IN THE SUPREME COURT
STATE OF FLORIDA

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND Petitioner, vs. CHARLES R. STEVENS, et al., Respondents.	)	CASE NO. 67,402 DCA NO. 84-719

RESPONDENTS' BRIEF

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INTRODUCTION

This is an action to quiet title to six (6) small parcels of property ("the parcels") which lie around the perimeter of the Stevens' mobile home park ("the park"). The park is located on San Carlos Island, adjacent to a shallow back bay, known as Hurricane Bay. Mr. Stevens developed the park between 1958-1964. In so doing, he dug a canal into his upland property, used the excavated material to "square off" his property and then sea-walled it.

All the land on which Stevens developed their park, together with all the adjacent land now submerged under Hurricane Bay was conveyed by the State into private ownership in the 1880's. However, the present Trustees allege that this submerged land and the filled parcels were sovereignty land in 1845 and seek to reclaim title. The following review of the relevant statutes, history of the disputed property and argument on the application of the Marketable Record Title Act, §712. Fla. Stat. and other fundamental concepts of real property law will satisfy the Court that the entry of summary judgment by the circuit court, quieting Stevens' title in the filled parcels, and the affirmance of that decision in the Second District Court of Appeal was entirely proper and correct.

THE RELEVANT STATUTORY PROVISIONS

Basically, the Marketable Record Title Act ("MRTA"), §712 Fla. Stat. enacted in 1963, permits a person to perfect and clear title to real property by the vesting of record title in the claimant, or his predecessors in title, for at least thirty years. Such title is "free and clear of all claims" unless one of the exceptions provided in § 712.03 Fla. Stat. applies.

The sole exception for consideration by this Court is §712.03(7) Fla. Stat. which provides that marketable record title shall not affect or extinguish "[s]tate title to lands beneath navigable waters acquired by virtue of sovereignty." This exception did not become law until June 15, 1978.

§ 712.04 Fla. Stat. provides that, subject to the exceptions in § 712.03, MRTA extinguishes all estates, interest and claims, including governmental claims, unless the state reserved the right claimed when it parted with title.

MRTA is to be liberally construed "to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons to rely on a record title as described in §712.02 subject only to such limitations as appear in §712.03" (§712.10 Fla. Stat.)

Entities, including the State, claiming an interest in land may preserve and protect those interests from extinguishment under MRTA by filing a notice within the thirty (30) year period, §712.05 Fla. Stat. In addition in 1963, interested parties were

given a two (2) year grace period to preserve claims over thirty years old from extinguishment by permitting filing of a notice setting forth the claim by July 1, 1965, (§712.09 Fla. Stat.)

HISTORY OF THE DISPUTED PROPERTY

The disputed property consists of six (6) small filled parcels comprising between them 2.94 acres, located around the perimeter of Stevens' mobile home park. To the north of the park lies Hurricane Bay. Stevens conceded, solely for the purpose of the summary judgment motion, that Hurricane Bay was sovereignty land in 1845.[1/] The following history of conveyances of sovereignty and swamp and overflow lands in this state, together with a review of the history of Stevens' property, will be of assistance to the Court in deciding this appeal.

In Florida Board of Trustees of the Internal Improvement Trust Fund v. Wakulla Silver Springs Company, 362 So.2d 706, 708-709 (Fla. 3d DCA 1978) under the heading "History of Land Conveyance in Florida" the district court adopted the following concise synopsis of the historical background to ownership of sovereignty and swamp and overflow lands:

> The United States acquired from Spain, by treaty in 1819, full property and sovereignty to all lands in Florida except those lands granted and approved prior to January 24, 1818. Under the treaty, the United States acquired titles to the lands

[1/] This was in response to the Trustee's filing an affidavit claiming that Hurricane Bay existed in 1846.

> which constitute the beds or shores of the navigable waters as well as all other lands not privately owned . . . Upon its admission to the Union in 1845, Florida acquired the right to own and hold the lands under navigable waters lying within the State, including the shores and space between he ordinary high and low water marks, which are called sovereignty lands. Title to all other lands in the State of Florida remained in the United States.
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> Congress, by chapter LXXXIV, Acts of Congress of the United States, September 28, 1850, 9 Stat. 519 (43 U.S.C.A. § 981 et seq.) granted and set up procedures for conveying swamp and overflowed lands to the State. The Act provided that the Secretary of Interior prepare an accurate list and survey plats of the swamps and overflowed lands and that he transmit these to the Governor of the State. The Governor of the State then submitted a selection list to the Secretary of Interior and certified to the Secretary that the lands were swamp and overflowed lands. Upon receipt of the certified selection list, the Secretary of Interior conveyed these lands to the State. Pierce v. Warren, 47 So.2d 857 (Fla. 1950). Title to all sovereign lands and swamp and overflowed lands, upon receipt by the State of Florida, was vested in the Trustees of the Internal Improvement Fund.

