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Riparian Rights in Florida

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RIPARIAN RIGHTS IN FLORIDA

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HISTORICAL BACKGROUND

By treaty of February 22, 1819, the Kingdom of Spain ceded "to the United States, in full property and sovereignty, all the territories . . . known by the name of East and West Florida," with an express provision that all the grants of land made by Spain before January 24, 1818, should be ratified and confirmed to the persons in possession of the lands.[1] In 1845 the Territory of East and West Florida was admitted to the Union as the State of Florida, on equal footing with the original states.[2]

Under the common law of England the Crown in its sovereign capacity held title to the beds of navigable or tide waters, including the space between high and low water marks, in trust for the people of the realm, who had rights of navigation, commerce, fishing, bathing, and other easements allowed by law. After the American Revolution neither proprietary rights in tidal lands within the states nor power to dispose of such lands was delegated to the federal government by the Constitution. All proprietary rights in shores and lands under navigable waters were therefore reserved to the states severally.[3] Thus Florida acquired the rights, prerogatives, and duties with respect to navigable waters and underlying lands within its boundaries that were held by the original thirteen states, except to the extent of their modification by the cession treaty with Spain.[4]

According to the laws of Spain, the rights of a subject in lands bounded by navigable waters were derived from the Crown and extended only to the high-water mark unless otherwise specified by an express grant. Although the Spanish possessions in America were held by the Crown to be alienable at will, a grant or concession of lands under navigable waters and tidelands was not in accord with

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[1]Treaty of Amity, Settlement, and Limits, 8 STAT. 252 (1819).

[2]Pollard v. Hagan, 44 U.S. (3 How.) 212 (1819); see State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 610, 47 So. 353, 355 (1908).

[3]State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908).

[4]Cases cited note 2 *supra.*

custom. Such lands and waters were held for the public use, and a conveyance of them to private ownership could be consummated only by a clear showing of sovereign intent.[5] Even private ownership would not preclude public use of the lands and waters unless the lands were reclaimed and improved for special purposes under Crown grants.[6]

Except for Spanish grants of submerged lands made prior to January 24, 1818, Florida applies an admixture of common law and statutory principles in determining riparian rights of its inhabitants.

NAVIGABLE WATERS

Determination of Navigability

Since riparian rights on nonnavigable and navigable waters differ, navigability must be defined. In the majority of jurisdictions navigable waters are defined as those that are navigable in point of fact.[7] Navigability in fact means susceptibility to use under normal conditions as highways of commerce over which trade and travel by water may be conducted in at least one of the customary modes.[8] The fact that the waters are tidal is immaterial,[9] as is the fact that the entire body, or any portion thereof, is not susceptible of use throughout the entire year.[10] The navigability of a particular aqueous

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[5]Jover y Costas v. Insular Gov't of Philippine Islands, 221 U.S. 623 (1911); Apalachicola Land & Development Co. v. McRae, 86 Fla. 393, 98 So. 505 (1923).

[6]Apalachicola Land & Development Co. v. McRae, 86 Fla. 393, 98 So. 505 (1923).

[7]Arizona v. California, 283 U.S. 423 (1931); The Montello, 87 U.S. (20 Wall.) 430 (1874); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); Bayzer v. McMillan Mill Co., 105 Ala. 395, 16 So. 923 (1895); Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909); Schulte v. Warren, 218 Ill. 108, 75 N.E. 783 (1905); People v. System Properties, 189 Misc. 991, 76 N.Y.S.2d 758 (Sup. Ct. 1947).

[8]United States v. Utah, 283 U.S. 64 (1931); Economy Light & Power Co. v. United States, 256 U.S. 113 (1921); Blackman v. Maudlin, 164 Ala. 337, 51 So. 23 (1909); Asselin v. Blount, 65 R.I. 293, 14 A.2d 696 (1940); Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. Civ. App. 1935); Ewell v. Lambert, 177 Va. 222, 13 S.E.2d 333 (1941).

[9]The Daniel Ball, *supra* note 7; The Genessee Chief v. Fitzhugh, 53 U.S. (12 How.) 443 (1851); Miami Beach Jockey Club v. Dern, 83 F.2d 715 (D.C. Cir. 1936); Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927); Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912); Home Real Estate Loan & Ins. Co. v. Parmele, 214 N.C. 63, 197 S.E. 714 (1938).

[10]United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Hallock v. Suitor, 37 Ore. 9, 60 Pac. 384 (1900).

body can be determined only by scrutinizing all the facts pertaining thereto.[11]

In a case involving the Suwannee River above White Springs,[12] the Florida Supreme Court held that a navigable stream is a public highway open to all persons for the business of any floatage to which it is adapted, and that even though a stream is so shallow as to be suitable only for the floating of logs and rafts it nevertheless will be regarded as a public stream and hence navigable in fact. The Court further held it unessential to navigability that a stream be continuously suited to floatage at all seasons of the year. This decision revised the moss-covered concept that a stream is not navigable unless it contains sufficient depth to float vessels.

