THE PROTESTANT MISSION OF PONAPE, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS and its ALIEN PROPERTY CUSTODIAN, Appellees

Civil Action No. 202

Trial Division of the High Court

Ponape District

March 23, 1965

Action to determine ownership of land on Ponape Island, in which petitioner claims ownership of two plots of land, one of them filled-in shore land formerly below high-water mark. On appeal from District Land Title Determination, the Trial Division of the High Court, Chief Justice E. P. Furber, held that title to both plots of land was in Alien Property Custodian of Trust Territory since oral statement of Navy official was insufficient to pass title to land, and title to property below high-water mark is in sovereign.

Modified and affirmed.

1. Public Lands-Use Rights

   Claim to land on Ponape Island based solely on oral statements of Political Affairs Officer of Navy Administration is insufficient, since officer's position did not carry with it implied authority to convey ownership of government land.

2. Former Administrations-Applicable Law

   Legality of act should be decided according to law as it was at time act was done.

3. Former Administrations-Redress of Private Wrongs-Exception to Applicable Doctrine

   It is not proper function of courts of present administration to right wrongs which may have been done by former administration except in cases where wrong occurred so near time of change of administration that there was no opportunity for it to be corrected through courts or other agencies of former administration.

4. Public Lands-Shore Lands

   Question of ownership of shore land between high-water and low-water mark and exact limits of private ownership of land bounded by sea is one peculiarly dependent upon local law.

5. Public Lands-Shore Lands

   Under general common law title in soil of sea is in sovereign except insofar as individual has acquired rights in it by express grant, prescription, usage, or by legislation.

6. Public Lands-Shore Lands

There is no universal and uniform law as to land under tide waters, and great caution is necessary in applying precedents in one state to cases arising in another.

7. Former Administrations-Applicable Law

Question of whether land settlement contract made with German authorities gave right below high-water mark should be determinedprimarily by law and practice of German Administration on Ponape.

8. Former Administrations-Applicable Law

Under German Administration on Ponape, all property from high-water mark out was considered to belong to German Government, with exception of three private mangrove reserves which were specifically granted by government.

9. Former Administrations-Redress of Prior Wrongs

If there were any private rights below high-water mark under Ponape custom, they were taken away by German land reform, and if that was a wrong, it is now too late for courts of present administration to correct it.

10. Former Administrations-Redress of Prior Wrongs

Japanese Government on Ponape in 1934 proclaimed all areas below high-water mark belonged to government except for rights specifically granted by government authority, and if there was any wrong here, it is now too late to correct it.

11. Public Lands-Shore Lands

Right of government to fill in areas owned by it below high-water mark and to retain ownership of land so made, and to expressly authorize others to do so regardless of wishes of owners of adjoining upland, is recognized in United States.

12. Public Lands-Shore Lands

In United States, owner of upland abutting shore does not acquire title to land he creates by unauthorized filling of underwater soil belonging to government.

13. Former Administrations-Official Acts

There was nothing legally wrong in filling in of land below high-water mark by Japanese Government or its claim of ownership of such land.

14. Former Administrations-Official Acts

Where land on Ponape Island below tide-water mark was filled in by Japanese Government, it became upland which was clearly claimed by Japanese Government.

15. Public Lands-Shore Lands

No right to filled-in land is created under Trust Territory Code, and only certain rights already in existence were preserved by Code. (T.T.C., Sees. 24 and 32(f) )

16. Former Administrations-Official Acts

Undertaking by Japanese Government on Ponape Island to permit private owners coming by boat to pass across filled-in land owned by government constitutes easement appurtenant to adjoining property.

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FURBER, *Chief Justice*

OPINION

This is an appeal from a determination of ownership and release by the Ponape District Land Title Officer in favor of the Alien Property Custodian of the Trust Territory and against the appellant covering certain lands on Ponape Island, which the Alien Property Custodian released to the Trust Territory by the endorsement on the determination of ownership and release before it was filed by the Clerk of Courts.

The appellant, in its notice of appeal, requested permission to submit evidence which it stated was not available at the time of the hearings held by the District Land Title Officer. This evidence, consisting of the copy of a land settlement contract in German dated July 15, 1909, a copy of a map of the land referred to in it, and an English translation of it, was admitted by stipulation. The appeal was submitted on the basis of the information in the Title Officer's file, a series of stipulations, including those as to the evidence referred to above, and oral argument.