In short, the State of Florida obtained title to all sovereignty lands in 1845. In contrast, title to swamp and overflow lands vested in the State only upon the United States Government patenting specific parcels of swamp and overflow land to the State. Swamp and overflow lands were never "sovereignty lands."

In 1873 the United States Government surveyed the area in question and classified Stevens' property and all adjacent parcels including all the land now submerged under Hurricane Bay as swamp

and overflow lands. On September 15, 1879 the United States patented the land to the State of Florida under the Swamp and Overflow Act of 1850.

In 1883, the State of Florida conveyed property that included part of what now is the Stevens' property and land now submerged under Hurricane Bay to the Florida Land Improvement Company. The Trustees' deed stated that the property was acquired under the Swamp and Overflow Act of 1850. In 1885, the Trustees of the Internal Improvement Fund of the State of Florida, in a deed of confirmation to one Hamilton Disston, the owner of Florida Land and Improvement Company, stated:

> that they had full power as such Trustees to sell and convey said lands and an absolute indefeasible estate in fee simple therein, and that the lands so conveyed are free from all charges, liens, trusts, confidences, or encumbrances whatsoever. . . and. . .(the) Trustees forever warrant and defend to said Disston, his heirs and assigns, said lands so conveyed, against the lawful claim of any and all persons whatsoever. . .[2/]

In June 1886, the remainder of Stevens' property was conveyed as part of a larger parcel, including land now submerged under Hurricane Bay, into private ownership by the Trustees.[3/]

Notwithstanding that the State received the property as swamp and overflow land and conveyed it into private ownership, the Trustees opposed summary judgment in the circuit court, filing an

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2/ Appendix A1 to Stevens' brief is a copy of the confirmation deed.

3/ Appendix A2 to Stevens' brief is a copy of this deed.

affidavit of Linda C. Sumarlidson, a land planner with the Department of Natural Resources, who stated that "it appears as though there was, in 1846, a waterbody lying in the present location of Hurricane Bay but known then under the generic name of "Ostego Bay,"[4] The maps attached by Sumarlidson as exhibits were not particularly detailed and did not show Hurricane Bay by name.[5] Prior to the filing of Sumarlidson's affidavit, Stevens had requested the circuit court to take judicial notice that (1) the Map of Township 46 South, Range 24 East, approved by the U.S. Surveyor General's office on September 30, 1873 showed no navigable waters, meandered streams or other significant watercourses on or immediately adjacent to the property the subject of this action, and (2) that prior to the 1929 map (based on a 1927 survey), the United States Geodetic Survey Maps of this area do not show Hurricane Bay (R.131-133).

Solely to enable the case to proceed to summary judgment, Stevens agreed that Sumarlidson's affidavit raised a possible "fact issue" as to whether Hurricane Bay was sovereignty land in 1845 and the Circuit court regarded Hurricane Bay as sovereignty land in 1845 for the purpose of ruling on Stevens' motion for summary judgment.

4/ Paragraph 8 of Sumarlidson's affidavit, R. 157-170.

5/ Interestingly, two of the maps attached as exhibits to Sumarlidson's affidavit show that the disputed property as land, See, Exhibit E - Sheet 24 of The Atlas of Florida, and Exhibit D - "The State of Florida 1911".

SUMMARY OF ARGUMENT

The Trustees' initial brief addresses two distinct but narrow issues, namely:

(1) Does the sovereignty land exception to MRTA, (§712.03(7) Fla. Stat.), enacted in 1978, have retroactive effect to 1963, and

(2) Does Art. X, §11 of the Florida Constitution (adopted in 1970) cause the appliction of MRTA to the disputed lands to be unconstitutional?

Therefore, Stevens' will limit their argument to these two issues. Obviously, by raising just two issues the Trustees concede that if §712.03(7) Fla. Stat. has no retroactive effect and if the disputed property has been "alienated", then Stevens' summary judgment must be affirmed. Stevens has chosen to address these points in reverse order, believing this approach is more orderly and simpler to follow.

The disputed property, which now forms part of a mobile home park was conveyed by the Trustees into private ownership a century ago. However, the Trustees now argue that the land has never been "alienated", claiming that Art.X, §11, Fla. Const. requires this Court to hold that the property is held for the public trust, and that granting title to Stevens title would be an "unconstitutional" application of MRTA. This argument was rejected unanimously by the Second District Court of Appeal which had no hesitation in finding that the property had been

"alienated", so foreclosing any consideration of the effect of Art. X, §11, Fla. Const. which applies only to land not formerly alienated by the State.