Twenty years later the Supreme Court expanded its "limited use" theory of navigability in a decision involving Lake Jackson in Leon County.[13] The lower court held that a United States patent of 1827 vested title to the bed of the lake in private ownership. The Supreme Court, however, held that Lake Jackson had the characteristics of navigability requisite to state ownership, even though most of the lake area at ordinary level could be navigated only by flat-bottomed boats drawing from three to six inches of water and at ordinary low water large portions of the bottom of the lake became exposed and dried out to such an extent that crops were planted and harvested on the bed. The Court took into consideration the fact that the waters were of considerable area and useful for general navigation in small boats. It stated that whether the lake had been used for commercial purposes in the past was immaterial in view of the fact that, by its nature, such uses could be made in the future. The fact that the lake went dry at times was disregarded, since in its ordinary state it was navigable.

Navigable waters in Florida include all lakes, rivers, bays, harbors, or other waters capable of practical navigation for useful purposes.[14] In order that a body of water be considered navigable and therefore free for public use, it must, in its natural state, be capable of sustaining navigation without the necessity of any improvement or artificial aid. A stream is not necessarily subject to free public use merely because it

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[11]United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940); Bucki v. Cone, 25 Fla. 1, 6 So. 160 (1889).

[12]Bucki v. Cone, 25 Fla. 1, 6 So. 160 (1889).

[13]Broward v. Mabry, 58 Fla. 398, 50 So. 826 (1909).

[14]Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927).

has been rendered navigable by artificial means.[15]

Common Law Rights

Once a body of water has been found to be navigable in the legal sense of the term, the Florida lawyer faces a dearth of decisions resolving common law rights incident to the ownership of contiguous lands. The Florida Supreme Court in two decisions, however, has defined the rights of a riparian owner in relation to navigable waters.

In *Ferry Pass Inspectors' & Shippers' Ass'n v. White River Inspectors' & Shippers' Ass'n*[16] a riparian owner sought to enjoin the defendant from depriving it of access to the river front adjacent to its land and asked enforcement of an asserted exclusive right to use the waters and shore contiguous to its land. Both plaintiff and defendant were engaged in the logging business. The lower court dismissed the plaintiff's bill on demurrer. The Supreme Court, in reversing the lower court, held that under the allegations of the complaint the plaintiff was entitled to relief against total exclusion from access to the water, but that no exclusive right to the use of the waters and shore existed. On this point the Court, through Chief Justice Whitfield, stated:[17]

> "As to mere navigation in commerce upon the public waters, riparian owners as such have no rights superior to other inhabitants of the State. A riparian owner may use the navigable waters and the lands thereunder opposite his land for purposes of navigation and of conducting commerce or business thereon, but such right is only concurrent with that of other inhabitants of the State and must be exercised subject to the rights of others. . . . The right of access to the waters from the riparian lands may in general be exclusive in the owner of such lands, but as to the use of the navigable waters and the lands thereunder including the shore, the rights of riparian owners and of others of the public are concurrent, and subject to applicable rules of law. A riparian owner has a right to enjoin in a proper proceeding the unlawful use of the public waters or the land thereunder including the shore which is a part of the bed, when

[15]Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912).
[16]57 Fla. 399, 48 So. 643 (1909).
[17]*Id.* at 404, 48 So. at 645.

> such unlawful use operates as a special injury to such riparian owner in the use and enjoyment of his riparian lands. . . . In the absence of a valid statute providing otherwise, the injury must relate to riparian lands or business conducted thereon and not to business conducted on the waters by virtue only of the right of navigation."

The Court pointed out that if a person obstructs the mere right of navigation and does no special injury to riparian property, a complainant must seek his remedy through the proper public officials.[18]

In *Thiesen v. Gulf, F. & A. Ry.*[19] the Court pointed out that riparian rights are property rights and that the riparian owner cannot be deprived of them without compensation. In that case the defendant railway had acquired title from the City of Pensacola to certain submerged lands contiguous to the plaintiff's land. The city had obtained the property from the state. After acquiring title the railway filled in the submerged lands and built docks, wharves, and other instrumentalities of commerce. The plaintiff, as a riparian owner, sought damages predicated upon an infringement of his rights of access and unobstructed view of the waters. Upon rehearing the Supreme Court, in reversing its own decision as well as that of the lower court, recognized that the plaintiff had validly asserted common law riparian rights independent of statute:[20]

> "Riparian rights we think are property, and being so the right to take it for public use without compensation does not exist. The fronting of a lot upon a navigable stream or bay often constitutes its chief value and desirability whether for residence or business purposes. The right of access to the property over the water, the unobstructed view of the bay and the enjoyment of the privileges of the waters incident to ownership of the bordering land would not in many cases be exchanged for the price of an inland lot in the same vicinity. In many cases doubtless the riparian rights incident to the ownership of the land were the principal if not sole inducement leading to its purchase by one and the reason for the price charged by the seller."

