positive and solemn duty as a last resort to protect the public's rights to the enjoyment and use of any of such lands. There is ample precedent of this Court to afford this protection, including those relating to the inalienable trust doctrine in sovereignty lands and navigable areas. Cf. State ex rel. Ellis v. Gerbing (1908), 56 Fla. 603, 47 So. 353, and Hayes v. Bowman (Fla. 1957), 91 So.2d 795.
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> With Florida's population burgeoning and its recreational needs multiplying by leaps and bounds, the State's courts can ill afford any longer to be profligate with its public areas and allow them to be frittered away upon outmoded pretexts for commercial exploitation.

City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73, 81 (Fla. 1974), Justice Ervin dissenting.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail to ROBERT J. ANGERER, ESQUIRE, Post Office Box 10468, Tallahassee, Florida 32301; JOSEPH C. JACOBS, ESQUIRE, Post Office Box 1170, Tallahassee, Florida 32301; C. DEAN REASONER, ESQUIRE, 800-17th Street, N.W., Washington, D.C. 20006; HALL, ESTILL, HARDWICK, GABLE, COLLINGSWORTH & NELSON, P.C., 4100 Bank of Oklahoma Tower, One Williams Center, Tulsa, Oklahoma 74172; DAVID G. HANLON, ESQUIRE, JOHN W. PUFFER, III, ESQUIRE, SHACKLEFORD, FARRIOR, STALLINGS & EVANS, P.A., Post Office Box 3324, Tampa, Florida 33601; JAMES R. HUBBARD, One S.E. Third Avenue, 1250 Amerifirst Building, Miami, Florida 33131; and ROBERT J. BECKHAM, BECKHAM, BECKHAM & MCALILEY, P.A., 3131 Independent Square, Jacksonville, Florida 32202, this 17 day of April, 1985.

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CONCLUSION

The decision below should be reversed with instructions to remand to the trial court for trial on the merits.

Respectfully submitted,

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