The parcels have been "alienated" because:

(a) The parcels were conveyed to the State of Florida by the United States Government as swamp and overflow land,

(b) The U.S. Government survey of 1873 showed no significant waterbodies lying on the disputed property,

(c) In the 1880's, the Trustees conveyed the disputed parcels and land now submerged beneath Hurricane Bay into private ownership,

(d) In 1885, the Trustees executed a "Deed of Confirmation" to one Hamilton Disston expressly restating their authority to convey swamp and overflow land which included certain of the disputed parcels,

(e) Stevens and his predecessors have paid real estate taxes on the disputed parcels and on the land now submerged beneath Hurricane Bay for generations,

(f) The Trustees are estopped to challenge the accuracy of the original U.S. Government survey, Odom v. Deltona Corp., 341 So. 2d 977 (Fla. 1976). Therefore, the Trustees claim that Hurricane Bay was "sovereignty land" in 1845 is irrelevant to the determination of this case.

(g) Estoppel by deed (legal estoppel) precludes the present Trustees from claiming that the disputed parcels have not been alienated.

(h) The present Trustees argument that the concept of erosion somehow precludes the application of MRTA or estoppel by deed is incorrect as a matter of law, City of Pensacola v. Capital Realty Holdings, 417 So.2d 687 (Fla. 1st DCA 1982).

(i) The "erosion" theory represents a complete turn-around of the Trustees' position before the circuit and district courts and is raised for the first time in this Court. As such, the argument has been waived.

(j) The "erosion" theory and the Trustees' "alienation" argument are totally contradictory. If "erosion" or "avulsion" occurred after 1873 then the alienation argument fails.

Therefore, "alienation" of the property has occurred and Art. X, §11, Fla. Const. does not bar the application of MRTA or estoppel by deed to quiet Stevens' title.

The Trustees second point, that the 1978 amendment to MRTA, providing an exception for "State title to lands beneath navigable waters acquired by virtue of sovereignty" (§712.03(7) Fla. Stat.) should be given retroactive effect is incorrect and inapplicable for the following reasons:

(a) The State no longer has "title" to these lands, having conveyed title into private ownership as set forth above,

(b) The disputed property is not beneath navigable waters, so the exception does not apply, Board of Trustees v. Paradise Fruit Co., 414 So.2d 10 (Fla. 5th DCA 1982) pet.rev. denied. 432 So.2d 37 (Fla. 1983),

(c) The 1978 amendment did not expressly and unequivocably state in the amendment itself that it was intended to apply retrospectively. Therefore, it does not have retroactive effect. Fleeman v. Case, 342 So.2d 815 (Fla. 1977).

(d) The legislative history to §712.03(7) Fla. Stat. relied on by the Trustees is totally ambiguous and does not support their argument.

ARTICLE X, SECTION II, OF THE FLORIDA CONSTITUTION HAS NO APPLICATION ON THE FACTS AND, IN ANY EVENT, DOES NOT PRECLUDE THE APPLICATION OF MRTA, OR ESTOPPEL BY DEED TO ALLEGEDLY SOVEREIGN LANDS WHICH HAVE BEEN CONVEYED INTO PRIVATE OWNERSHIP.

The State does not contest that the Trustees conveyed the parcels into private ownership during the 1880's or that Stevens can satisfy the requirements of MRTA to perfect title. Instead, the State takes the position it never "alienated" the Stevens' property, so permitting the Trustees to argue that Art. X, §11, Fla. Const. precludes the application of MRTA to quiet Stevens' title.6/ Plainly, the parcels have been alienated and Art. X, § 11 has no application. Indeed, the Trustees are estopped to attack the ancient conveyances and the surveys upon which those conveyances were based.

Interestingly, the argument that Art. X, §11, Fla. Const. mandates that MRTA cannot constitutionally be applied to sovereign lands was not pleaded as an affirmative defense and was raised only in a most cursory fashion before the circuit court in the final paragraph of the State's memorandum in opposition to Stevens' motion for summary judgment. Only in the district court did the Trustees begin to develop this meritless argument.

Following the adoption of Art. X, §11, Fla. Const. in November, 1970, there has been a uniform approach to application of MRTA to sovereignty lands, namely: that MRTA can be used to

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6/ Article X, §11, Fla. Const. provides: The title to lands under navigable waters, within the boundaries of the State, which have not been alienated, including beaches below mean high water lines, is held by the State, by virtue of sovereignty, in trust for all people.

quiet title. In Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976) this Court acknowledged that Florida's constitution and statutes require that grants of title to real property "without any reservation of public rights in and to waters thereon" should not be upset because of new standards of value relating to recreational needs and ecology, Id. 341 So.2d 977, 989. Of course, as this Court will recognize, no water area is even involved in this appeal, merely land on which people had been living for over twenty years.

Continuing, the Odom Court stated "it seems logical to this Court that . . . the state should conform to the same (MRTA) standard as it requires of its citizens; the claim of the Trustees to beds underlying navigable waters previously conveyed are extinguished by the Act" (citing Sawyer v. Modrall, infra), Id.341 So.2d 977, 989. This Court then explained that the State could exercise powers of eminent domain to reacquire any such property, otherwise legal estoppel barred the Trustees' claim of ownership, concluding:

> it should be reiterated that, as stated in Sawyer, supra, ancient conveyances of sovereign land in existence for more than thirty years, when the State has made no effort of record to reclaim same, clearly vests marketable title in the grantees, their successors or assigns and the land may be recovered only by direct purchase . . . Id.341 So.2d 977, 989-990.