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[18] *Id.* at 406, 48 So. at 646.
[19] 75 Fla. 28, 78 So. 491 (1918).
[20] *Id.* at 78, 78 So. at 507.

Legislative Revision of the Common Law

a. Act of 1856

Undoubtedly impelled by the commercial potentialities of the state's 1398-mile coastline,[21] its 30,000 lakes and ponds,[22] and its countless miles of uplands and tidelands bordering navigable waters, the Florida Legislature in 1856 enacted chapter 791, entitled "An Act to Benefit Commerce."[23] This act vested full title to riparian shallows in the riparian proprietors in order that they might fill in the shoreline and erect warehouses and wharves. The owners could prevent encroachments by appropriate legal action, including the right to maintain the action of trespass.

It appears at first glance that the Legislature by this act vested an absolute title in the riparian owners. Subsequent litigation, however, proved otherwise.[24] In *State v. Black River Phosphate Co.*[25] the state sought to enjoin a riparian owner from taking phosphate deposits from the bed of a navigable river. The defendant claimed title to the phosphate under the Riparian Act of 1856. The Court held that the statute did not give to the riparian owner the right to take phosphates from the beds of navigable streams. It stated that the 1856 act had the distinct public purpose of connecting the shore and banks of bays, harbors, and streams with the channel and navigable waters and that, instead of being an absolute and unqualified gift of the land intervening between the shore and channel, it was, so long as the water was not converted into land by filling in, a mere grant for a particular and specially defined use.

b. Act of 1921

The Riparian Act of 1856 was limited to lands owned by the United States or its citizens and affected only land between the channel and the low-water mark on navigable streams, bays, and harbors.

In 1921 the Legislature extended the act of 1856.[26] This act, com-

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[21]WORLD ALMANAC 102 (1949).

[22]MORRIS, THE FLORIDA HANDBOOK 70 (3d ed. 1952).

[23]FLA. GEN. LAWS c. 791, §2 (1856).

[24]Panama Ice & Fish Co. v. Atlanta & St. A.B. Ry., 71 Fla. 419, 71 So. 608 (1916); State v. Black River Phosphate Co., 32 Fla. 82, 13 So. 640 (1893).

[25]32 Fla. 82, 13 So. 640 (1893).

[26]Fla. Laws 1921, c. 8537, now FLA. STAT. c. 271 (1953).

monly known as the Butler Bill, vested in the riparian owners on navigable streams the title to submerged lands from the edge of the channel to the high-water mark, with a provision that the grant should apply to only those submerged lands "which have been, or may be hereafter, actually bulkheaded or filled in or permanently improved, and shall in no wise affect such submerged lands until actually filled in or permanently improved."[27]

Specifically excluded from the grant of the 1921 act, *inter alia,* were swamp and overflowed lands, lakes other than tidewater, and public bathing beaches. For curative reasons the act was designed to take effect retroactively to the date of passage of the 1856 act.

It has been held that a riparian owner who fills and bulkheads submerged contiguous lands matures a provisional grant into an absolute title and that he cannot be divested of his title even by a subsequent act of the Legislature.[28] After an upland owner bulkheads and fills in land within the requirements of the 1921 act, "the title to the filled in land becomes absolute and equal to that of the upland."[29]

The leading case of *Holland v. Fort Pierce Financing & Construction Co.*[30] dealt with an attempt of the Legislature by special act[31] to vest in the Trustees of the Internal Improvement Fund title to certain submerged lands in the Indian River, St. Lucie County, that previously had been partially filled and converted to gainful use by the riparian owner. The owner sought to enjoin the trustees from asserting title to the lands and from attempting to dispose of lands already filled. The lower court enjoined the trustees and declared the special act unconstitutional. The Supreme Court, in affirming, observed that appellee's bulkheading and filling operations had legal sanction under the 1921 act, that the conversion stopped short of the edge of the channel, and that full space was left for the requirements of commerce and navigation as provided by the act.

Though title to lands filled pursuant to the Riparian Act of 1921 becomes absolute and is not subject to subsequent divestment, the riparian owner by failure to fill or improve may, under some circum-

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[27]FLA. STAT. §271.01 (1953).

