BEFORE THE COMMISSIONER OF LAND PATENTS

STATE OF MARYLAND

IN THE MATTER OF	:	
THE APPLICATION FOR	:	
A PATENT BY	:	WARRANT APPLICATION NO. 69
RAYMOND H. SIMMONS, JR.	:	

OPINIONS AND FINDINGS

The above-captioned matter involves the application of Raymond H. Simmons, Jr. of Baltimore County, Maryland for a patent of a particular parcel of vacant land containing approximately 11.9 acres lying in the Sixth Election District of Dorchester County, Maryland.

The Application for a Warrant to Survey Vacant Land was filed with the Commissioner of Land Patents in accordance with Real Property Article, Title 13 of the Annotated Code of Maryland and a warrant subsequently issued. In due course, actual notice was given to all adjoining land owners and various State agencies, and notice by publication was given in accordance with Real Property Article, § 13-308. The Registered Property Line Surveyor to whom the warrant issued made his return by Certificate of Survey in accordance with Real Property Article, § 13-310 and the actual fair market value of the land embraced by the survey was determined in accordance with Real Property Article § 13-313. A timely objection was filed by Dr. Torrey C. Brown, Secretary of the Department of Natural Resources in accordance with Real Property Article, §§ 13-401 and 13-402.

As required by law and after proper notice, a hearing was held on September 23, 1983, at 2:00 p.m. and continued, by agreement of the parties, until November 16, 1983, to allow the applicant and the objector to submit additional evidence and legal argument. Present at the hearing were the Commissioner; his Deputy; the Assistant Attorney General assigned; Jeffrey Hunt, professional court reporter; Raymond H. Simmons, Jr., applicant; Thomas A. Deming, Assistant Attorney General representing Torrey C. Brown, M.D., Secretary of the Department of Natural Resources, objector; Glenn

Earhart, Army Corps of Engineers; Carlos R. Brunori, Chief of Technical Services for the Wildlife Administration of the Department of Natural Resources; and several observors of the proceedings. The Commissioner explained the procedure to be followed at the hearing and the individuals who proposed to testify were duly sworn.

The basic issues in this matter are:

(1) Can the Commissioner consider an application for a patent for an island whether it be a natural island or an artifically made island?

and

(2) if so, has the applicant proven to the satisfaction of the Commissioner that the island in question is not covered by prior patent?

In the Commissioner's opinion, the clear intent of the careful revisions made to the land patents law in 1976 and 1977 were to permit the Commissioner to examine all applications for patents to vacant lands, whether they be for islands or property elsewhere in Maryland. The prohibition of the Board of Public Works in 1967 with regard to the issuance of patents for islands was, in the Commissioner's opinion, superceded by the exhaustive study and proposed revisions to the land patents law made by the select committee of experts in 1976 and 1977 which were adopted by the General Assembly as the current Real Property Article, Title 13. Those revisions give the Board of Public Works the clear power to review the actions of the Commissioner once he or she has recommended the issuance of a patent, but leaves the matter of review of any land patent application to the Commissioner and a process designed to provide the Board with as much relevant information as the Commissioner is able to elicit from the applicant and any objectors.

With regard to the matter of the Commissioner's jurisdiction over islands, an island, whether created artifically or by natural causes, is land as defined in Real Property Article, § 13-101(f). The island in question is without a doubt an "area of land in the state" and "does not include any area covered by navigable water." The fact that this particular

island is located on land which at one time was covered by navigable water does not change the fact that it is presently not covered by navigable water. Thus, there is no reason to exclude an island from the purview of the land patents title. See, e.g., Sterling v. Sterling, 211 Md. 493, 495 (1957) (Lands under navigable waters do not include islands.); Wagner v. City of Baltimore, 210 Md. 615 (1956) (Because island was covered by navigable waters at time patent was issued, patent is void.) Moreover, the Court of Appeals in resolving numerous disputes over patented islands has never suggested that islands are not patentable. See, e.g., Sterling v. Sterling, supra; Wagner v. City of Baltimore, supra; and Tyler v. Cedar Island Club, 143 Md. 214 (1923).

As early as Browne v. Kennedy, 5 H. and J. 195, 206-07 (1821), the courts of this State have held that all islands arising in navigable waters belong to the State unless they have been granted to private persons. The Supreme Court in Morris v. U.S., 174 U.S. 196, 238, 19 S.Ct. 649, 666 (1899), expressly rejected the reasoning in Browne v. Kennedy in holding that vacant land means land subject to cultivation and that, consequently, islands could not be patented. The Supreme Court conceded, however, that Wilson v. Inloes, 11 Gill & J. 351 (1840) interpreted Browne v. Kennedy as providing that the State has the right to grant land under navigable water and that when the water ceases to exist, the right of possession is in the patentee. Morris, supra, 174 U.S. at 238; 19 S.C. at 666. The Court of Appeals has relied on Browne v. Kennedy consistently over the years. See, e.g., Board of Public Works v. Lamar Corp. 262 Md. 24 (1971); Kerpelman v. Board of Public Works, 261 Md. 436 (1971); Bowie v. Western Md. R.R. Ter. Co., 133 Md. 1 (1918). Thus, the decision of the Supreme Court in Morris v. U.S. is not controlling in determining whether patents should issue on islands in Maryland.