The Trustees claim that Odom did not deal with sovereignty lands is incorrect for two reasons. First, this Court expressly applied its holding to navigable waters, concluding that

> the claims of the Trustees to beds underlying navigable waters previously conveyed are extinguished by the [Marketable Record Title] Act, 341 So.2d at 989 (emphasis added).

Second, had the Odom Court been affirming on the basis that the waters involved there were nonnavigable, it would have been unnecessary to address the issues of legal estoppel, equitable estoppel and Marketable Record Title Act. A determination of nonnavigability would have ended the case by eliminating any claim of sovereignty ownership.7/

This Court could not have been more explicit in stating that its Odom holding was addressing the problem of title to navigable water bottoms. The majority opinion noted at the beginning:

> The complex nature of the whole problem of navigable waters has created much doubt and controversy in attempting to determine what is or is not navigable water and sovereign land. 341 So.2d at 987.

Likewise, Board of Trustees of the Internal Improvement Fund v. Paradise Fruit Co., 414 So.2d 10, pet. rev. denied, 432 So.2d 37 (Fla. 1983) involved the application of MRTA to submerged land which the State claimed constituted sovereignty lands. There, just as in this case, the State made its customary belated effort to alleged that the disputed lands were sovereignty lands in 1845, although the original government surveys did not meander the water body involved. In 1906, the Trustees had conveyed the property to

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7/ The dissenting justices in Odom recognized that the effect of the majority opinion was to apply MRTA to navigable waters. Over the Trustees' continuing protestations, the Second, Third and Fifth District Courts of Appeal have subsequently applied MRTA to navigable waterbodies.

private ownership under the Swamp and Overflow Act. The district court concluded that the issue of "sovereignty" status was irrelevant since MRTA could divest the State of ownership to sovereignty lands because the thirty year period required by MRTA had expired prior to the enactment of the 1978 amendment to MRTA, (§712.03(7) Fla. Stat.) creating the exception for certain sovereignty land. Board of Trustees of the Internal Improvement Fund v. Mobil Oil Corp, 455 So.2d 412 (Fla. 2d DCA 1984); Coastal Petroleum Co. v. American Cyanamid Co., 454 So.2d 6 (Fla. 2d DCA 1984) and Board of Trustees of the Internal Improvement Fund v. Agrico Chemical Co., 462 So.2d 829 (Fla. 2d DCA 1984) are to the same effect.

Likewise, the decisions in Department of National Resources v. Contemporary Land Sales, Inc., 400 So.2d 488 (Fla. 5th DCA 1981); Starnes v. Marchon Investment Group, 571 F.2d 1369 (5th Cir. 1978); and Sawyer v. Modrall, 286 So.2d 610 (Fla. 4th DCA 1973), cert. denied, 297 So.2d 562 (Fla. 1974) are further examples of the uncontradicted holdings of Florida courts that title to sovereignty lands can be cleared and perfected by the use of MRTA.

In contrast, the State has cited no decision in which a court has refused to apply MRTA to "sovereignty" land when the applicable thirty year root of record title was present. However the Trustees, in a frantic effort to avoid the effect of MRTA on land previously conveyed by into private ownership, now seek to ignore and disvow the conveyances made by their predecessors. The

legal description in those earlier conveyances (attached in the appendix) covered all the 2.94 acres and much of what is now submerged land under Hurricane Bay. Indeed, the Confirmation Deed to Hamilton Disston could scarcely have been clearer in its terms, namely: that the Trustees had full power to convey and held an absolute indefeasible estate in fee simple and that the lands were free from all charges, liens or trusts and that the "Trustees forever warrant and defend" to Disston and his successor the land so conveyed.

Years have passed, people have established homes on the land and now this Court is invited to hold that previous Trustees' solemn representations and warranties were for naught, and that the 2.94 acres has never been alienated, presumably on the sole ground that the Trustees have changed their philosophy. However, it is well established that:

> Public officers are presumed to do their duty. The Court will, therefore, assume that the then Trustees, before executing the deed to plaintiff's predecessor in title, made the findings necessary to make their acts legal.
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> The Supreme Court, almost a century ago, held that "common honesty is quite as respectable on the part of the State as in an individual, and hence the state will be honest and not repudiate." Cheney v. Jones, (citation omitted).
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> Applying this principle, the Court holds that the State must be honest with the plaintiff and not repudiate its solemn deed.
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> If, perchance, the trustees have executed conveyances they should not have executed and divested the State of assets which the public interest now requires the State to own, the State has an adequate remedy. It may exercise

> the power of eminent domain and reacquire the assets improvidently sold, thus protecting the integrity of the State and making whole the citizens who would otherwise be defrauded. . . Askew v. Taylor, 299 So.2d 72, 74 (Fla. 1st DCA 1974) (Rawls, J., quoting from trial court opinion).