[28]Holland v. Ft. Pierce Financing & Constr. Co., 157 Fla. 649, 27 So.2d 76 (1946).

[29]Commodores Point Terminal Co. v. Hudnall, 283 Fed. 150 (D.C. Cir. 1922); Holland v. Fort Pierce Financing & Constr. Co., *supra* note 28; Trumbull v. McIntosh, 103 Fla. 708, 138 So. 34 (1931).

[30]157 Fla. 649, 27 So.2d 76 (1946).

[31]Fla. Spec. Acts 1941, c. 21546.

stances, be deprived of all title and interest in adjacent submerged lands.[32]

In a recent case, *Duval Engineering & Contracting Co. v. Sales*,[33] the Supreme Court held that the Trustees of the Internal Improvement Fund could withdraw the provisional legislative grant and sell a riparian owner's frontal submerged lands if the owner had not performed the condition of the grant of the 1921 act by filling in and improving them. The plaintiffs were fee simple owners of lands abutting on the St. Johns River in the City of Jacksonville. The Florida State Improvement Commission, acting for the use and benefit of the State Road Department, acquired from the Trustees of the Internal Improvement Fund a perpetual easement in submerged lands adjacent to plaintiffs' upland property, preparatory to the construction of a bridge. Plaintiffs sought to enjoin construction of the bridge and to require defendants to institute condemnation proceedings before making use of the submerged property. The trial court held that the plaintiffs, as owners of the riparian rights appurtenant to their land, were entitled to compensation on the theory of a vested interest under the 1921 act. The Supreme Court, however, held that submerged lands are subject to reversion to the state at any time before the owner has complied with the improvement provision of the grant under the 1921 act. The Court also held that, although appellees' common law right of ingress and egress and the right to fish and bathe in the waters of the river might have been slightly impaired by off-shore filling operations, these rights were not sufficiently injured to warrant a right to compensation. *Damnum absque injuria* seems to have been regarded with favor in the ruling.

Hence he who hesitates to bulkhead and fill toward the channel may lose his legislative permit at any time the state decides to devote the off-shore shallows to some public use, leaving the upland owner with only his ancient rights of access, view, and use.

Applicability to Islands. A discussion of the Riparian Rights Act of 1921 and its effects on rights attendant to ownership of riparian uplands would not be complete without an inquiry into the applicability of the act to certain islands, title to which is vested by statute in the Trustees of the Internal Improvement Fund.[34] The question

[32]Duval Engineering & Contracting Co. v. Sales, 77 So.2d 431 (Fla. 1954); Bridgehead Land Co. v. Hale, 145 Fla. 389, 199 So. 361 (1940).

[33]77 So.2d 431 (Fla. 1954). *But cf.* Webb v. Giddens, 82 So.2d 743 (1955).

[34]FLA. STAT. §§253.06-.07, 253.12 (1953).

presented is whether the owner of an island in a navigable river or bay may claim the benefits conferred by the Butler Bill upon mainland riparian owners who bulkhead and fill to the edge of the channel. It is readily concluded that to allow an island owner to expand his land area channelward through bottoms and waters "lying in front" of the island presents a problem quite different from that raised by permitting a mainland riparian owner to extend and fill in his water front channelward. This difference is of particular importance when considered in light of the topographical characteristics and contours of the shallow bay and harbor areas of this state.

The question was directly presented to the 11th Judicial Circuit in 1948 when the owner of Burlingame Island, a twenty-acre spoil-filled island lying off the mouth of the Miami River near the downtown business section of Miami, instituted an action against the municipality and the Trustees of the Internal Improvement Fund to quiet title to the island as it then existed behind bulkhead. The plaintiff also requested a declaratory decree establishing his right to extend the island boundaries toward the Miami River channel on the north and the East Coast Waterway channel on the east, involving an anticipated appropriation of fifty-five acres of bay bottom owned by the trustees. It was asserted that a proper construction of the Butler Bill accorded this right to the owners of islands acquired from the state in the same manner that it was accorded to mainland riparian owners. It was admitted that the island abutted lengthwise along a navigable channel, but it was contended that the owner nevertheless had a right under the statute to fill in other directions to the edges of other channels.

The trustees and the City of Miami countered by questioning the plaintiff's title to fifteen of the twenty acres then behind bulkhead and vigorously denied his right, under the Butler Bill, to appropriate other state-owned bottoms. The lower court granted a decree quieting title to the twenty-acre area but declined to rule on the fifty-five-acre issue on the premise that the ruling would be premature. On defendants' appeal to the Supreme Court it was first held, by a division opinion rendered in January 1954 and as yet unpublished, that the plaintiff below had title to the twenty-acre bulkheaded area and that he was entitled under the Butler Bill to a declaratory decree authorizing the bulkheading and filling in of his island to the two channels, subject only to approval of the United States Government on points of navigation and commerce.