The conclusion that islands are patentable in Maryland is further supported by the consistent practice of the Land Office in granting patents for islands. For instance, several patents were issued for islands in the 1930s. In 1939, the Deputy Attorney General advised the Land Commissioner that ch. 224 of the Acts of 1935, providing that no patent shall be issued by the Land Commissioner to islands created by dredging or formed by natural causes since the opening of the inlet at Ocean City during the August 1933

storm, did not apply to islands in existence prior to August of 1933. Thus, the Deputy Attorney General advised the Land Commissioner that "if you are convinced that the land in question was in existence prior to August 1933, you may issue your warrant for it, according to the usual procedure." See 24 Opinions of the Attorney General 479, 480 (1939). Patents also issued for Trudy's Island in 1954, for Guy's Island in 1955, and for Prince Island in 1962.

Further, the General Assembly has not been silent on the question of whether patents should issue for islands. As early as 1933, the General Assembly enacted provisions prohibiting the issuance of patents on certain islands in the Sinepuxent, Chincoteague, and Isle of Wight Bays. See 1933 Md. Laws, Spec. Sess., ch. 69; 1955 Md. Laws., ch. 643; 1973 Md. Laws, Special Session, ch. 4, currently codified at § 9-402(b) of the Natural Resources Article. In 1976, the General Assembly enacted a general provision relating to the patentability of islands by amending the land patent title to provide that, with the exception of Dorchester and Baltimore Counties, no patent could issue for islands created by dredging unless the Board of Public Works approves the patent. See 1966 Md. Laws, ch. 573. During its next session, the General Assembly made substantial changes in the land patents title and attempted to repeal the provision relating to islands enacted the previous year. See 1967 Md. Laws, ch. 355. In 1968, the General Assembly repealed the provisions enacted in 1966 relating to islands. See 1968 Md. Laws, ch. 348. Thus, it would appear that the General Assembly in providing generally for the land patent process, intended by its specific prohibitions against patents issuing for islands in certain waters of the State, and by its action in repealing the general prohibition, that patents may be issued for islands.

The only matter to be resolved here, then, is whether or not the applicant has proven to the Commissioner's satisfaction that the island in question is not covered by prior patent. On the surface this seems a spurious question because it is well-documented that the Army Corps of Engineers created the island, but as the record shows, both the applicant and the objector are well aware that erosion is a factor to be considered with regard to the neighboring Barren Island, which, at most, is only a few hundred feet away from the island in question. It thus becomes incumbent

upon the applicant to demonstrate to the Commissioner that the island was not created in an area that once was a part of Barren Island that has since eroded away. If indeed the island in question was created on land now eroded away, then the issue of whether or not a prior patent exists becomes paramount and the application would be decided on whether or not a prior patent determines the title to the island. Patents to lands issued before 1862, even if those lands have eroded away, may still be in effect under current Maryland Law and it appears that all patents for Barren Island were issued prior to 1862.

The applicant chose not to submit expert testimony on the question of whether or not the island in question was created in an area that was once part of Barren Island, although ample opportunity was given to him to do so. The applicant chose instead to rest his claim on the evidence as submitted by the Commissioner that merely documented that it was possible to address the issue with the aid of expert witnesses. In the opinion of the Commissioner the applicant did not fulfill his responsibility under Title 13 to establish to the satisfaction of the Commissioner that the land in question was truly "vacant" within the definition provided by Title 13.

The applicant presented no evidence whatsoever on whether prior patents have been issued on this land. In response to the Commissioner's questions concerning the possibility of prior patents, the applicant responded that he would submit on the Commissioner's records. Such a response is wholly inadequate and cannot meet the burden of establishing that no prior patents were issued for this particular piece of land. Although requested to do so, the applicant presented no evidence whatsoever on whether the site of the alleged vacant island was ever part of a tract of land patented before March 3, 1862, either as land under navigable water or as land now eroded away. The applicant presented no evidence relating to surveys or maps of Barren Island, no evidence of erosion studies of Barren Island or the nearby mainland, no evidence from a registered land surveyor, and no expert testimony concerning earlier mappings of Barren Island or the nearby mainland. The applicant merely proffered that the photographic evidence shows that "this island is well to the east of Barren Island and is no way connected or has never been connected to those points," (Transcript pages 130-32).

Based on this minimal evidence submitted by the applicant, the Commissioner finds that the applicant has failed to establish that a vacancy exists. Thus, the Commissioner shall not cause a patent to the lands embraced by the application to be prepared. Further, because the issue--whether a vacancy exists--was not established, the Commissioner need not, and does not, reach the questions (1) whether the objector established that the State required the alleged vacant land for public purposes, and (2) the valuation of the alleged vacant land.