If alienation has occurred, then the State has no foundation on which to rest its argument that Art. X, §11, Fla. Const. (adopted in 1970) has any application, because that provision applied only to "title to lands under navigable waters (or beaches) which have not been alienated" (emphasis added). The land in question was surveyed and conveyed to the State as swamp and overflow land in the 1870's; quickly, it was reconveyed by the Trustees into private ownership as swamp and overflow land, and Stevens and their predecessors have for generations, paid real estate taxes on the parcels and on the adjacent submerged land encompassed within their deeds.8/

Conspicuous by its absence from the Trustees brief is any real attempt to explain why the Trustees' conveyances in the 1880's did not constitute an "alienation". The Trustees do not deny that, after a survey, they did expressly transfer and convey all the property involved into private ownership. Indeed, such a position would be untenable in view of the Trustees actions in the 1880's. The Trustees sold the land and were paid for the

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8/ In 1984, Stevens voluntarily conveyed to the Trustees all the land encompassed by their deeds which was then submerged under Hurricane Bay.

property; thereafter, they sought to exercise no dominion over the 2.94 acres, Stevens even paid taxes on the land now submerged beneath Hurricane Bay. That is alienation.

Trustees citation to Martin v. Busch, 93 Fla. 535, 112 So.2d 274 (Fla. 1927) is of no assistance in establishing the lack of alienation because Martin involved a conveyance by the Trustees of then unsurveyed property. This permitted the Trustees to later assert that such a conveyance did not include any sovereignty land encompassed within the legal description of the conveyed property. In contrast, in this case the Trustees conveyed surveyed land, which survey showed no navigable waters or other areas that would qualify as sovereignty lands. Of course, the Trustees approach in this case is identical to their position in Paradise Fruit, supra, where they ignored government surveys and conveyances into private ownership and then, at the last moment, alleged ownership based on vague claims of sovereignty status in 1845.

Among other reasons, the Trustees cannot deny alienation because of the application of the concept of legal estoppel by deed, Odom v. Deltona Corp., supra; Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961); Daniell v. Sherill, 48 So.2d 736 (Fla. 1950). Of course, legal estoppel or estoppel by deed is a bar which precludes a party to a deed and his privies from asserting any right or title in derogation of the deed, Lobean, 127 So.2d 98, 102; Odom, 341 So.2d 977, 989. The Trustees cannot now be heard to argue that they have not "alienated" the 2.94 acres which they specifically deeded away a

century ago. Truly, their confirmation deed to Hamilton Disston would not be "worth the paper it is written on" if the present Trustees could succeed in such an argument.

In Lobean, the State had erroneously conveyed sovereignty lands to Lobean by a Murphy Act deed. Subsequently the State, over Lobean's objection sold the same lands under provisions of Section 253.12, Florida Statutes (1955). Both the First District Court of Appeal and this Court held that legal estoppel (estoppel by deed) operated against the State even though the Murphy Act deed was void. The import of this Court's application of legal estoppel in Lobean is that the Trustees were held estopped by their deed conveying water bottoms, which at that time they had no "authority" to convey.

If the present Trustees do not understand this Court's holding in Lobean, the same cannot be said for their predecessors who were parties to the Lobean case. In their supplemental brief on file in this Court, the earlier Trustees urged the Court not to "adopt the doctrine of legal estoppel against the sovereign state of Florida" as applied to sovereignty lands and further asked that the Court modify its prior holding in Daniell v. Sherrill, supra, to avoid any such result. The Court's opinion rejected both requests.

A significant aspect of legal estoppel is the doctrine of "after-acquired title," defined in Tucker v. Cole, 148 Fla. 214, 3 So.2d 875, 877 (1941) as follows:

> As a general rule, when a person conveys land in which he has no interest at the time, but afterwards acquires a title to the same land, he will not be permitted to claim in opposition to his deed, from the grantee, or any person claiming title from the grantee.

This would apply against the Trustees in this case.

Fifteen years after Lobean, this Court again applied legal estoppel against the Trustees in Odom v. Deltona Corp., supra. The Court stated:

> Stability of titles expressly requires that, when lawfully executed land conveyances are made by public officials to private citizens without reservation of public rights in and to the waters located thereon, a change of personnel among elected state officials should not authorize the government to take from the grantee the rights which have been conveyed previously without appropriate justification and compensation. If the state has conveyed property rights which it now needs, these can be reacquired through eminent domain; otherwise, legal estoppel is applicable and bars the trustees' claim of ownership,[9/] subject to rights specifically reserved in such conveyances 341 So.2d at 989.

Just as they cannot challenge the validity of the swamp and overflow land conveyances, so the Trustees are foreclosed from challenging the accuracy of the original survbeys upon which those conveyances were based.