The Trustees of the Internal Improvement Fund filed a petition for rehearing and, because of the importance to the public of the question involved and the effect of the ultimate decision upon the general welfare, requested by motion an opportunity to reargue de novo before the full Court. The motion was granted: and, following lengthy reargument before the Court en banc, the original opinion was withdrawn by a four-to-three decision, as yet unreported,[35] and the question answered as follows:

> "While it may well be that the Legislature intended the Riparian Rights Acts to extend to islands such as those with which we are concerned in the City of Tampa case, supra, it is our opinion that the grant made to owners of land to the low water mark in the 1856 Act, and extended to owners of land to the highwater mark by the so-called 'Butler Bill,' Chapter 8537, Acts of 1921 (now appearing as Chapter 271, Laws of Florida 1953), should be strictly limited to islands of that type and character. It should not be extended to 'islands, sand bars and shallow banks,' the title to which was vested in the Trustees by the Tidelands Acts, supra, for the reasons hereinafter stated.
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> "No authority need be cited for the proposition that a grant in derogation of sovereignty must be strictly construed in favor of the sovereign. And since the grant made by the Butler Bill, as construed by this court, appears to have gone far beyond the original intention of the 1856 Riparian Rights Act – which was limited to filling in and bulkheading as an aid to commerce and navigation only – it is even more important that the grant therein made should not be extended beyond its terms. Despite the language of the Butler Bill that the grant therein made was 'subject to any inalienable trust under which the state holds all submerged lands and water privileges within its boundaries,' this court knows, since everyone knows it, that the Butler Bill has operated to divest the state of its sovereign lands just as effectively as though a grant thereof without such limitation had been made to a riparian owner. And it would in our opinion, do violence to the legislative intent to construe the Riparian Rights Acts of 1856 and 1921 as applicable to the 'islands, sand bars and shallow banks,' the title to which was vested by the Legislature in the Trustees for the purpose of sale . . . ."

[35]Trustees of Internal Improvement Fund v. Claughton, No. 24501, Jan. 7, 1955.

A petition for rehearing was filed to the second opinion during the early part of 1955, but it has not yet been disposed of by the Court.[36]

Thus the effect of the "fill in" act on an owner of a bay or river island is as yet undetermined, with the urges of common sense and historical precedent undoubtedly supporting the interpretation adopted in the second opinion.[37]

c. Special Laws

Practitioners and students of law should be mindful of the fact that private and public rights in certain bodies of water and lands riparian thereto in particular counties and sections of the state are regulated by innumerable special acts, population acts, and local laws. It is beyond the scope of this article to delve into these local or restricted rules of law that exist throughout Florida. Suffice it to say that these hand-to-find acts should be searched out and examined for possible variances or departures from general law in any given riparian situation.

In Dade, Palm Beach, and Monroe counties, for instance, the Trustees of the Internal Improvement Fund have the right to control and sell islands, sand bars, and shallow banks only if certain characteristics, set forth in sections 253.06 and 253.07 of Florida Statutes 1953, are present. It is to be noted, however, that a 1955 general act contains a "sleeper" repeal of these acts.[38] The legal efficacy of the 1955 act seems open to serious doubt in view of its apparent violation of the subject and title clause of the Florida Constitution.[39] The title[40] and first section of the act deal exclusively with ratification and validation of certain previous conveyances of the Trustees of the Internal Improvement Fund, whereas the second section interjects an unnoticed amendment wholly alien to the title. A third and concluding section repeals the six separate sections of existing law applicable to the three

[36]The Supreme Court has ordered reargument on all issues in this case on Jan. 10, 1956.

[37]Candor suggests that the possibility of a slight personal prejudice born of professional advocacy should here be confessed, since the writer has been privileged to serve with the Attorney General of Florida in representing the interests of the state in the trial and appeal of this case.

[38]Fla. Laws 1955, c. 29763, §3.

[39]FLA. CONST. art. III, §16.

[40]"An Act to provide that certain conveyances of lands by the trustees of the internal improvement fund are ratified by the enactment of section 253.121, Florida Statutes."

counties above named. The second and third sections are not even remotely related to the subject of validation of previous conveyances.

SEAS AND BEACHES

Beaches

> "There is probably no custom more universal, more natural or more ancient, on the sea-coasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto."[41]

The sun-blessed beaches of Florida are among the finest in the world; they are the natural playgrounds of the citizens of Florida and of thousands of tourists who visit the state each year. Their perpetual preservation for public use is essential to the public welfare and the continued growth and prosperity of the state. Necessarily, therefore, the rights of riparian owners must be strictly regulated in the public interest, and attempts to trespass below the high-water mark by the appropriation of any portion of the public foreshore for private purposes should be vigilantly restrained.

