IN THE SUPREME COURT
STATE OF FLORIDA

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND,

Petitioner,

v.

CASE NO. 67,402
DCA NO. 84-719

CHARLES R. STEVENS, ET AL.,

Respondents.
_____/

APPELLANT'S INITIAL BRIEF

LEE R. ROHE
Assistant General Assistant
Department of Natural Resources
Suite 1003, Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32303
(904) 488-7150
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CITATIONS

PAGE

CASES

PAGE

PAGE

STATUTES

PAGE

RULES

OTHER

QUESTIONS PRESENTED

POINT I

CAN SECTION 712.03(7) BE APPLIED RETROACTIVELY?

POINT II

THE TRUSTEES DID NOT "ALIENATE," (AS THAT TERM IS USED WITHIN ARTICLE X, SECTION 11) SOVEREIGN LANDS UNDERLYING HURRICANE BAY THROUGH A SWAMPLANDS CONVEYANCE.

INTRODUCTION

The Defendant below, Board of Trustees of the Internal Improvement Trust Fund, State of Florida, will be referred to variously as "Appellant," "Trustees" or "State." The Plaintiff below, Charles R. Stevens and Louise Helen Jahncke Stevens will be variously referred to as "Appellee," "Appellees" or "Stevens."

References to the record shall be designated by an "R" followed by the particular page number. For example, "R: 100-101" shall mean record, pages 100 and 101. The appendix shall be designated by an "A" followed by the number of the document. For example "A:1" shall mean Appendix 1 and so forth.

STATEMENT OF CASE

In July 1983 Appellees brought an action against the Trustees to quiet title to various parcels of land lying within government lots three and four of section 19 and government lot four of section 18. Suit was instituted under the purview of Chapters 65 and 712, Florida Statutes.

By surveyor's affidavits, and the attached exhibits, Appellees' parcels are depicted upon aerial photographs as encompassing natural uplands, filled land which was formerly submerged, and land which underlies the waters of Hurricane Bay. R:40-45 and R:141-149. The survey exhibits are a retracement of the boundaries of the government lots as originally described by the federal surveyors. Thus, boundary lines, as shown by Appellees exhibits, were projected over the waters of Hurricane Bay without regard for the location of the bay's mean high water line in relation to the uplands portion of each parcel.

Hurricane Bay separates the island where Appellees' lands are located, San Carlos Island, from the Lee County mainland. A: 1. To the west of San Carlos Island is Mantanzas Pass and Estero Island. On its north and south ends, Hurricane Bay opens into Mantanzas Pass which lies on the leeward side of Estero Island.

Hurricane Bay consists of 384 acres in surface area. It is a tidally influenced waterbody and, as a consequence, its mean high water line is easily detectable. R:172. An affiant for the Trustees, a retired commercial fisherman and charterboat captain,

Captain Trowbridge, stated that Hurricane Bay was three to four feet in depth during extreme low tide. Captain Trowbridge could also recall fishing in the bay with his father as far back as 1917. R:135-140.

At the trial court level, a dispute arose as to whether or not Hurricane Bay existed during the time of statehood and therefore was sovereign. The 1873 federal survey did not depict any waterbody in the area of Hurricane Bay. R:131-133.

To avoid an issue of fact from precluding a summary judgment, the Appellees stipulated that Hurricane Bay is a sovereign waterbody. R:3-4. (An affidavit filed by a Department of Natural Resources (DNR) land planner, Linda Sumarlidason, accompanied a map, dated 1846, which shows an "Ostego Bay" lying within the general location of present day Hurricane Bay.) R:161.

Depending upon which of the several parcels is being examined, Appellees can trace their roots of title back to the period between 1939-1943.[1] R:58-124. Under the 30 years vesting schedule of MRTA, Appellees successfully claimed that marketable title to the lands in question was perfected in them as of the period 1969-1973. R:5.

Original title of the lands in question can be traced back to lands granted to Florida by the United States under the Swamp and Overflow Act of 1850. In particular, the U.S. conveyed the land to the state by patent in 1879. In 1883 and 1886, the

---

[1] "Roots of title" is used here as it is defined under Section 712.01(2), Florida Statutes, Marketable Record Title Act (MRTA).

parcels which constituted the parent tracts of Appellees' lands were conveyed to a private predecessor in title.

The uplands and filled lands claimed by Appellees comprise a mobile home park. The filled lands were created by Appellees between 1958-1964. R:4. (See also Appendix 1 of Appellant's brief for the Second District Court of Appeal). The affidavit of Bulson, with attached survey sketches, illustrates the original shoreline of the upland property before filled land was added. R:141-149.

The Trustees did not claim title to the original or natural uplands but did claim title, on behalf of the public, to the submerged lands underlying Hurricane Bay and the filled lands claimed by Appellees. The filled parcels consist of 2.94 acres in the aggregate.

