OLKERIEL SECHESUCH, representing the IBAU LINEAGE, Appellant

v.

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

Civil Action No. 165

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

v.

ODELOMEL CLAN, represented by RECHIREI, Appellee

Civil Action No. 177

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

v.

NGKEKIIEL CLAN, represented by MELIMARANG NGIRACHITEI, Appellee

Civil Action No. 178

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

v.

ESEL CLAN, IBLONG CLAN, NGKEKLAU CLAN and IBERRONG CLAN, represented by SOAI SPIS, Appellees

Civil Action No. 183

Trial Division of the High Court

Palau District

September 25, 1963

Actions to determine ownership of lands in Airai Municipality which was taken by Japanese Government without payment of compensation and against free will of claimants. On appeals from District Land Title Determinations, the Trial Division of the High Court, Chief Justice E. P. Furber, held that taking of which claimant had definite notice in 1933 cannot now be upset, but that claimants who had no definite notice of taking until 1940 are entitled to return of lands.

Affirmed in part and reversed in part.

1. **Former Administrations—Taking of Private Property by Japanese Government—Limitations**
   Where clan was definitely on notice by about 1933 that Japanese Government had claimed its land, so much time has elapsed between taking of land and end of Japanese Administration that courts of present administration cannot properly upset it.

2. **Eminent Domain—Taking**
   In United States, in order for action to constitute taking of land, without any formal condemnation proceedings, possession and use of land or beneficial enjoyment of it must be affected.

3. **Eminent Domain—Taking**
   "Taking" under power of eminent domain is generally defined as entering upon private property and under warrant of legal authority devoting it to public use, or otherwise affecting it in such a way as to substantially deprive owner of beneficial enjoyment thereof.

4. **Eminent Domain—Taking**
   Mere temporary entry on land for purpose of making survey of it is not enough by itself to constitute a taking.

5. **Eminent Domain—Taking**
   Making of public recording of map showing proposed improvement of land does not constitute a taking in absence of special circumstances, such as further clear act evidencing intention to proceed according to map, or statute providing that recording of map shall operate as a taking.

6. **Former Administrations—Taking of Private Property by Japanese Government—Limitations**
   Policy established by Trust Territory regarding relief from taking of lands by Japanese Government is binding on court until such time as it is rescinded or modified. (Policy Letter P-1, December 29, 1947)

7. **Former Administrations—Taking of Private Property by Japanese Government—Limitations**
   For purpose of applying Trust Territory policy regarding relief from taking of lands by Japanese Government, taking of land of which owner had no notice until 1940 is considered to have been made in 1940. (Policy Letter P-1, December 29, 1947)

8. **Former Administrations—Taking of Private Property by Japanese Government—Limitations**
   Land transfers from non-Japanese private owners to Japanese Government, corporations or nationals since March 27, 1935, are considered valid unless former owner establishes sale was not made of free will and just compensation not received. (Policy Letter P-1, December 29, 1947)

9. Former Administrations—Taking of Private Property by Japanese Government—Limitations

Clear intent of Trust Territory policy regarding relief from transfer of lands to Japanese Government from non-Japanese owner applies to a taking just as much as to purported sale. (Policy Letter P-1, December 29, 1947)

FURBER, *Chief Justice*

MEMORANDUM OF DECISION

FINDINGS OF FACT

1. The Japanese Government, during its official land survey of around 1924 to 1928, surveyed all of the lands in question in these actions and placed at least temporary markers on them. Based on that survey a map was made and, either at that time or during what some of the witnesses have referred to as a "second survey" about 1932 or 1933 and concerning which there was little public understanding, the lands in question were indicated on this map in the Land Office as government land, but this map was not publicized until the land survey of 1940, referred to by some of the witnesses as the "third survey".

2. At the beginning of the survey of 1940, cement markers were placed on the lands by the government. These brought strong protests from the claimants and others. A temporary land office was set up at Airai to handle such claims and the claimants were at first told that a further survey would be made and any errors found would be corrected, but later they were told by the Japanese officials that the lands had been taken by the government in the survey of around 1924 to 1928, and either, that they would have to take any complaints to the Land Office in Koror or to the courts, or that it was too late for them to do anything about it.

3. After discussions with the Japanese Administration as to the ownership of the land claimed by the Iblong Clan,

n connection with the "second survey", the brother of the resent chief of that clan leased from the government, rom about 1933 until World War II, the major part of he land claimed by that clan in Civil Action No. 183, nd planted over 800 coconut trees there.

4. The Japanese Government never directly or indirectly ook possession of, or interfered with the claimants' pos- ession of, any of the land involved in these actions, other han that claimed by the Iblong Clan, until after March 27, 1935 (the cutoff date set in the Deputy High Commis- sioner's Trust Territory Policy Letter P-1 of December 29, 1947).

5. The Japanese Government never gave any of the claimants, other than the Iblong Clan, any definite notice of claim of taking or to ownership of the lands in ques- tion (other than that claimed by the Iblong Clan) until the survey of 1940.

6. Satomisang never actually used any of the particular land claimed in Civil Action No. 165, or interfered with the use of it by the Ibau Lineage.

7. The destruction of trees by the Japanese Government on the lands involved in Civil Action No. 183, alleged by the appellants in this action, did not take place until after the survey of 1940.