Long ago, the State of Florida and the United States determined that the Stevens' lands were not sovereignty lands but were swamp and overflow lands which could lawfully be conveyed

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9/ Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98, 104 (Fla. 1961).

into private ownership. The classification and determinations made by duly authorized surveys by government officials are binding and conclusive as a matter of law. Even though conceded as a "fact issue", the Trustees' assertion of sovereignty status in 1846 is legally irrelevant. This Court has previously considered and rejected the Trustees' argument that the Court should ignore what the government surveyors had determined. In Odom, this Court stated

> This Court is in a poor posture to evaluate the work of those surveyors of many decades past. It can only be accepted that they did their job as instructed and recorded what they found then, which may or may not be what appears now. It is to be observed that governmental conveyances were made in reliance on them and the grantees of such conveyances had the right to assume the U.S. government and the Trustees were acting lawfully, 341 So.2d 977,987.

Florida has followed the corresponding federal doctrine that in the administration of the public land system, factual determinations of the federal land department are final, including factual decisions as to the physical character of lands being "swamp and overflow lands." Odom v. Deltona Corp.; Pembroke v. Peninsular Terminal Co., 146 So. 249, 258-59 (Fla. 1933); see United States v. Chicago, Milwaukee & St. Paul Railway Company, 218 U.S. 233 (1910); McCormick v. Hayes, 159 U.S. 332 (1895); Heath v. Wallace, 138 U.S. 573 (1891); French v. Fyan, 93 U.S. 169 (1876). Therefore, Ms. Sumarlidson's outrageous claim of

"sovereignty" status in 1845 can be ignored for the purposes of this appeal. Certainly, the parcels were "alienated" in the 1880's.

In French v. Fyan, supra, the Supreme Court of the United States held:

> [I]t would be a departure from sound principle, and contrary to well considered judgments in this court and in others of high authority, to permit the validity of the patent to the State to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey,
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> 93 U.S. at 169-73.

McCormick v. Hayes, supra, was an appeal from a state court. Following a survey of a section of land, the Secretary of the Interior had classified only a portion of the section as swamp and overflowed land at the request of the state governor, omitting the land in question from the classification. The Supreme Court held that the state court erred in admitting parol evidence in an attempt to overturn the Secretary's factual determination as to the character of the land. McCormick established that once the Secretary of the Interior, concurrently with the governor of the state, determined the character of the land, this finding was final and binding on all courts, including the state court:

> Upon the authority of former adjudications, as well as upon principle, it must be held that parol evidence is inadmissible to show, in opposition to the

> concurrent action of Federal and state officers, having authority in the premises, that the lands were in fact on the date of the Act of 1850, swamp and overflowed grounds. . . .

159 U.S. at 348. See also Heath v. Wallace, 138 U.S. 573, 585 (1891) ("[T]he decision of the Land Department on the question of the actual physical character of certain lands is not subject to review by the courts").

This Court has adopted the same view in Pembroke v. Peninsular Terminal Co., supra. In that case a landowner's title was challenged on the ground that a Trustees' conveyance of submerged lands into private ownership "erroneously or falsely recited that the lands conveyed were lands 'upon which the water is not more than three feet deep at high tide'" and that the Trustees were without authority to deed the lands. Rejecting the challenge, the Court agreed with the trial court that "the title and ownership of the land in question should rest upon a grant, and not upon an evidentiary fact." 146 So. at 257.

In considering the Trustees' argument on this appeal that MRTA does not foreclose their claims of title to sovereignty lands, the Court should be made aware that the Trustees have taken an entirely different position in this Court in Askew v. Sonson, 409 So.2d 7 (Fla. 1981). There, counsel for the Trustees candidly admitted that MRTA would bar such claims by the State if there had been a conveyance of the land in question, even if void. The point was made both in the Trustees' Motion for Rehearing[10/] and

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10/ "Once public domain lands are conveyed by the sovereign by (footnote continued)

at oral argument[11/] It was perhaps for this reason that Justice Overton, one of the dissenting justices in Odom v. Deltona Corp., receded from his earlier position in a separate opinion in the Sonson case:

> I agree that the act applies to lands that the state previously conveyed, even if it did so erroneously, such as swamp and overflow lands or Murphy Act Deed properties. See, e.g.,. Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1977); Sawyer v. Modrall, 286 So.2d 610 (Fla. 4th DCA 1973). It cannot agree, however, that the legislature in any manner intended that MRTA apply to lands which the state never conveyed. . . .

409 So.2d at 16 (emphasis in original).

No reason has been given why this Court should recede from its prior holdings in the Odom and Sawyer cases. As the Court emphasized in Askew v. Sonson:

> Substantive rules governing the law of real property are peculiarly subject to the principles of stare decisis. United States v.

