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Robert H. Abrams

Florida A&M University College of Law, robert.abrams@famuedu

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The Sound of Litigation: Who Owns Nantucket Waterbeds?

by Robert H. Abrams

United States
v.
State of Maine
(Docket No. 35, Original)

Argued December 11, 1985

ISSUE

This latest incarnation of the long-playing New England Seaward Boundary Cases (see *Preview*, 1984-85 term, pp. 107-109) raises a very narrow issue pertinent only to offshore boundary litigation: what quantum of proof must a state adduce in support of a boundary claim? In this case, the special master appointed by the United States Supreme Court to hear Massachusetts' boundary claims required that there be proof which is "clear beyond doubt." Finding Massachusetts had not met that standard, the special master held that the waters of Nantucket Sound were not inland waters under the jurisdiction and control of the state. In this "exception" to the Report of the Special Master, Massachusetts asserts that a less exacting standard of proof should be applied. Importantly, the special master expressly found that Massachusetts' proof of its claim to Nantucket Sound would satisfy a lesser standard than "clear beyond doubt."

FACTS

In 1968, the United States filed a quiet title action against all of the Atlantic coast states (except Connecticut) to ascertain the seaward boundaries of the states. The major reason for the proceedings was to determine ownership of submerged offshore lands. The general rule is that states own the beds for three miles seaward from the coastline. Predictably, issues about what is legally considered the coastline arise in regard to bays and, as in this instance, the areas inshore of islands like Nantucket that are more than three miles off the mainland.

Massachusetts and the United States contested claims over four areas—Massachusetts Bay, Buzzards Bay, Vineyard Sound and Nantucket Sound. Through agreement and earlier phases of this litigation all issues

Robert H. Abrams is Associate Dean and Professor of Law at Wayne State Law School, Detroit, MI 48202; telephone (313) 577-3973.

save that of Nantucket Sound have been resolved. Massachusetts now claims that Nantucket Sound is inland water by virtue of the recognized "doctrine of ancient title, *i.e.*, that the Sound is the Commonwealth's [of Massachusetts] by right of the British Crown's discovery and occupation."

In the main, the special master has concurred in all aspects of Massachusetts' case. He agreed that the rights created by the Crown's occupation and discovery of the region were transferred to Massachusetts by virtue of her Colonial Charter or alternatively, by the Treaty of Paris of 1783. The master agreed that English law doctrine of "country waters" would have been the legal device which would have decided if the waters and marine resources of Nantucket Sound were part of the domain enjoyed by the Crown and later transferred to Massachusetts. Indeed, the master even agreed that the types of evidence of the inland character of the waters offered by Massachusetts was the precise sort of evidence that could sustain her claim. But the master found the evidence insufficient to establish the proposition "beyond clear doubt" and held that Nantucket Sound was not inland water.

BACKGROUND AND SIGNIFICANCE

Apart from determining the ownership (state or federal) of beds of portions of Nantucket Sound, this case has little significance. Even though the issue is one regarding the standard of proof in these cases, the effect of selecting one standard or another is unlikely to influence the outcome of many cases. Usually the facts pertaining to the character of an offshore area are less shrouded than this case, where the pivotal factual issue revolves on the perception of the colonists who populated Cape Cod and Nantucket Island more than 200 years ago. Even in regard to bed ownership, the case is not of vast significance. If Massachusetts wins, she gains only that territory lying more than three miles off the mainland that is also more than three miles inshore of Nantucket Island. Unless the beds in that small area are the situs of unusually valuable resources, the importance of their ownership is not great.

ARGUMENTS

For the Commonwealth of Massachusetts (Counsel of Record, William L. Pardee, Room 2019, One Ashburton Place, Boston, MA 02108; telephone (617) 727-1014)

1. The "clear beyond doubt" standard is too extreme

and is not supported by international law or common law doctrines governing quiet title actions.

2. The "clear beyond doubt" standard is inappropriate to state-federal marine boundary disputes and is not supported by policy or the decisions of the United States Supreme Court.
3. The United States has never effectively disclaimed the inland water status of Nantucket Sound.

For the United States (Counsel of Record, Michael W. Reed, Department of Justice, Washington, DC 20530; telephone (202) 633-2217)

1. No inland water title to Nantucket Sound was perfected in colonial times and therefore none passed to the commonwealth of Massachusetts.
2. Any colonial title to the Sound that survived statehood was subsequently renounced by the commonwealth of Massachusetts.
3. The United States repudiated any colonial title to the Sound that survived statehood.
4. The "clear beyond doubt" standard is appropriate to federal-state boundary disputes in which the United States has disclaimed the title of the state.