While the case was under advisement with the trial court, Appellees quitclaimed to the Trustees their submerged lands claim after Judge Thompson indicated he was inclined to render only a partial summary judgment. R:17-18. The final summary judgment of March 2, 1984, was made only with regard to the 2.94 acres of filled, formerly submerged land. R:209.

Notice of Appeal of the final summary judgment was filed March 29, 1984 and the case was briefed with oral argument heard on November 21, 1984 before the Second District Court of Appeal. The Second District Court of Appeal filed its opinion July 10, 1985, affirming the trial court but certifying to this court the following question as a question of great public importance: Can section 712.03(7) be applied retroactively?

The Trustees argued below that MRTA's application to sovereign lands conflicts with Article X, Section 11 of the Florida Constitution, that the 1978 Amendment to MRTA (712.03(7)) was declarative of the legislature's original intent when it enacted MRTA in 1963 and that it was legally impossible for Appellees to have gained a MRTA root of title to sovereign lands.

On the other hand, Appellees argued that Article X, Section 11 did not apply since the lands involved had been validly alienated, within the meaning of Article X, Section 11, and that the 1978 Amendment has no retroactive application and does not apply to filled lands.

On July 22nd, the Trustees filed a Notice of Appeal with the lower appellate court, and on July 25th a copy of the same notice along with the lower court's opinion and certified question were filed with this court. This court assumed jurisdiction on July 25th and issued to the parties a briefing schedule for briefs on the merits.

ARGUMENT AS TO POINT I
(Certified Question of Great Public Importance)

POINT I: CAN SECTION 712.03(7) BE APPLIED RETROACTIVELY?

Section 712.03, Florida Statutes (1983), states in pertinent part under the heading of "Exceptions to marketability" that:

> "Such marketable record title shall not affect or extinguish the following rights:
>
> (7) State title to lands beneath navigable waters acquired by virtue of sovereignty."

As an addition to Section 712.03, subsection seven both became law and took effect on the same date: June 15, 1978. It was enacted during a special session of the legislature convened by Governor Askew's proclamation of June 2, 1978, which declared:

> "Whereas, it is vital to the interest of the State of Florida that the Legislature immediately consider and adopt legislation for the protection of the state's lands. . . ."

The result of the special session was the above-quoted addition to section 712.03 passed as Chapter 78-288, Laws of Florida. It is also interesting to note that subsection seven became law and took effect simultaneously. Clearly, the governor and legislature were motivated by a sense of urgency with regard to sovereign lands.

To be sure, a growing apprehension of judicial interpretation of MRTA had finally reached crisis proportions with the governor and lawmakers as spurred by the following cases:

Sawyer v. Modrall, 286 So.2d 610 (Fla. 4th DCA 1973); Odom v. Deltona, 341 So.2d 977 (Fla. 1976); Starnes v. Marcon, 571 F2d 1369 (5th Cir. 1978).[2]

In Starnes, the Fifth U.S. Circuit Court of Appeals reversed the trial court's decision on the following basis:[3]

> In light of the intervening Florida Supreme Court case of Odom v. Deltona Corp., 341 So.2d 977 (Fla. 1976), the district court's judgment must be reversed." 571 F2d at 1370.

The Starnes court quoted from pages 989-90 of Odom v. Deltona Corp., supra, as follows:

> "Ancient conveyances of sovereign lands 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 or through eminent domain proceedings."

Also cited in Starnes, for the federal court's interpretation of Florida law, is Sawyer v. Modrall, supra.[4] Thus, three cases prompted the governor's proclamation and the legislature's enactment: Sawyer, Odom and Starnes. But it was Starnes which sounded the alarm since it represented the first case where Odom was cited as a statewide precedent for the contention that MRTA serves to divest the sovereign of sovereign lands.

---

[2] The Starnes case, supra, was decided during the 1978 regular session of the legislature on April 28th, but rehearing was not denied till May 22nd.

[3] The Board of Trustees of the Internal Improvement Trust Fund had not been a party in the Starnes v. Marcon case.

[4] Again, the Board of Trustees had not been a party to the Sawyer case.

Of the more than 20 million acres of swamp and overflowed land patented to Florida by the U.S. under the Swamp Land Act of 1850, only 1,206,870 acres remained with the State of Florida by January 1, 1919. Everglades Sugar and Land Co. v. Bryan, 87 So. 68, 73 (Fla. 1921). As a result, when MRTA was enacted in 1963 most state claims to navigable waterbodies lying within, or adjacent to, a swamplands conveyance would have been cut off as much older than thirty years if MRTA did not exempt sovereign lands from the time of its original enactment. Indeed, if subsection seven of 712.03 is regarded as prospective-only, any mistaken state conveyance of swamplands containing sovereign lands made, for example, before June 15, 1948, would survive the operation of the 1978 amendment.5

This court has described MRTA as a curative act, a statute of limitations and a recording act. City of Miami v. St. Joe Paper Co., 364 So.2d 439, 442 (Fla. 1978); Askew v. Sonson, 409 So.2d 7, 13 (Fla. 1981).