(footnote continued from previous page)
deed they cease to be a part of the public domain and record title would be founded in the appropriate county where they are located; and this title is of course subject to the operation of the Marketable Record Title Act." Page 3, Motion for Rehearing served August 7, 1981.

11/ "JUSTICE BOYD: [Y]ou would take back all those motels and hotels and everything around the edge of Florida that's built out on this sovereign land that they shouldn't have gotten to at all -- and not even pay the people for it."

"MR. WEISS: Justice Boyd, if there had been an effort on the part of the State to convey those lands, and there was no fraud connected with it, I would say, no, the State, like any other citizen, would be required to do equity. Now, counsel for appellee and I both agreed that there were no equitable arguments to argue before this Court."

Transcript of oral argument, November 5, 1979 (emphasis added).

Title Insurance and Trust Company, 265 U.S. 472, (1924); Alta-Cliff Co. v. Spurway, 113 Fla. 633, 152 So. 731 (Fla. 1933).

409 So.2d at 15.

Plainly, the Trustees cannot establish that the 2.94 acres has not been alienated which is prerequisite for even suggesting any constitutional impediment to applying either MRTA or estoppel by deed to perfect Stevens' title.

It should be observed that if Art. 10, § 11, Fla. Const. renders MRTA impotent and ineffective with regard to sovereignty land, then the legislature wasted its efforts in 1978 in passing §712.03(7) Fla. Stat. because that exception from MRTA for certain sovereignty lands would be totally unnecessary.

Further, as Stevens' title was perfected by MRTA prior to the adoption of Art.X, §11 in 1970,12/ a holding that Art. X, §11 rendered MRTA ineffective after 1970 would be a clear violation of Art. X, §6 Fla. Const. which precludes a taking of private property for public purpose without full compensation. This, of course, was recognized by this Court in Odom v. Deltona, supra.

Improperly, the Trustees now seek to raise new issues that they have not argued previously. The Trustees' argument that this Court should consider the doctrines of erosion, submergence, reliction and accretion raises an issue which the Trustees did not present to the circuit court or to the district court. Therefore,

12/ Stevens could have sued to perfect title under MRTA upon its enactment in 1963.

these arguments have been waived, Dept. of Health and Rehabilitative Services v. Petty-Eifert, 443 So.2d 266 (Fla. 1st DCA 1983); Poly Glycoat Corp. v. Hirsch Distributors, Inc., 442 So.2d 958 (Fla. 4th DCA 1983).

Of course, this Court will recognize that the Trustees' sudden reliance on the theory of erosion represents a complete turn-around in their argument. No longer do they rely on Ms. Sumarlidson's claim that Hurricane Bay was sovereignty land in 1845. Instead, they accept that in 1873 the Stevens' property was swamp and overflow land (as stated by the Government survey) and so, presumably must accept that the land was legally alienated by the Trustees. This is fatal to their "constitutionality" argument.

Without any factual predicate, the Trustees insist that the doctrine of erosion now precludes MRTA's application. In fact, although the Trustees failed to raise this matter in either the circuit court or the district court, Stevens did lay the necessary and undisputed factual predicate to avoid the application of the concept of erosion.[13/] Stevens' surveyor, by affidavit relied on at summary judgment, stated that aerial photographs show that the natural boundaries of Hurricane Bay in the area adjacent to Stevens' mobile home park were basically unchanged from 1927 (R.141). In Florida, it is established that if erosion occurs before the recorded "root of title", then the root of title

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13/ Of course, if this case were ever tried, Stevens position would be that Hurricane Bay was almost certainly formed by a hurricane (probably in 1926) and as such avulsion would apply to keep title to the newly submerged land in Stevens' predecessors.

governs for MRTA purposes and overrides any natural topographical changes. In contrast, if the changes post-date the root of title, then MRTA is of no assistance to the title holder, City of Pensacola v. Capital Realty Holdings, 417 So 2d 687 (Fla. 1st DCA 1982). Stevens' "roots of title" vary from 1939 to 1943. They plainly post-date any topographical changes set forth in the record. Therefore, any "factual" dispute about the formation of Hurricane Bay was irrelevant to the disposition of the summary judgment motion.

THE SOVEREIGNTY LAND EXCEPTION IN MRTA, ENACTED IN 1978, HAS NO RETROACTIVE APPLICATION AND DOES NOT APPLY TO THE DISPUTED LANDS.

In 1978, the legislature amended MRTA to exclude from its operation "[s]tate title to lands beneath navigable waters acquired by virtue of sovereignty" § 712.03(7) Fla. Stat. The Trustees argue that the 1978 amendment should be given retroactive effect to MRTA's enactment in 1963. This position ignores the accepted rule of statutory interpretation that statues apply prospectively only in the absence of express intent by the legislature. Also the argument ignores the pronouncement of the Supreme Court that the clear legislative intent behind MRTA, as expressed in §712.10, Fla. Stat., was to simplify and facilitate land title transactions by allowing persons to rely on a record title, Marshall v. Hollywood, Inc., 236 So.2d 114 (Fla. 1970).