Recognizing the need of preserving the beaches for public use, the Florida Legislature has not extended to riparian owners on the ocean or gulf the right to bulkhead and fill or otherwise appropriate lands below the high-water mark. The Butler Bill applies only to the riparian shores of navigable streams, bays, and harbors.

In the absence of legislative authorization, any intrusion by the owner of the upland upon the shore below the ordinary high-water mark is unlawful and is treated as a purpresture or a nuisance.[42] Until 1949, however, there was no reported instance in Florida of legal action on the part of the state or other public authority to enjoin or suppress a private appropriation of the foreshore.

In February 1949 an action was filed in the 11th Judicial Circuit[43] by the Dade County Solicitor to abate and remove as a nuisance a completed purpresture on the shore of the famous "hotel row" in

[41]White v. Hughes, 139 Fla. 54, 58, 190 So. 446, 448 (1939).

[42]Thiesen v. Gulf, F. & A. Ry., 75 Fla. 28, 78 So. 491 (1918); ANGELL, TIDEWATERS c. 7 (2d ed. 1847).

[43]State *ex rel.* Taylor v. Simberg, State *ex rel.* Marsh v. Simberg, 2 Fla. Supp. 178 (1952), 4 Fla. Supp. 85 (1953).

Miami Beach. The City of Miami Beach, one of the defendants, had enacted certain ordinances in 1948 providing for the establishment of a "harbor line" in the Atlantic Ocean. A harbor line was subsequently set by the engineering office of the city, without regard for the rights of the public to the use of the beach or foreshore for bathing, recreation, fishing, boating, or navigation. This line was to be used only as a "bulkhead line" for the purpose of marking the eastern or oceanward point to which hotel owners would be permitted by the city to extend their proprietary uses.

The line fixed by the city extended on the foreshore of Miami Beach north and south between high and low water marks, and certain hotel owners were granted permits to fill in the shore and erect structures to this line. The structures erected were permanent in nature and resulted in the exclusion of the public from considerable portions of the beach in front of the hotels.

The plaintiffs sought, in addition to relief from nuisance, a declaratory decree to determine whether the city had authority to issue permits for structures extending over the foreshore and, if not, to enjoin the city from issuing such permits in the future. Circuit Judge Charles A. Carroll entered an order severing the suit for trial purposes into two causes, one against the infringing landowners and the other against the City of Miami Beach.

The city took the position that the establishment of a harbor line was for the purpose of allowing riparian owners to reclaim lands that had been washed away by the 1926 hurricane and later storms. On this point the court found that there had been a recession of the beach line to some extent over the past twenty or thirty years and that hurricane seas had played some part in the loss of upland soil. The court held, however, that the instances in which the city had permitted upland hotel owners to take over the foreshore were not predicated on any factual findings of a visible loss by avulsion as distinguished from erosion.

The court concluded that the ocean foreshore or beach is held by the state in trust for the public for purposes of navigation, fishing, and bathing, and that any attempt on the part of the city to authorize appropriation thereof by a riparian owner should be invalidated.

The city was permanently enjoined from granting permits or other authorizations for the construction of seawalls, bulkheads, fills, or other structures on the foreshore of the Atlantic Ocean within municipal limits. The court further ordered, however, that its in-

junction should not apply to the construction of groynes or jetties built at right angles to the beach for the purpose of preserving the existing beach, entrapping sand, and improving the beach in the public interests, but that permits should not authorize the erection of fences or walls across the foreshore or out into the ocean in such manner as to obstruct or prevent public passage and use of the foreshore.

The issue of structure removal incident to nuisance abatement is yet to be decided, but it seems fairly safe to predict that defenses of estoppel by acquiescence and laches, strengthened by the illusive "hardship" doctrine, will provide the riparian defendants with a protective shield of some quality in the final stage of their litigation. The idealist, however, may well wonder why a *fait accompli* violation of public property rights should find sanctuary in any legal doctrine when, except for the speed and promptness of the wrongful act, the law would have condemned and enjoined the trespass. In this regard, a "fast grabber" is apparently given a reward that might be denied the more deliberate taker. A more vigilant enforcement of public laws and rights would doubtless have prevented these grave losses of valuable public properties.

