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Successors of William Webster (United States) v. Great Britain

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tion was a matter of police entirely within the powers of the military government and quite justified by the circumstances. Hence, we hold that this claim must be rejected, and it is so decided.

SUCCESSORS OF WILLIAM WEBSTER (UNITED STATES)

v. GREAT BRITAIN

(December 12, 1925. Pages 540-546.)

CESSION OF SOVEREIGNTY, ANNEXATION, SUCCESSION OF STATES: PRIVATE RIGHTS ACQUIRED PREVIOUS TO— Purchase in 1836-1839 by Webster, United States citizen, of certain lands in New Zealand from native chiefs and tribes. Proclamation by Great Britain on January 14 and 29, 1840, of non-recognition of titles to land not derived from or confirmed by Queen. Cession of sovereignty on February 6, 1840, by native chiefs and tribes to Great Britain. Act of June 9, 1841, going less far than proclamations and establishing Commission to examine titles derived from aborigines and recommend Crown grants in lieu thereof to maximum of 2,560 acres per claimant, unless more authorized by Governor and Council. Submission by Webster of his claims to Commission "willing to take his chance with all others". Crown grants made for about 42,000 acres. Claim for compensation presented before Tribunal on the ground that not all native titles were given effect.

JURISDICTION, PRELIMINARY MOTION. Preliminary objection to jurisdiction overruled since: (1) Tribunal unable to decide upon jurisdiction before full hearing of Cayuga Indians claim (see p. 173 *infra*), and (2) since according to rules of procedure award shall be delivered as soon as possible and Tribunal satisfied that claim must be rejected on its merits.

INTERPRETATION OF (PRIMITIVE AND DEVELOPED) MUNICIPAL LAW.—EQUITY. *Held* that under customary native law Webster acquired no more than titles of uncertain scope and content, not extending to full property (*dominium*). Differences listed with Burt's claim (see p. 93 *supra*). *Held* also that Act of June 9, 1841, instead of destroying Webster's imperfect native titles, gave him option of claiming them and insisting they be allowed, for what they were worth, on the basis of international law, or of exchanging them for better title derived from Crown to such lands as should be awarded him, and that he agreed to the latter. *Held* further not equitable that Webster, who was awarded more than sixteen times maximum, should receive full title to whole of large claimed areas.

AWARENESS OF RISK. *Held* that Webster must have known that native titles not marketable unless confirmed, established, or transformed, so that losses due to delay or uncertainty in confirming, etc. (proclamations of January 14 and 29, 1840), were risk of his speculation. Claim disallowed.

Cross-references: Am. J. Int. Law, vol. 20 (1926), pp. 391-397; Annual Digest, 1925-1926, pp. 83-84.

Bibliography: Nielsen, pp. 537-539; Annual Digest, 1925-1926, p. 84.

As described in the memorial, "this claim is for damages resulting from the denial of title to and loss of possession of certain lands in . . . New Zealand" as a consequence of what are claimed to have been "unwarranted and unjustifiable acts of the British authorities after the annexation by the British Crown".

It appears that William Webster, a citizen of the United States, who was engaged in trading with the native population of New Zealand, purchased from native chiefs and native tribes, between 1836 and 1839, large tracts of land, the extent of which is not clearly established. As shown by the claims lodged before the New Zealand Commission, they amounted to some 184,000 acres. As claimed in his applications to the American Government, they amounted to about 500,000 acres, of which he asserted he had "proved title to about 240,000 acres". The purchases were paid for chiefly in goods and merchandise, and he claims to have invested in this way about \$78,000. The New Zealand Land Commission found an outlay of a little less than \$40,000.

Webster was not the only person engaged in buying land from the natives at this time. Indeed, it appears that different land speculators, other than Webster, claimed to have bought in this way some 654,000 acres more than the whole area of the two principal islands. Hence, to avoid conflict and to prevent spoliation of the natives, it became necessary for some government to step in. This was done by the British Government when, in 1839, it commissioned Captain William Hobson, R.N., as Lieutenant Governor of New Zealand, and directed him to proclaim that Great Britain would "not acknowledge as valid any title to land, which either has been or shall hereafter be acquired in that country", unless derived from and confirmed by the crown. In pursuance thereof, on January 29, 1840, Captain Hobson made a proclamation in which, reciting that it was not intended to "dispossess the owners of any lands acquired on equitable conditions, and not in extent or otherwise prejudicial to the present or prospective interests of the community", he announced that the crown did not deem it "expedient to recognize any titles to land in New Zealand which are not derived from or confirmed by Her Majesty". A like proclamation had been made on January 14, 1840, by Sir George Gipps, Governor of New South Wales, to whose jurisdiction New Zealand had been added.