The issue of retroactive application of the 1978 amendment was considered and rejected in Board of Trustees v. Paradise Fruit Co., 414 So.2d 10 (5th DCA 1982), pet. rev. denied, 432 So.2d 37 (Fla. 1983) and Coastal Petroleum Co. v. American Cyanamid Co., 454 So.2d 6 (Fla. 2d DCA 1984). These decisions provide that the 1978 amendment's application was prospective only and would not affect the rights of parties, such as Stevens, whose title was perfected by MRTA between 1963 and 1978. Indeed, to treat the 1978 amendment as retroactive would have a devastating effect on property rights, making it possible that the Trustees could seek to revisit any conveyance between private parties involving property which might arguably involve sovereignty land, even though that land had been in private ownership for a century or more. The Trustees' position in this action, in Paradise Fruit, and other cases[14/] shows that they have no hesitation in seeking to dishonor ancient conveyances by earlier Trustees or to question ancient surveys on which the Trustees and grantees relied in conveying property and on which titles have been based for generations. The same cases show that Courts will not permit such arguments to succeed.

Of course, it is a well established rule of construction that, in the absence of clear legislative expression to the contrary, substantive statutes operate prospectively only, Van

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14/ For example, in Odom v. Deltona, the trustees sought to go behind an ancient survey. The Supreme Court stated that it was not in a position "to evaluate the work of those surveyors of many decades past." 341 So.2d 988.

Bidder v. Hartford Acc. & Indem. Ins. Co., 439 So.2d 880 (Fla. 1983); Walker & La Berge v. Halligan, 344 So.2d 239 (Fla. 1977); Fleeman v. Case, 342 So.2d 815 (Fla. 1977). In Fleeman, this Court stated:

> We decline to devine legislative intent for an issue as important as retroactive operation... We can restrict the debate on a legislative "intent" for retroactively ... if we insist that a declaration of retroactive application be made expressly in the legislation under review. By this means the forward or backward reach of proposed laws is irrevocably assigned to the forum best suited to determine that issue, and the judiciary is limited only to determining in appropriate cases whether the expressed retroactive application of the law collides with any overriding constitutional provision. There being no express and unequivocal statement in this legislation that it was intended to apply to leases which antedate its enactment. We hold the statute inapplicable to the contract in these proceedings. Id. 342 So.2d 815, 817-818.

The rule that statutes are not to be construed retroactively, unless such construction was plainly intended by the Legislature, applies with peculiar force to those statutes, the retrospective operation of which would impair or destroy vested rights, State v. Lavassoli, 434 So.2d 321 (Fla. 1983); In re Seven Barrels of Wine, 79 Fla. 1, 83 So.627 (1920).

Nothing in the 1978 amendment itself expressly or impliedly suggests at retroactive application, and Fleeman precludes the Court from relying on ambiguous statements by legislature. In the absence of clear express legislative intent in the amendment itself, the exception can have prospective application only, Fleeman, supra.

The Trustees' claim that MRTA was intended to apply only to private landowners ignores that §712,04 Fla. Stat. specifically provides that it applies to claims by the state and United States Government. Once again the Trustees seek to argue that conveyances by earlier Trustees, relied on for generations, should be ignored, and, in suggesting that the state cannot be expected to comply with MRTA, the Trustees ignore their statutory duty to maintain an inventory of state owned submerged lands. §253.03(8)(a) & (b) Fla. Stat.

Finally, as worded, the 1978 exception applies only State lands beneath navigable waters. No such lands are involved in this case. As already argued, the State has not owned Stevens' land since the mid 1880's. Further, the disputed land is not beneath navigable waters. Therefore, on its face, the exception does not apply; but MRTA would, Askew v. Sonson, supra; Paradise Fruit, supra.

CONCLUSION

The summary judgment entered by the circuit court must be affirmed. The State cannot, merely because of a change of Trustees or philosophy, disavow and ignore ancient conveyances made by their predecessors. Indeed, they are estopped to do so. There is no constitutional issue involved because the parcels in dispute were alienated by the Trustees almost a century ago.

Both on the basis of MRTA and on general title principles, Stevens' were entitled to quiet their title against any claim of the present Trustees. The 1978 amendment to MRTA does not apply because the filed lands are not "state lands" or beneath navigable waters and, in any event, making the 1978 amendment retroactive would ignore the well established rule of construction that statutes apply prospectively only. Additionally, retroactive operation would create great uncertainty in title transactions generally, and would amount to an uncompensated taking of property for public purposes contrary to Art. X, §6 Fla. Const.

If this Court should conclude that summary judgment was entered improperly, the case must be remanded because substantial issues remain to be tried.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was sent by U.S. Mail this 9th day of September, 1985 to Lee R. Rohe, Esquire, Department of Natural Resources, Suite 1003, Douglas Building, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303.

Hywel Leonard.
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