MRTA, by its very nature, is retrospective because it reaches back in the past to cure or cut off past transactions or claims. It follows that an amendment or addition to a retrospective statute must also necessarily operate in a retroactive manner.

When first passed, MRTA's validity was uncertain because of its "retroactive features." As one commentator noted:

---

5 Assuming, arguendo, that sovereign lands pass by virtue of a swamplands conveyance.

> "The clauses of the federal constitution which usually will be pleaded against this kind of legislation are the due process clause of the fourteenth amendment and the clause which says that no state shall pass a law impairing the obligation of contracts." 18 U. Miami L. Rev. 103, 119 (1963).

In St. Joe Paper Co., supra, this court held MRTA to not be violative of the Due Process Clause where the statute gave owners of old claims a reasonable time to preserve their interests. 364 So. at 444. And, in Trustees of Tufts College v. Triple R Ranch, Inc., 275 So.2d 521, 526 (Fla. 1973), this court characterized MRTA as having "retroactive application." A curative or remedial statute is necessarily retrospective in character. City of Lakeland v. Catinells, 129 So. 2d 133 (Fla. 1961) (curative statute); Coon v. Board of Public Instruction, 203 So.2d 497 (Fla. 1967) (remedial statute).

But it was not until Board of Trustees v. Paradise Fruit Co.[6] that the issue of whether subsection seven is retroactive was raised for the first time:

> "Since MRTA is not a statute of limitations and acted to terminate all interests to which it applied when it was enacted and continuously since that time, Appellee's title was perfected in 1963 and any retroactive construction of the amendment would unconstitutionally deprive Appellee of rights vested in it in 1963." [Emphasis added.] 414 So.2d at 11.

Presumably, Judge Cowart was referring to the Due Process Clause with regard to Paradise Fruit Company's claim. Judge Cowart opined that Paradise Fruit Company's rights were "vested" as of 1963. A retroactive operation of the 1978 amend-

---

[6] Cited at 414 So.2d 10 (Fla. 5th DCA 1982). Petition for rev. denied at 423 So.2d 37 (Fla. 1983) with one dissent.

ment would then deprive the private party of "vested rights." But on closer analysis, a private claimant could have had no "rights" in sovereign land before 1963 because of the common law which existed at and before 1963. In other words, the thirty-years vesting schedule never began to run against the sovereign; no "root of title" was gained to sovereign land. If anything, the Fifth DCA has retroactively applied MRTA decisions of the 1970's and 1980's to a real estate title as it existed in 1963 and before and, in the process, has created "rights" where none existed before.

The State of Michigan has been the forerunner of MRTA legislation among all the states. 18 U. Miami L. Rev. 103, 104 (1963). In fact, the Michigan Bar and Michigan Law School were chiefly responsible for Michigan's MRTA. Id. Professor Scurlock, in a book published by the Michigan Law School, defined retroactive legislation as follows:

> "The term retroactive when applied to legislation has been used to suggest a variety of meanings, but the sense in which the term is employed here is that a statute is retroactive when it extinguishes or impairs interests acquired under the previously existing law." SCURLOCK, RETROACTIVE LEGISLATION AFFECTING INTERESTS IN LAND 1 (1953)

Another definition of retroactive law includes the following:

> "Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." (Emphasis added.) Black's Law Dictionary, Fourth Edition (1968).

In 1963 no private owner expected to successfully claim sovereign land. Not until 1973, in Sawyer v. Modrall, supra, could any private landowner find a legal precedent by which to assert title to sovereign land. From 1963 on back, the Florida Trust Doctrine unequivocally protected sovereign land.

Prior to the 1970 adoption of Art. X, §11, the Florida Public Trust Doctrine was recognized and reaffirmed again and again in this court's many decisions. Black River Phosphate Co, 13 So. 640 (Fla. 1893); Ellis v. Gerbing, 47 So. 353 (Fla. 1908); Merrill-Stevens Co. v. Durkee, 57 So. 428 (Fla. 1912); Martin v. Busch, 112 So. 274 (Fla. 1927); Deering v. Martin, 116 So. 54 (Fla. 1928); Perky Properties, Inc. v. Felton, 151 So. 892 (Fla. 1934); Hayes v. Bowman, 91 So.2d 795 (Fla. 1957); Bryant v. Lovett, 201 So.2d 720 (Fla. 1967). See also Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); United States v. 2,899.17 Acres of Land, Etc., 269 F.Supp. 903, 909 (1967).[7]

Equitable estoppel was not usually available to establish title against the sovereign. Adams v. Crews, 105 So.2d 584, 589-590 (Fla. 2nd DCA 1958); Bryant v. Peppe, 238 So.2d 836 (Fla. 1970). At one time, State lands were protected from suit by sovereign immunity. Hampton v. State Board of Education, 105 So. 323, 328 (Fla. 1925).