OPINION

These actions are appeals, which were tried together, from determinations of ownership and release made by the Palau District Land Title Officer concerning nearby lands in Airai Municipality on Babelthaup Island, Palau District. In each action the Trust Territory and its Alien Property Custodian allege that the land involved was taken about 1924 to 1928 and that this was so long before the transfer of administration from the Japanese Govern- ment to the United States Government that the taking

cannot now be upset properly as a matter of right, relying upon the principle recognized by this court in the cases of *Wasisang v. Trust Territory*, 1 T.T.R. 14, and in *Itpik Martin v. Trust Territory*, 1 T.T.R. 481, and set forth in the leading case of *Cessna v. United States, et al.*, 169 U.S. 165, 18 S.Ct. 314 (1898) by the United States Supreme Court. They do not allege any semblance of a sale of the land or that any consideration whatever was paid. The claimants on the other hand allege that whatever takings were involved were not made until 1940 and that, therefore, in accordance with Trust Territory Policy Letter P-1, they are entitled to the return of their respective lands, since it is clear there was no sale made of free will and no compensation was received.

The determination of ownership in favor of the Alien Property Custodian, appealed from in Civil Action No. 165, was apparently based in large part upon an affidavit summarizing the testimony of the claimant Olkeriel (spelled "Olekeriil" in the affidavit), which appeared to indicate possession of the land had been taken by the Japanese Satomisang in 1929, that cattle were put on the land that year under Satomisang as farm manager, and that the land was used as a cattle farm until the war came. The court, however, is satisfied from the testimony presented before it that there was a serious mistake in this affidavit and that, as shown by the sixth finding of fact above, Satomisang's house and cattle farm were actually on other land. Each of the other determinations of ownership involved is based on a finding that the taking in question occurred in 1940.

[1] The position of the Iblong Clan is radically different from that of all the other claimants involved. For some unexplained reason the Japanese Administration dealt more definitely and directly with the members of that clan than in the case of any of the other claimants,

as a result of which, about 1933, the brother of the present chief of the clan leased from the Japanese Government most of the land claimed by that clan, as shown in the third finding of fact above. That clan was therefore definitely on notice that the government had claimed its land by about 1933. That clan's claim, therefore, appears clearly to be governed by the principles explained in *Itpik Martin v. Trust Territory*, 1 T.T.R. 481. While that clan makes out a strong moral claim for consideration as a potential homesteader of the land it claims, the court feels compelled, as a matter of law, to hold that so much time had elapsed between the taking and the end of the Japanese Administration that the courts of the present administration cannot properly upset it.

As to the lands of the other claimants, there is no showing of any definite notice of taking until 1940, or of any physical interference with the possession and use of any of their respective lands until shortly before that, although it is clear that the Japanese Government did then allege it had taken the lands in the survey of around 1924 to 1928.

[2, 3] At least in the United States, for action to constitute a taking of land, without any formal condemnation proceedings, the possession and use of the land or the beneficial enjoyment of it must be affected.

" 'Taking' under the power of eminent domain may be defined as entering upon private property for more than a momentary period and, under the warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." 18 Am. Jur., Eminent Domain, § 132.

[4] Mere temporary entry on the land and making a survey of it is not enough by itself to constitute a taking. 18 Am. Jur., Eminent Domain, § 143.

[5] Nor does the making, or even the public recording, of a map showing a proposed improvement, constitute a taking in the absence of special circumstances such as some further clear act evidencing a definite intention to proceed according to the map or a statute providing that the recording of the map shall operate as a taking. 18 Am. Jur., Eminent Domain, § 144. Here, according to the evidence, the map involved was not known to the public until the disputes arose about the lands in 1940.

[6, 7] Regardless of any principle less favorable to the claimants, which the Japanese Government may have attempted to apply, the court believes that the foregoing precedents should be considered in construing the policy established by the Deputy High Commissioner's Trust Territory Policy Letter P-1 of December 29, 1947, of which the court has frequently taken judicial notice and which it considers binding on it, at least until such time as it is rescinded or modified. The court accordingly holds that, for the purpose of applying Policy Letter P-1, the takings of all the lands involved, except that claimed by the Iblong Clan, must be considered to have been made in 1940.

[8] Paragraph 13 of that letter reads as follows:—

"Land transfers from non-Japanese private owners to the Japanese government, Japanese corporations, or Japanese nationals since March 27, 1935, will be subject to review. Such transfers will be considered valid unless the former owner (or heirs) establishes that the sale was not made of free will and the just compensation was not received. In such cases, title will be returned to former owner upon his paying in to the Trust Territory government the amount received by him. Yen currency and Japanese postal savings which have been turned in by the former property owner (or heirs) to United States authorities for redemption, and which have not been exchanged for dollars, may be credited toward the payment required to clear the title. In case sufficient yen are not available from this source, exchange will be computed at the following rates, for transactions during the times indicated: prior to 1940, 4 yen

to the dollar; 1940, 5 to 1; 1941, 6 to 1; 1942, 7 to 1; 1943, 8 to 1; 1944, 9 to 1; 1945, 10 to 1."

In view of this policy, it is not necessary to consider whether the claimants pursued their legal rights as vigorously and promptly as they should have after receiving notice in 1940 that the government considered the lands had been previously taken.

[9] While paragraph 13 of Policy Letter P-1 states that transfers since March 27, 1935, will be considered valid unless the former owner establishes "that the *sale* was not made of free will and the just compensation was not received" (emphasis added), the court considers that the clear intent of the policy applies to a taking just as much as to a purported sale, and that the word "sale" in the statement of policy quoted above should be construed to include a taking.

The court therefore holds that each of the claimants (or the group for which he claims), other than the Iblong Clan, is entitled to the land claimed by or for it. Separate judgments will be entered in each of these actions in accordance with the above findings and opinion.