**[1]** The appellant's basic claim before the Land Title Officer was in two distinct parts-one as to the land referred to in the title determination as Section "A", which is admittedly filled land, and a totally separate claim as to the land referred to in the title determination as section "B". During the course of the argument, counsel for the appellees stated that the Government recognizes that the appellant has a tenancy at will in the land described as section "B", and counsel for the appellant stated that its

claim to this land was based solely on the oral statements of a Political Affairs Officer of the U.S. Navy Administration of Ponape (for which no consideration is alleged), plus occupancy. No evidence of any specific authority of this officer was introduced, and the court takes judicial notice that such an officer's position would not carry with it implied authority to convey ownership of government land. The principal issues raised by the appeal, therefore, relate to the filled land described as section "A".

The land settlement contract dated July 15, 1909, purports to have been concluded on behalf of the Public Treasury of German New Guinea as vendor and the Mission of Liebenzell as purchaser, covering the sale of certain lands "in the northeast bordered by the sea, all other sides bordered by land belonging to the Treasury", which it appears from the map submitted with it, is land immediately inland from section "A", it being stipulated that the westerly boundary of section "A" is the former shoreline. There is no mention in the contract of any rights in areas under water, but the map does show an area marked "Mangrove". This contract was not asserted before the Title Officer, and counsel for the appellant admitted in his argument that the deed of 1880 relied upon before the Title Officer was not recognized by the German Administration.

The argument of the appellant briefly stated is that this contract gave the Mission ownership to the sea, which it construes to mean low-water mark, that section "A" having been filled in without the Mission's permission andover its objection, is its land, and that this was confirmed by, or should be recognized as coming under, Section 32(f) of the Trust Territory Code.

It is not too clear just when section "A" was filled in, and it appears that parts of this filling were done at different times,but it is clear it was all done before the

United States occupied Ponape. (See testimony of Reverend Martin Kelen about the middle of pages 12 and 15 of the transcript of testimony before the Title Officer, and the translation of Reverend Kinzo Tanaka's letter of November 9, 1949.) The court believes it is fair to infer, as the parties appear to have, that nearly all the filling was done by or on behalf of the Japanese Administration, and that any small part done by the Mission was done without the permission of the Japanese Administration. It is clear that this whole section was claimed by the Japanese Administration as government land.

[2, 3] As this court has already held, the legality of an act should normally be decided according to the law as it was at the time the act was done and it is not a proper function of the courts of the present administration to right wrongs which may have been done by a former administration, except in those cases where the wrong occurred so near the time of the change of administration that there was no opportunity for it to be corrected through the courts or other agencies of the former administration. *Wasisang v. Trust Territory,* 1 T.T.R. 14. *Kumtak Jatios v. L. Levi, et al.,* 1 T.T.R. 578.

[4, 5] The question of ownership of shore land between high-water mark and low-water mark and the exact limits of private ownership of land bounded by the sea is one peculiarly dependent upon local law, the general common law rule being that title in the soil of the sea below ordinary high-water mark is in the sovereign except so far as an individual or a corporation has acquired rights in it by express grant, or by prescription or usage, or as a result of some particular legislation. 12 Am. Jur. 2nd, Boundaries, § 14. *Shively v. Bowlby,* 152 U.S. 1, 14 S.Ct. 548 (1894).

[6] In *Shively v. Bowlby* cited above, Mr. Justice Gray, on behalf of the Supreme Court of the United

States, said concerning this matter at p. 26 of 152 U.S., p. 557 of 14 S.Ct.,

"The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another."

[7, 8] The question of whether the land settlement contract relied on by the appellant gave any right below high-water mark should therefore be determined primarily by the law and practice of the German Administration on Ponape. The attitude of that administration at the time of its land reform of 1912 on Ponape was well known to be that high-water mark was the seaward limit of shore property and the title documents given to owners of property abutting the shore in that land reform did *not* automatically give rights which extended beyond the shoreline under the German system. It was widely known on Ponape that all property from high-water mark out was considered to belong to the German Government with the exception of three private mangrove reserves which had been specifically granted by the German Government. See Land Tenure Patterns, Trust Territory of the Pacific Islands, Vol. 1, p.126-127.

[9] From this it appears most unlikely that any rights below high-water mark, beyond a possible revocable license, were conveyed by the contract in question without any specific mention of them, but if they were, the court considers they were taken away in the land reform. If that constituted a wrong, it is too late now to expect the courts of the present administration to try to correct it.

**[10]** Furthermore, the court takes notice that the Japanese Administration, at least as early as 1934, proclaimed all areas, in what is now the Trust Territory, below high-water mark to belong to the government except for rights which had been specifically granted by government authority. If there was anything wrong about this, it is also too late now to expect the courts of the present administration to try to correct it.

It is very clear, and impliedly acknowledged by one of the witnesses for the appellant at the Title Officer's hearing, that the Japanese Administration claimed the right to fill in areas below high-water mark and retain ownership of the land formed thereby, and also claimed ownership of any such areas filled in without its permission.