---

[7] U.S. v. 2,899.17 Acres cites Trustees of Internal Improvement Fund v. Claughton, 86 So.2d 775 (Fla. 1956) at page 786:

> "No authority need be cited for the proposition that a grant in derogation of sovereignty must be strictly construed in favor of the sovereign."

As noted by Judge Bentley's dissent in the decision below, not even adverse possession runs against the sovereign title. Pearce v. Cone, 2 So.2d 360, 361 (Fla. 1941); Lovey v. Escambia County, 141 So.2d 761, 763 (Fla. 1st DCA 1962). MRTA has been described by this court as a statute of limitations. St. Joe Paper Co., supra. The sovereign was exempt from a statute of limitations when MRTA was adopted. See section 95.02, Fla. Stats. (1963). See also section 95.031(3) which gave the state an unlimited time to file various causes of action involving sovereignty lands.[8]

In the case sub judice, it should be noted that Appellees could not possess or make use of the lands claimed under MRTA until they were filled. Up until filling occurred during 1958-1964, Appellees could not themselves have expected to lay claim to sovereign lands. In order to do so, they had to first alter the condition of the lands before possession could be effectively wrested from the public. Hurricane Bay is for publicly used fishing, water-skiing, boating and recreation.

Without a doubt, the principle at work behind the state's exclusion from equitable estoppel and adverse possession is sovereign immunity and the Trust Doctrine.[9]

---

[8] Subsection three expired on July 1, 1983.

[9] During the recent 1985 session, the Florida Legislature invoked sovereign immunity by precluding all quiet title actions against the State until October 1, 1986. A: 2, Ch. 85-83, Laws of Florida 1985.

In short, contrary to Paradise Fruit, no private landowner claimant had any "vested rights" in sovereign land at the time of MRTA's passsage and the end of the savings clause period. The existing law was to the contrary. The state relied upon the Trust Doctrine and sovereign immunity when its officials assumed that MRTA, when enacted, did not apply to state-owned lands. And, as originally adopted in 1963, MRTA contained an exemption for the U.S. and Florida within section 712.04:

> ". . . this chapter shall not be deemed to affect any right, title or interest of the United States, Florida or any of its officers, boards, commissions or other agencies reserved in the patent or deed by which the United States, Florida or any of its agencies parted with title.

The above-underlined quotations give obvious evidence of legislative intent that in order for MRTA to work its effect, the state had to expressly convey the land by deed.[10] Where sovereign, submerged land has been deeded, it no longer remains sovereign but becomes privately-owned submerged land. This point was made clear where, in City of Miami v. St. Joe Paper Co., the city tried to claim that as a political subdivision of the state, the city could claim exemption from MRTA under sovereign lands titleholder status. Justice Adkins referred to the city's lands as "previously held in public trust by the state." 364 So.2d at 445.

---

[10] In the case sub judice, Appellees improperly claim formerly submerged lands through a conveyance of appurtenant uplands, i.e. swamp and overflowed lands. See Martin v. Busch, 112 So. 274, 284 (Fla. 1927).

As a consequence of the language within §712.04, as quoted above, the state had no reason to believe lands not expressly conveyed by deed could be successfully claimed. If the state had been forced to file claims in each county, such a task would have been impossible where the Trustees have no documents of title to sovereign lands which passed to the state by operation of law. At best, the state has within its own records the federal surveys of meandered waterbodies. But these waterbodies were not laid out in sections and government lots. Only the lands surrounding those waterbodies were surveyed. Moreover, many navigable-in-fact waterbodies, not meandered, would have been lost if the Trustees had had to only claim those waterbodies meandered and presumptively sovereign. And, filing a general notice would not have worked since a general notice would be too imprecise.[11] An unreasonable filing period (for the Trustees) can render a retroactive statute unconstitutional. Trustees of Tufts College v. Triple R. Ranch, Inc., 275 So.2d 521, 526 (Fla. 1973) A two-year filing period for the State of Florida, which claims millions of acres of sovereign lands, is preposterous.[12]

When subsection seven was adopted, the Florida Legislature, in 1978, acted against the backdrop of Sawyer, Odom and Starnes. Thus, the 1978 legislature must be presumed to

---

[11] See footnote two of Board of Trustees v. Paradise Fruit Co., 414 So.2d 10 (Fla. 5th DCA 1982).

[12] The federal government has given states, under the U.S. Quiet Title Act, 12 years in which to file land claims against the United States. Block v. N. D. Ex Rel. Board of University and Sch. Lands, 103 S. Ct. 1811 (1983).

have been congnizant of the judicial construction of MRTA under the above three cases. State Ex Rel. Quigley v. Quigley, 463 So.2d 224 (Fla. 1985). To not give retroactive meaning to the 1978 amendment would be to both ignore the legislature's mission to "protect state lands" and render the amendment useless. (See page eight, supra.)