On February 6, 1840, Great Britain entered into a treaty with the native chiefs and tribes of New Zealand, called the Treaty of Waitangi, whereby sovereignty was ceded to the British Crown. The land laws of New South Wales were then extended to New Zealand, by an Act of August 4, 1840, and commissioners were appointed to examine and report on claims to land titles. On June 9, 1841, this Act was repealed, and an Act was passed by the Colony of New Zealand providing for a second commission to examine the titles derived from the aborigines and recommend grants in lieu thereof. This Act established a maximum of 2,560 acres for any one claimant, unless more was authorized expressly by the Governor and Council. After some correspondence with the American Consul at Sydney, New South Wales, and with the New Zealand authorities, Webster, on October 3, 1841, wrote to the Colonial Secretary: "I wish my claims to be laid before the Commissioners and am willing to take my chance with all others." Accordingly he submitted his claims to the Land Commission and ultimately he and his assignees were allowed about 42,000 acres, the difference being due partly to surveys and definite fixing of boundaries, partly to interpretation of native grants, partly to determination of the amount of the consideration paid by Webster in different conveyances, and partly to the insistence of the Home Government that the Colonial Government should not go too far in approving and allowing grants in excess of the maximum. The contention is that the several native grants should have been given effect as conveying to Webster a full and complete title by British law to their entire extent, and that his successors are entitled to compensation for the difference between the amount of land called for in the native grants and granted to him by the Crown.

A preliminary question was raised to the effect that this claim is barred by

article V of the convention between Great Britain and the United States, executed on February 8, 1853, and ratified on July 26, 1853. This question was argued to us in connection with the argument of a like question in the Cayuga Indians claim. We found upon that argument that some of the points involved were also involved in the Cayuga Indians claim, and felt unable to pass upon them with assurance until a more complete understanding of the latter could be had from a full hearing thereon. Hence we were constrained to overrule the preliminary objection, reserving power to decide the present case upon the point involved in the objection, should it ultimately appear proper to do so. At the hearing on the merits, counsel for Great Britain has once more urged this point upon us.

Rule 39 of the rules of procedure governing our proceedings reads: "The award of the Tribunal in respect to each claim shall be delivered at a public session of the Tribunal as soon after the hearing of such claim has been concluded as may be possible." We do not feel justified in passing on the question as to the effect of article V or the Convention of 1853 until after full argument of the Cayuga Indians claim. Nor, in view of rule 39, do we feel justified in delaying a decision of the present case until after that argument is concluded, since we are satisfied that, in any event, the claim now before us must be rejected on its merits.

Native land tenure in New Zealand prior to the annexation was the subject of an elaborate report to the Colonial Government in 1843. It is a subject upon which much has been written by local historians, in public documents, and by anthropologists and ethnologists. The native law was customary and in a low stage of development. The land was possessed and occupied by the tribe and separate cultivation seems to have given no more than what might be called a usufructuary interest. Alienation, in the sense in which it was understood by the white purchasers, was something quite new to the natives. There is some evidence that many of the tribes and chiefs supposed that they were giving purchasers no more than a sort of usufruct. As the sales to speculators were made mostly within five years before annexation and the bulk of Webster's purchases were within the year before Captain Hobson's proclamation, it is obvious that no specific customary law as to the manner or effect of these wholesale alienations of communal property could have grown up. In order to purchase land so held, so as even to obtain such title as was known to native law, was far from easy. It involved the collective interests of a large group, not always easy to ascertain, and called for representation of interests by persons whose authority was not always clear. Hence, before annexation purchases of land from the natives were the chief source of quarrels and disturbances. The first care of the Government after annexation was to put an end to this cause of conflict by establishing a definite régime of private property under British law instead of the indefinite régime of customary, collective tribal rights of occupation or possession and of uncertain titles by purchase from chiefs and tribes.

Conveyances from the native chiefs could give Webster no higher or different title than that which existed by native customary law. As has been said, it is, at least, very doubtful how far the customary communal or collective title to land involved more than a claim to occupation by the tribe. Nor is it clearly shown that the natives understood any such thing as *dominium* over land, as it is understood in developed law, or understood the sort of title, with its implications, which Webster asserts was conveyed to him.

It is argued that the title of the British Crown is derived from the same source as Webster's title. We cannot agree. All those who had any claim to represent the aboriginal natives, as politically organized, entered into a treaty

ceding sovereignty to Great Britain. The treaty ceded sovereignty in article I. In article II, possession was guaranteed to the chiefs and tribes in all which they possessed individually or collectively. This is a clear declaration of the nature of native property as it existed at the time of the cession. It is far from recognizing the sort of proprietary system which Webster's claim presupposes. In addition an exclusive right of pre-emption of lands was given to the Crown. This was a matter of sovereignty. It was a legal regulation of alienation, not a conveyance of property.