**[11]** This right of government to fill in areas owned by it below high-water mark and retain ownership of the land so made, and to expressly authorize others to do so, regardless of the wishes of owners of the adjoining upland, is one which has been generally recognized in the United States in areas where government ownership below high-water mark is recognized. This has been done even as against the United States itself and as against grants by the United States Congress of lands bordering on or bounded by navigable waters. 56 Am. Jur., Waters, § 501, especially the part added to p. 910, in the 1964 Cumulative Supplement, p. 73 (see particularly note 18.51). 91 A.L.R.2d, 873-875. *Shively v. Bowlby,* cited above. *United States v. Mission Rock Co.,* 189 U.S. 391, 23 S.Ct.606 (1903).

In concluding the opinion of the United States Supreme Court in *Shively v. Bowlby,* cited above, involving rights claimed by the defendants in error under certain statutes of Oregon, in lands below high-water mark, Mr. Justice Gray said at p. 58 of 152 U.S., p. 570 of 14 S.Ct.:-

"Grants by congress of portions of the public lands within a territory to settlers thereon, though bordering on or bounded by navigable waters, convey, of their own force, no title or right below high-water mark, and do not impair the title and dominion of the future state, when created, but leave the question of the use of the shores by the owners of uplands to the sovereign control of each state, subject only to the rights vested by the constitution in the United States.

"The donation land claim bounded by the Columbia river, upon which the plaintiff in error relies, includes no title or right in the land below high-water mark; and the statutes of Oregon, under which the defendants in error hold, are a constitutional and legal exercise by the state of Oregon of its dominion over the lands under navigable waters."

**[12]** It has also been recognized in the United States that an owner of upland abutting the shore does not acquire title to the land he creates by unauthorized filling of underwater soil belonging to the government. 56 Am. Jur., Waters, § 501, note 16. 91 A.L.R.2d, 860-863.

**[13]** There was therefore nothing legally wrong about the filling in of this land by or on behalf of the Japanese or about its claim of ownership. Regardless of how late in the period of the Japanese Administration the last of the filling was done, it violated no rights of the Mission, and gives rise to no claim for which the courts can properly grant relief.

**[14]** When section *"A"* was filled in, it lost its character as land below high-water mark and became upland as was clearly claimed by the Japanese. This also is in accordance with many American precedents. 56 Am. Jur., Waters, § 502. 91 A.L.R.2d, 876-877.

**[15]** The court therefore believes that section *"A"* cannot fairly or properly be considered to come within the terms of subsection (f) of Section 32 of the Trust Territory Code. Subsection (f) does not purport to create or revive any rights, but simply provides that certain rights

shall not be affected by Section 32. The court holds that that subsection must be construed in conjunction with Section 24, and relates only to rights which were in existence at the time the subsection was promulgated, namely, December 10, 1959, in areas which were still "marine areas below the ordinary high-water mark" at that time.

**[16]** While the Japanese might have cut off the Mission's direct access to tide-water by the filling in question, the court considers from the evidence that there was an undertaking by the Japanese to permit those coming by boat to pass across section *"A"* to and from the Mission property and that this undertaking constitutes an easement appertinent to the Mission's adjoining property. The court was advised by counsel for the appellees that the Government was ready to grant a specific right of way for this purpose over a part of section *"A"* and the court requested counsel to endeavor to agree upon its exact location so that it might be specifically designated in the judgment in this action without prejudice to the appellant's rights of appeal, but the court is now informed by counsel for the appellees that attempts at such agreement have failed.

JUDGMENT

It is ordered, adjudged, and decreed as follows:-

1. The District Land Title Officer for the Ponape District's Determination of Ownership and Release No. 21, dated February 20, 1961, filed May 25, 1961, with the Clerk of Courts for the Ponape District, is hereby modified by:-

a. Adding after the words "is the property of (list names and interest of each) Alien Property Custodian of the Government of the Trust Territory of the Pacific Islands", the words

"subject to the following:-

i. as appertinent to the Protestant Mission's land adjoining section "A" on the west, a right of way for the passage of travelers

on foot and handcarts, with such burdens as are normally and commonly carried by foot travelers or on handcarts on Ponape, across said section *"A"* to and from said Mission's land and tide-water;

ii. the Protestant Mission's right to continue to use said section "B" as tenant at will unless and until this right is terminated on reasonable notice;"

b. Striking out in the granting clause the words "in its entirety and without reservation" and substituting therefor the words "subject to the above mentioned right of way and tenancy at will".

2. As so modified, said Determination of Ownership and Release No. 21 is affirmed.

3. If the parties are unable to agree upon the exact location and width of the above mentioned right of way, any one of them may apply to the court, by motion filed in this action, for further determination as to the right of way.

4. No costs are assessed against any party.