The High Seas

The decision of the United States Supreme Court in *United States v. California*,[44] the famous "Tidelands" case, and its later decisions in *United States v. Louisiana*[45] and *United States v. Texas*,[46] commonly known as the Submerged Lands Cases, created doubts as to Florida's right to regulate the use of the inshore waters of the Gulf of Mexico and the Atlantic Ocean and to control the adjacent submerged lands. These doubts, however, now appear to have been resolved in favor of the state with the passage by Congress of the 1953 Submerged Lands Act.[47] By this act Congress established a distance of three geographical miles from the coast line of each state as the general offshore limit of the state's rights to submerged lands. It was provided in addition that if the state's boundary at the time of entrance into the Union, or as approved by Congress prior to the passage of the act, extended beyond this distance the previously established distance would be recognized. Section 2(b) placed a

[44] 332 U.S. 19 (1947).
[45] 339 U.S. 699 (1950).
[46] 339 U.S. 707 (1950).
[47] 67 STAT. 29 (1953), 43 U.S.C. §3101.

definite limit of three geographical miles from the coast line for states bordering the Atlantic and Pacific oceans and three marine leagues, or nine geographical miles, for states bordering the Gulf of Mexico. Florida's seaward boundaries, therefore, are three geographical miles on the Atlantic Ocean and nine geographical miles on the Gulf of Mexico.

NONNAVIGABLE WATERS

Determination of Ownership

If a lake, pond, or other body of water is nonnavigable in fact, it is generally conceded in Florida that the bed is subject to private ownership.[48] In fact, the state itself has conveyed to private owners millions of acres of land, much of which consists of lakes and ponds, without reservation of title to the beds.[49]

By statute all beds and bottoms under navigable waters are declared to be the property of the state.[50] This result was obtained by virtue of sovereignty upon admission to statehood long before statutory declaration.[51] Since beds under nonnavigable waters were ignored in the statutory declaration of state ownership, it is reasonable to presume that the public policy of the state intends that they shall be subject to private ownership.

In *Pounds v. Darling*[52] the Florida Supreme Court, in invalidating a city ordinance prohibiting bathing in a nonnavigable lake in the City of Orlando, observed quite pointedly: ". . . the lake is owned by the persons whose lots border upon it. . . . Nor is there any doubt as a matter of law that nonnavigable bodies of water may be the subject of private ownership." In a case decided only last year,[53] the Florida Supreme Court met the question more directly by holding that small lakes are susceptible of private ownership in Florida.[54]

[48]Martin v. Busch, 93 Fla. 535, 112 So. 274 (1927); Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912); Pounds v. Darling, 75 Fla. 125, 77 So. 666 (1918).

[49]Whitfield, *Political and Legal History of Florida*, 1 FLA. STAT. ANN. cxii (1953).

[50]FLA. STAT. §370.03 (1953).

[51]Pollard v. Hagan, 44 U.S. (3 How.) 212 (1819); see State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 353, 355 (1908).

[52]75 Fla. 125, 135, 77 So. 666, 669 (1918).

[53]Crutchfield v. Sebring Realty Co., 69 So.2d 328 (Fla. 1954).

[54]*Id.* at 329: "It is settled by the decisions of this Court that small lakes are susceptible of private ownership in Florida. . . . In the instant case the court below found, and the evidence sustained the finding, that Basket Lake was a non-

It is to be presumed, of course, that the rule of private ownership applied to a single owner of an over-all lake area will likewise be applicable when more than one person owns the lands riparian to a nonnavigable lake or river.

Whether an owner of land riparian to nonnavigable waters owns the underlying bed to the center of the lake or other body in question will depend, as in any other title question, upon whether the deeds in his chain of title are sufficient to convey the lands. When no other intent is ascertainable from the deed, it is generally presumed that the intention was to convey title to the center of the submerged land.[55] Such was the holding of the lower court in a Florida case, *Broward v. Mabry*,[56] although direct review was obviated by the finding of the Supreme Court that the lake was navigable and that the bed underlying the waters therefore belonged to the state by virtue of sovereignty.

Use

Assuming private ownership of the bed to the center of the submerged area, the question arises whether each owner is restricted to the use of the water over his fee or is allowed to use the entire body for fishing, boating, and bathing in common with other shore proprietors.

The common law rule makes no distinction between land and water so far as absolute dominion and control are concerned;[57] it restricts each owner to the use of the water overlying his fee.[58] The civil law rule allows the owner of a portion of the bed to make a reasonable use of the surface of the entire lake, as long as he does

navigable lake and that it, and all the land surrounding it was owned by the plaintiff. It is plain, therefore, that the defendants could not claim any right to lay their pipes along the strips and to the lake shore and to take water from the lake for large-scale irrigation because of any riparian rights vested in them; it being well settled that riparian rights subsist only for riparian owners and that those who do not own riparian land cannot claim such rights."