There is ample evidence in the legislative history of subsection seven to show that when passed the legislature thought it would be retrospective like the rest of MRTA. Whether subsection seven would be retrospective was one of the central issues during the 1978 special session. This is evidenced by the fact that the bill's supporters warned that prospective application of the exception would allow further losses of sovereignty land under MRTA. See A: 3; page 40, excerpt of transcript of hearing of Select Committee on Sovereignty Lands. (SCSL)

The Florida Bar, through its representative, Mr. Gardner, advised the committee the bill would be applied retrospectively and, to counter this prospect, urged that the bill be amended to indicate prospective-only application. A: 3, page 30, excerpt from SCSL transcript.

In both the senate and house, amendments were offered to limit the reach of subsection seven by exempting certain lands from retrospective operation.[13] Both houses rejected the proposed exceptions to the bill's intended retroactivity, implying

---

[13]A: 4, Journal of House, page 6, Amendment 1 offered by Rep. Langley. A: 5, Journal of Senate, page 6, Amendment 2 moved by Senator Gallen.

that the legislature wanted the new subsection seven to apply retrospectively. Clearly, if the legislature had desired to give the bill future effect only, it would have adopted the Florida Bar's or other proffered amendments.

Moreover, this court has already impliedly construed MRTA's 1978 amendment, in Askew v. Sonson, as having retrospective effect:

> "It is apparent that the legislative branch of government has come to grips with the issues resolved by this court in prior MRTA decisions and has left the framework of the act intact." 409 S.2d at 15.

If Justice Adkins had not been approving of the 1978 amendment as the legislative solution to the MRTA and sovereign lands issue, then what else could he have been making reference to? Unfortunately, because the State Lands Committee took no action in recommending that other state lands be exempted, Justice Adkins found that school lands were not protected. Id. Of course the implication is that since the 1978 amendment referred to only sovereign lands, only sovereign lands were protected by the new exception to MRTA; school lands were not immune.

The Florida Legislature and Governor Askew acted quickly in 1978 after Starnes, supra, was decided. The courts had taken an unusually technical approach to the statute's interpretation. Legislators then enacted subsection seven in order to clarify (rather than create new law) MRTA's original 1963 intent.

City of Lakeland, supra, this Court ruled that remedial statutes do not come within the general rule against retrospective operation of statutes.

---

[13] 129 So.2d 133 (Fla. 1961)

And in Coon v. Board of Public Instruction, 203 So.2d 497 (Fla. 1967) this court held that the legislature could cure, retroactively, certain procedural defects which initially adversely affected a bond issue.

A curative or remedial statute is necessarily retrospective in character and may be enacted to cure or validate errors or irregularities in legal or administrative proceedings, except such as are jurisdictional or affect vested substantive rights. 10 Fla. Jur.2d Constitutional Law §298.

In Village of El Portal v. City of Miami Shores, [14] this Court has cited:

> "Remedial or procedural statutes do not fall within the constitutional prohibition against retroactive legislation and they may be held immediately applicable to pending cases." Id.

So long as vested substantive rights are not affected, a curative statute may operate as intended -- retrospectively. As noted above, on page nine, Judge Cowart in Paradise Fruit Company, supra, held that the 1978 amendment to MRTA unconstitutionally divested the private claimant of "vested rights" in sovereign submerged lands of Lake Poinsett. But Judge Cowart's reference to "vested rights" is merely conclusory.

The Fifth DCA offered no explanation or analysis as to how Paradise Fruit Company's "rights" became vested as of 1963.[15] A vested right would be one that has been perfected to

---

[14] 362 So.2d 275 (Fla. 1978).

[15] Assuming the court was correct, would not the claimant's "rights" vest as of 1965, the end of the filing period?

the point where it cannot be taken away by statute. Although there is more than one test for what is a constitutionally valid restrospective law, the true test, in the final analysis when looking at due process, is whether a party has changed his position in reliance upon the existing law or whether the retrospective act gives effect to or defends the reasonable expectations of the parties. In other words, would it have come as a "surprise" to the private claimant in Paradise Fruit Company, supra, or the Appellee in the case sub judice, that the submerged lands of a sovereign waterbody were not owned by the claimant?[16]

The existing common law, as noted above, when MRTA was passed, immunized state-owned sovereign land (from claims or private appropriation) through the Trust Doctrine, sovereign immunity and statutory law. The "existing law" was in fact so clear and considerable in its import that when the original version of MRTA was drafted, the drafters removed an exception for the "State of Florida" because the proposed act "could not affect the rights of the State of Florida in any event."[17]

---

[16]The notice of navigability concept, recognized by the Fifth DCA in Paradise, but not applied in the case, prevents a private upland owner from believing he owns the waterbody. See also 73 Harvard Law Review 692, 696 (1959-60).