It is said that in this respect the present case is governed by the decision of this Tribunal in one of the Fiji land claims, namely, the claim of Rodney Burt, American-British claims arbitration, No. 44. But we think that case differs from the present case in three important respects. In the first place, in the Burt case there was a long period of transition from native customary law to the white man's law, as a result of which conflicting theories as to power to convey and the effect of conveyance grew up. The British Government deliberately committed itself to one of these theories, and that theory was the basis of Burt's claim. Secondly, Burt, who had what, under the decision of the Land Commissioners in his case, was a full and complete native title, was deprived of all rights although he had been in actual (not constructive) possession prior to the cession. He was not allowed even what the native grant, at the very least, must have given him, nor was he allowed any equivalent therefor. Thirdly, the provisions of the cession as to titles were very different from those in the present case. In the Burt case, in addition to the cession of sovereignty, there was a declaration that "the absolute proprietorship of all lands, not shown to be now alienated, so as to have become bona fide the property of Europeans, or other foreigners", subject to certain exceptions, should be the property of the Crown. In other words, the cession assumes a pre-existing régime of "absolute proprietorship" in land and of alienations whereby European purchasers had acquired such property rights. In the present case the cession recognizes nothing more than a régime of possession by chiefs and tribes.

It is argued further that Webster's title has the same basis as the title of the British Crown because the native grants to him were taken as extinguishing the native title and the surplus over the grants made to Webster by the Colonial Government was held to revert to the Crown. But we interpret differently the proceedings by which these grants were made and cannot accept this contention.

Our conclusion is that Webster acquired no more than a native customary title, the content and scope of which was very uncertain and can not be said to have extended to a full property or *dominium* as known to matured law.

We do not think that these customary titles were "destroyed" by the local legislation, as contended by the United States. The Act of August 4, 1840, setting up the first commission, provides that native titles not "allowed" by the Crown after investigation shall be void. It then provides for grants and prescribes a maximum grant to any claimant. The Act of June 9, 1841, setting up the second commission, provides that all lands validly sold by the aboriginal natives shall be vested in the Crown. But this is evidently for the purpose of adopting the common-law view that all lands are held of the Crown, and thus laying the foundation for a modern property régime in place of the native customary tenure. For the Act then provides how any person who had acquired title prior to annexation may obtain a grant in lieu of his purchase fixing a scale for judging what he had paid and a maximum grant for any grantee. True, it was not till 1865 that an allowance of customary titles as such was provided for. But we think Webster was given an option of claiming his customary title and insisting it be allowed, for what it was worth, on the basis of international law, or of exchanging it for a Crown grant in fee simple

under the terms of the statute of 1841. Obviously there was great advantage in the latter in that the title under the latter was marketable, while, after annexation, the customary title was not. Webster agreed to submit his claims to the Land Commission and "take his chances along with the rest". We think this means that he agreed to exchange his customary title for a title derived from the Crown to such lands as should be awarded him. In fact the maximum was not applied in his case. He was awarded more than 16 times that maximum. This feature of the case distinguishes it at once from the Burt case. After this exchange and these grants, which seem to have been the result of very careful investigation and of a disposition on the part of the commissioners and of the Governor to do Webster justice and to be governed by equity rather than by the strict terms of the statute, we do not think Webster had any just claim for further grants in fee simple. He had exchanged his customary title to the surplus for a better title to what was granted him. It does not seem to us equitable that for his customary title he should receive a full title by British law to the whole of the large areas which he claims. Even less would it have been equitable to award him full title by British law to the fullest possible extent of the indefinite boundaries which his conveyances from the native chiefs called for. He could not have been in actual possession of all of these tracts, nor were the limits of such possession as he had by any means clear. In these respects also the Burt case is very different.

As to one claim which Webster submitted to the Land Commission, it appeared that all the chiefs who should have joined were not parties to his conveyance. On this ground the Commission rejected his title. It is contended that he should have been allowed an undivided interest corresponding to that of those who joined. But, as we understand it, these customary titles were collective. The chiefs were in no sense tenants in common. Such title as there was, was in the collectivity. If the collectivity, or its representatives, acted there was an alienation. If not, less than the collectivity had nothing to convey. Such seems to have been the view of the Commission, and we see no reason to think that their view of native tenures was erroneous.

It is said that the "threat" in the instructions of the British Government to Captain Hobson in 1839—and in the proclamation of Sir George Gipps, prior to annexation, that the Crown would not acknowledge as valid titles not derived from or confirmed by a grant from the Crown—destroyed the value of Webster's property. But the statutes after annexation did not go as far as these proclamations. The proclamations deprived him of nothing. If it is claimed that they injured the marketability of his property (which he had acquired as a speculation, not in order to settle thereon), the answer is that he must have known that, in order to be marketable, the title would ultimately need some kind of confirmation or establishment or some kind of transformation into the sort of title known to developed law. The titles obtained from native chiefs under customary law were not like those under consideration in *United States v. Percheman*, 7 Peters 51, 86-87. Those were titles to land in Florida under Spanish law. They were full and complete, giving a *dominium*, as well understood from Roman times in continental Europe and in lands settled therefrom. In the present case, losses due to delay or uncertainty in confirming or establishing the titles, or to deductions in exchange for a full and marketable title under British law, were a risk of Webster's speculation.

We are, therefore, of opinion that this claim should be rejected, and we so decide.