[55]The United States has held that local law determines the extent of a grant by United States patent of property abutting on nonnavigable waters. Marshall Dental Mfg. Co. v. Iowa, 226 U.S. 460 (1913); Hardin v. Shedd, 190 U.S. 508 (1903); Mitchell v. Smale, 140 U.S. 406 (1891). This statement has since been limited to an assumption that the United States has assented to local construction of the patent provided it exhibits no conflicting intent. United States v. Oregon, 295 U.S. 1 (1935); Oklahoma v. Texas, 258 U.S. 574 (1922).

[56]58 Fla. 398, 50 So. 826 (1909).

[57]Lamprey v. Danz, 86 Minn. 317, 90 N.W. 578 (1902).

[58]Smoulter v. Boyd, 209 Pa. 146, 58 Atl. 144 (1904).

not unduly interfere with the rights of other proprietors.[59] Decisions of the various states are as diverse as they are numerous.[60] The paucity of Florida decisions on the subject led one writer to remark that in searching for the Florida rule "the ironic spectre of 30,000 lakes and no case law arises."[61] Such is indeed the case, and whether Florida will ultimately follow the restrictive common law use rule or adopt the more practicable rule of the civil law remains an open question.

It is submitted that, since Florida is a great tourist state of world fame for boating, fishing, and yachting, the civil law "reasonable use" rule would better serve the interests of the state, notwithstanding the fact that as a common law state the common law rule ordinarily would be accepted as controlling. Under the latter rule, however, boaters, skiers, fishermen, and swimmers would be permitted to enjoy only that portion of the lake waters defined by an extension of their riparial property lines, or those of their host for the occasion, to the center of the lake.

It is logical to assume that a state that steadfastly preserves, as a public trust, the title to the beds of navigable lakes for the use and enjoyment of the public would look with much more favor upon the use-in-common rule of the civil law when the nonnavigable use question is presented for determination. Indeed, had there existed in old England such things as an abundance of lakes, fast motorboats, and skiers, the common law rule might have been vastly different.

It should be mentioned that in water consumption cases the Florida Supreme Court, in applying the rules of equal right and reasonable use to the taking of waters from lakes by riparian owners, may have furnished indications that it will apply the same doctrines to recreational uses of the surface of such water bodies.[62]

Possibility of Divestment

Through the entire question of private ownership of lands under waters assumed to be nonnavigable shines the warning light of *Broward v. Mabry* — a warning that a court decree may at any time

[59]Hardin v. Jordan, 140 U.S. 371, 390 (1891) (dictum).

[60]*E.g.*, Mix v. Tice, 164 Misc. 261, 298 N.Y. Supp. 441 (Sup. Ct. 1937); Akron Canal & Hydraulic Co. v. Fontaine, 73 Ohio App. 93, 50 N.E.2d 897 (1943); Smoulter v. Boyd, 209 Pa. 146, 58 Atl. 144 (1904); Taylor Fishing Club v. Hammett, 88 S.W.2d 127 (Tex. Civ. App. 1935); see Note, 5 U. FLA. L. REV. 166, 176 (1952).

[61]Note, 5 U. FLA. L. REV. 166, 178 (1952).

[62]Taylor v. Tampa Coal Co., 46 So.2d 392 (Fla. 1950); Tampa Waterworks Co. v.

liquidate assumed private ownership of any shallow lake or river bottom by holding such waters to be navigable. This holding would automatically vest title in the state under the sovereignty premise.

In this day of shallow draft skiffs and skis and state consciousness of the vast mineral potential of its subaqueous soil, it would be well for riparian owners of shallow lakes and rivers of whatever size, depth, or use to *prenez garde* lest their aqueous bodies suddenly become fitted with the thorn-studded crown of navigability and be thereby transmuted to state ownership sans compensation or thanks.

Legislation enumerating the navigable streams and lakes of the state would probably settle the matter; this has been resorted to elsewhere.[63] Application of *expressio unius est exclusio alterius* to such a statute would tend to operate as a title ratification in the private owners of lands underlying unenumerated bodies of water, absent a federal question.

The Legislature in a rather obscure and untested 1953 act[64] may have relieved the situation by incorporating definitions of navigable waters and riparian rights into a blend of tax assessment matters. Granting constitutional effectiveness of the act and application thereof beyond the tax theme, it would seem that the door has been closed to future judicial labors on the question of navigability of lakes and ponds in certain instances.[65]

Cline, 37 Fla. 586, 20 So. 780 (1896).

[63]CAL. HARBORS & NAVIGATION CODE §§101-106 (1937).

[64]FLA. STAT. §192.61 (1953).

[65]FLA. STAT. §192.61 (2) (1953) provides: "Navigable waters in this state shall not be held to 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 of America or by the State of Florida without reservation of public rights in and to said waters."