[17]See 34 Fla. B. J. 139, 143, footnote 8 (1960).

Indeed, not until the 1973 decision of Sawyer v. Modrall could a private claimant even begin to think he might have "rights" in sovereign lands. But Sawyer did not represent statewide precedent. Then, in Odom, supra, this court said in dicta that MRTA could aply to sovereign lands. Even as of the 1976 decision in Odom, a private party still could not point to a clear and final decision regarding MRTA's effect or non-effect on sovereign lands.

The 1978 Starnes decision brought the legislators into special session. Again, a private claimant still had no reasonable stability in the law, to rely upon, for his potential claim to sovereign land. For how could anyone claim his "rights" were "vested" in sovereign lands during the tumult of the law surrounding MRTA in the last two decades? (It is clear that the same claimant had no color of legal authority whatsoever, in the 1960s, to believe MRTA perfected a claim to sovereign land.)

In 1982, the law remained unsettled when this court declared at page nine of Askew v. Sonson:

> "It is clear that in no case does the MRTA serve to protect a private party's title to sovereignty lands if title had not been perfectecd prior to the effective date of the 1978 amendment. We do not now pass on the questions of whether a private owner's title to what had been sovereignty lands could be perfected by the MRTA prior to the effective date of the 1978 amendment. See Odom v. Deltona Corporation, 341 So.2d 977, 988 (Fla. 1976).

Despite the 1982 Paradise Fruit Company decision, supra, this court has recently accepted, under Rule 9.030(2)(v), Florida Rules of Appellate Procedure, the so-called MRTA phosphate cases.[18] Also, as noted above, on page 12, the legislature has imposed a year-long moratorium upon MRTA suits claiming title to sovereign lands. Thus, the law has never been favorably established for private MRTA claims to sovereign lands. Rights cannot "vest" where there is no settled law to support such vesting. Any practitioner, after looking at the decisions from Sawyer to the present, can readily see that Paradise Fruit Co. is an orphan.

It takes more than one bad definite case, among a few indefinite cases, to establish a rule that MRTA's 1978 amendment does not operate retrospectively; especially when such a lone holding as in Paradise must overcome a body of common law and earlier decisional law to the contrary. As once observed in a U.S. Supreme Court Florida case, a court can disregard a prior decision which has been too literal - or technically-minded when new subsequent legislation has been enacted:

> "It is true also that when rights are asserted on the grounds of some slight technical defect or contrary to some strongly prevailing view of justice, courts have allowed them to be defeated by subsequent legislation and have used various circumlocutions. . . " Forbes Pioneer Boat Line v. Board of Commissioners of Everglades Drainage District, 258 U.S. 338, 42 Sup.Ct 325 (1922).

---

[18] Board of Trustees and)Coastal Petroleum v. American Cynamid Co., Case No.s 65, 755/65, 696.

"Rights" in sovereign lands by private claimants have never existed before (without a sovereign lands deed) until Paradise Fruit Co. MRTA's purpose is to extinguish past claims which might affect a party's title, not create an estate in fee simple in sovereign lands. MRTA merely confers marketability to a real estate title. Thus, MRTA never bestowed any "rights" to sovereign land in the first place. MRTA can only be used to perfect an imperfect title, not create an estate out of thin air.

Minnesota's MRTA has been held by that state's highest court to not be a statute which will provide a new "foundation" of title based on a stray, accidental, or interloping conveyance. Wichelman v. Messner, 83 N.W.2d 800, 819 (Minn. 1957).

This court, however, has decided in Marshall v. Hollywood, Inc., 236 So.2d 114 (Fla. 1970), that Florida's MRTA can provide a valid source of title where the root of title is wild or forged. Yet such a holding presumes that there is a paper title, be it forged or wild, which gives some notice and carries some color of title. In such examples, the wild or forged deed does purport to convey by description the property claimed. But in state cases like the one sub judice, there is no wild deed or deed of any kind to the bed of Hurricane Bay; only a deed to uplands. Thus, "rights" are judicially "manufactured" through inattention to the category of public land conveyed by the state.

Finally, the 1978 amendment is declarative of the 1963 Legislature's intent when MRTA was enacted. The 1978 amendment served as a clarification of the law following misinterpretation of MRTA. Even the change of language in a statute does not necessarily signal an intent to change the law but rather to clarify what was doubtful and to safeguard against misapprehension as to existing law. State Ex. Rel. Szabo Food Service, Inc. v. Dickinson, 286 So.2d 529, 531 (Fla. 1973).

The timing and circumstances of an enactment may indicate it was formal only and served as a legislative clarification or interpretation of exising law and thus such an enactment may even suggest that the same rights existed before it. Williams v. Hartford Accident & Indemnity Co., 382 So.2d 1216, 1220 (Fla. 1980).