It is probable that no application for warrant would have been made for this island had the Department of Natural Resources taken steps prior to the beginning of the dredging project to secure title to the island. Assuming this island was placed on land for which a patent never issued prior to March 3, 1862, the land does, in fact, belong to the State. It belongs to the State, because the State has never parted with its right to the land to anyone. However, while vacant land belongs to the State, individuals may attempt to obtain a patent to that land, if it is vacant, pursuant to the rules of the Land Office. See Baltimore v. McKim, 3 Bland 445 (1831). If this occurs, the State or one of its agencies must prove that it needs the land for a public purpose so that no patent will issue.

Although the Department of Natural Resources assisted the Army Corps of Engineers in obtaining two-year easements from nearby property owners during the construction phase of the island, the evidence presented at the hearing revealed that the Department did not attempt to determine whether it and the Army Corps of Engineers were placing the dredged material on land for which a patent had previously issued. The Department assumed the land under the navigable waters belonged to the State. The better course would have been for the Department (1) to ascertain whether a patent had issued prior to March 3, 1862, to the land upon which dredged materials were to be placed; (2) if a patent had issued, to purchase the underwater land from the current titleholders; and (3) if a land patent had not issued, to attempt to acquire title through the patent process because the Department cannot avail itself of the procedure set forth in Article 78A, §§ 15, 15A, or 16. See Real Property Article, § 13-502(c).

Both the Army Corps of Engineers and the Maryland State Department of Natural Resources have been negligent in their duty to the citizens of

Maryland and the United States by not clearly establishing their right to create an island such as the one in question here. The procedures as provided under Title 13 are simple, relatively inexpensive, and reasonable. According to the testimony presented at the hearing, whenever the Army Corps of Engineers decides to dredge a channel and deposit the dredgings on, or adjacent to, existing land, care is taken to secure the permission and cooperation of the owner of record. The same should be done with regard to the creation of islands. Title 13 permits this to be done with a minimum of effort and with lasting effect. Assuming that the site for a proposed island is not covered by prior patent, a patent can issue to the state or federal agency involved and that patent in turn will be recorded among the land records of the county in which the proposed island would lie, beginning a clear chain of title that will leave no one in doubt as to ownership. If, in the process of pursuing the application, the state or federal agency should find that a prior patent may have a bearing on the title to the site, then arrangements can be made with the current title holder, to permit the creation of the island and its use by the state or federal agency involved. The application for patent in that case would be withdrawn with the grounds for withdrawal made a matter of record to inhibit any frivolous attempts to secure patent to the island at some point in the future.

As to whether or not a patent can issue to a state or federal agency from the State in the person of the Governor, the answer is both a practical and a philosophical yes. From earliest times, the Proprietor of Maryland (now the State, but before 1776, Lord Baltimore) reserved the right to certain lands (called reserved lands) which reservations were recorded among the central land records of the Province in the custody of the then "Commissioner of Land Patents." In effect the issuance of a patent to a state or federal agency for lands formerly vacant is a proper vehicle today for the State to reserve "vacant" lands for public use.

To resolve the issue with regard to the island in question here, the Commissioner strongly urges the Department of Natural Resources and/or the Army Corps of Engineers to apply for a patent for this island and to establish beyond any doubt their right to the island, whether it be by patent or through agreement with anyone who should hold title under prior patent to the island.

The present applicant has been given his opportunity to prove that the land in question is truly vacant and has not done so. Anyone else who chooses to apply for the island has the right to begin the process all over again and the Commissioner is bound by law to accept such applications on a first come, first served, basis. It is in the best interests of the taxpayers of Maryland and of the United States, for those who created the island in the first place to apply for a patent and resolve the issue of ownership once and for all. The island was created with public funds for an avowed public purpose, yet its title remains unclear. If any applicant is able to establish that the island is truly vacant land, he or she need only pay the fair market value of the land, plus the costs of the patent, and not the real cost to the taxpayer of creating and planting the island. If in the course of his or her research, a future applicant should establish that the island in question is covered by prior patent, then the matter of title must be resolved between the creators of the island and the owner or owners of the island.

Whichever the case may be, the land patent law provides an effective vehicle by which the proper course of action can be determined. In the Commissioner's opinion, it is incumbent upon the state and federal agencies that created the problem of this island to resolve it so that interested citizens, such as the present applicant, can have a clear and unequivocable answer to the quesion of ownership without having to go to considerable expense to obtain that answer. The present applicant chose to assume an unreimbursable financial burden in the hope that he could secure title to the island. He failed to make his case, but the State also failed to fulfill its responsibility by not making its claim clear from the outset.

CONCLUSION OF LAW

Based upon the record and the evidence presented, the Commissioner concludes that the applicant has failed to sustain his burden of proof that the land embraced by the application is vacant land within the meaning of the statute.

ORDER

It is, therefore, this 9th day of December, 1983, by the Commissioner of Land Patents, State of Maryland

ORDERED, That the application of Raymond H. Simmons, Jr., for a land patent for certain alleged vacant land in Dorchester County, Maryland, be and the same is hereby denied.

Edward C. Papenfuse
Commissioner of Land Patents