ARGUMENT AS TO POINT II

Point II: THE TRUSTEES DID NOT "ALIENATE," (AS THAT TERM IS USED WITHIN ARTICLE X, SECTION 11) SOVEREIGN LANDS UNDERLYING HURRICANE BAY THROUGH A SWAMPLANDS CONVEYANCE.

On page three of its decision, the lower court states that the Trustees made their argument below in the face of "certain admitted transactions." True, the Trustees do acknowledge that certain lands were conveyed by certain state deeds. However, such an observation falls short where the nature of the conveyance and category of land conveyed are disregarded.

Appellee's predecessor in title received a swamplands conveyance. By definition, swamplands lie above the ordinary high water line. Martin v. Busch, 112 So. 274 (Fla. 1927). Yet Appellees claim lands which once lay (until filled) below the mean high water line of Hurricane Bay. The self-evident proof of this assertion lies in the fact that the land had to be filled and thus "raised" above the bay's mean high water line.

It cannot be overemphasized that the Trustees do not claim Appellee's upland property. The state only claims that which was the submerged bed of the bay.

Notwithstanding the fact that the lands as originally surveyed did not contain a waterbody but are now covered, in part, by a sovereign waterbody, the Appellees can not claim anything more than uplands. (As noted on Page Four, the Trustees do not contest Appellees' title to the uplands.)

In Lord v. Curry,[19] where "waters encroached on the land" during the years intervening between the federal survey and the filing of the lawsuit by Lord, this court held that land does not pass under a deed as an appurtenance to land. Id. See also Lopez v. Smith, 145 So.2d 509 (Fla. 2nd DCA 1962); 19 Fla. Jur.2d, Deeds §157.

Thus, the lower court's observation, in the case sub judice, that the lands involved were "classified as swamp and overflowed lands" is an oversimplification of the matter. The original survey of 1873 shows the subject government lots to be whole lots without bordering a navigable waterbody. However, today, and long before the time Mr. Stevens filled submerged land, a portion of the property is and was covered by the waters of the bay. To legally ignore the presence of the bay is to also ignore the fundamental doctrine of erosion and submergence. Where the land no longer looks like it did in a survey of 112 years ago, the lower court should have presumed that submergence had taken place during the intervening years and that title had shifted according to the shift in the waterbody's mean high water line. Municipal Liquidaters, Inc. v. Tench, 153 So.2d 728 (Fla. 2nd DCA 1963); Schulz v. City of Dania, 156 So.2d 520 (Fla. 2nd DCA 1963).

---

[19] 17 So. 21, 25 (Fla. 1916)

[20] It should be recalled that Appellees have stipulated that Hurricane Bay is a navigable, sovereign waterbody.

The survey sketches submitted by Appellees show the property's boundaries as lines projected over the waters of Hurricane Bay. The filled parcels are also embraced by upland property lines which have been prolongated over what was once the water of the bay. Appellees improperly claim sovereign land appurtenant to their lawfully-held uplands by redrawing the boundaries of the original federal survey without regard to the presence of a sovereign waterbody which constitutes a natural monument.

The protraction of lines of survey over the bed of a navigable waterbody do not change the character of the title by which the land is held by the state. State v. Gerbing, 47 So. 353, 356 (Fla. 1908). Moreover, the Swamp Lands Act does not cover "tide lands." Id. at 357. See also Forman v. Florida Land Holding Corporation, 121 So.2d 784, 787 (Fla. 1960).

For Appellees' surveyor, Bulson, to protract lines of survey across the bay is to ignore a fundamental principle of land surveying rules. The hierarchy of calls to be followed in a deed's legal description are recited in Trustees of Internal Improvement Fund v. Wetstone:

> ". . . natural monuments prevail over courses and distances, and courses and distances prevail over quantity." 222 So.2d 10 (Fla. 1969).

Bulson's fixing of boundaries as they once existed 112 years ago flies in the face of Due Process. In State of Florida National Properties, Inc., Justice Boyd wrote of a law fixing boundaries as of 140 year ago:

> "Upon careful consideration of both the record and arguments of counsel, we conclude that the trial court correctly held the efforts of the State to fix specific and permanent boundaries were improper." (Emphasis added) 338 So.2d 13, 18 (Fla. 1976).

Lands bordering waterbodies are, in the words of the ancient English Common law "moveable freeholds." That is, lands can expand or contract in size according to the shrinkage or enlargement of a waterbody.[21]

Although the original government survey plat shows larger tracts of land than today, title to the land formerly above water, but now below, is in the Appellant, not the upland owner. The Second DCA, in the case sub judice, failed to grasp the significance of the stipulation made by Appellees regarding the sovereign status of Hurricane Bay. With the advance or retreat of the mean high water line across formerly upland property, title to the state follows. Mexico Beach Corp. v. St. Joe Paper Co., 97 So.2d 708, 710 (1957).

On page four of the lower court's decision, the majority attaches weight to the fact that the "Trustees do not challenge the conveyances themselves nor do they contest that they expressly conveyed all the property into private ownership after a survey." The Second DCA then states: "Simply, the lands have been alienated. Furthermore, the Florida Supreme Court has held the Marketable Record Title Act Constitutional."

---

[21]It should be noted that an unlawful change in the high-water mark, such as illegally filling submerged lands, does not divest the state of title. 338 So. 2d at 18-19.

To begin with, there is no reason to challenge the swamp and overflowed deeds to Appellees' predecessors in title. For swamp deeds do not convey sovereign lands. Whatever amounted to upland property is what the Trustees conveyed. If all the land shown by the original survey was conveyed or alienated, and a portion of that land later became submerged, the portion submerged became vested again in the state as sovereign lands.

The common law doctrines of submergence or reliction can divest the private upland owner, or state, of title depending upon which way the mean high water line moves, up or down. To say, as did the lower court, that once uplands are deeded they remain forever with the grantee despite natural changes in the features of the terrain is to neglect the common law doctrines of erosion and submergence, reliction and accretion.

Abiding by a survey of 112 years ago is not determinative of what Appellees may or may not own. Ownership turns upon boundaries, and waterfront boundaries are ambulatory in nature.

Artice X, Section 11 of Florida's Constitution states that title to lands under navigable waters, which have not been alienated, including beaches below mean high water lines, is held in trust.

The state can only lose sovereign land by virtue of three ways: (1) a valid, submerged sovereign lands conveyance executed by the Trustees after an affirmative vote of five of the seven Trustees,[22] (2) a transfer by legislative act such as in

---

[22] See Section 253.02(2), Florida Statutes.

the Sawyer case, or (3) by virtue of the operation of the common law doctrines of either reliction or accretion.

By the above third method of title transfer, the former sovereign lands become exposed or emerge through natural forces. Once this happens, title automatically passes to the upland owner. Conversely, submergence of upland property causes title to pass to the state. Hence, land can be alienated at one time but then be "reconveyed" to the state by operation of law, all without "muniments of title."

Interpreting Article X, Section 11 in the manner construed by the lower court does violence to the common law. In effect, the Second DCA has said that once land is alienated, it remains forever alienated notwithstanding common law doctrines and the movement of boundaries.

The above argument only serves to point out some of the surprising results which can be had when a court tries to apply MRTA to the unique nature of sovereign land ownership. Affirming the doctrines of reliction and accretion for private ownership but not affirming the doctrine of erosion and submergence for public ownership, creates a "double standard" in the law and serves to "erode" public policy and the public domain itself in favor of private interests. Thus, to apply MRTA to sovereign lands is an unconstitutional application where those alnds are protected by Article X, Section 11, of the Florida Constitution.

SUMMARY

MRTA's 1978 amendment is an amendment to a retrospective statute. At the time it was passed, the amendment consisted of the legislature's reaction to Sawyer, Odom and Starnes. Legislative history of the amendment clearly reveals its intended retrospective or clarifying effect. Paradise Fruit Company is based on the mistaken premise that applying the amendment retroactively would deprive a claimant of "vested rights." In fact, a private claimant has never had any "vested rights" in sovereign land where the common has been to the contrary and where the legislative law and case law have continued to be in tumult over MRTA's application to sovereign lands.

The lower court incorrectly held that the Appellees' lands in dispute were "alienated" by the Trustees and thus not deserving of protection from MRTA under Article X, Section 11. Sovereign lands cannot be alienated through a swamplands deed. Lands formerly swamplands but now submerged, became sovereign.

CONCLUSION

For Appellees to improperly describe their boundaries as encompassing submerged and filled lands signals the falsity to their MRTA claim. For boundary law does not allow one to claim lands below the mean high water line of a sovereign waterbody. Thus, even if MRTA could operate against sovereign lands, there would be no way to "embrace" those lands and gain a root of title to them.

The Paradise Fruit Company decision is based upon a lack of appreciation as to the common law's incapacity to confer rights, or vest them, upon a sovereign lands private title claimant.

The Florida Legislature has spoken in 1978 and again in 1985 as to its own intent for MRTA.

The lower court should be reversed and the Trustees be declared the owner of the submerged sovereign and filled sovereign lands of Hurricane Bay. Ownership of the filled lands should be declared in the Trustees according to where the mean high water line lay at the time filling took place.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Purolator to HYWEL LEONARD, Esquire, One Harvour Place, Tampa, Florida 33602 this 14th day of August, 1985.

Lee R. Rohe

LEE R. ROHE
Assistant General Counsel
Department of Natural Resources
Suite 1003, Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32303