

KUMTAK JATIOS, Appellant

v.

L. LEVI et al., Appellees

Civil Appeal No. 1

Appellate Division of the High Court

August 10, 1954

See, also, 1 T.T.R. 36

Appeal from the Trial Division of the High Court, Marshall Islands District, involving ownership of land. The Appellate Division of the High Court, Chief Justice E. P. Furber, held that under Marshallese customary land law, which is essentially feudalistic, one chief cannot deprive workers of rights in land for refusal to recognize him without action by feudal high chief. Modified and affirmed.

1. Former Administrations—Official Acts

Fact that Japanese set up arrangement of land on Marshalls which violated local custom is not valid objection to it.

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

Fact that arrangement of land by Japanese Administration was induced by misrepresentations is not valid objection where parties or predecessors had time to appeal to Japanese Administration.

3. Former Administrations—Official Acts

Present government is entitled to rely upon and respect official acts of Japanese Administration.

4. Former Administrations—Official Acts

Law-making authorities and not courts are entitled to upset special arrangements in land made by Japanese Government.

5. Appeal and Error—Scope of Review

Theory upon which case is tried should also be followed on appeal and trial assistants cannot advance new theories for first time on appeal.

6. Marshalls Land Law—Generally

Under Marshallese custom, there is no analogy between American idea of an absolute owner and Marshallese idea of holder of any one of levels of rights in common kinds of land ownership.

7. Marshalls Land Law—"Alab"

Under Marshallese custom, *alab* is only one of owners of land, at one level in feudalistic system.

JATIOS v. LEVI

8. Marshalls Land Law—Generally

Under Marshallese custom, all levels of owners of land have rights which courts will recognize and obligations to each other which severely limit their control over land.

9. Marshalls Land Law—Generally

Under Marshallese custom, there is duty of loyalty up lines of feudal ownership and duty of protection of welfare of subordinates running down lines.

10. Marshalls Land Law—“Alab”—Limitation of Powers

Under Marshallese custom, *alab* may not put *dri jermal* off land without obtaining consent and may not disregard rights of *iroij erik* established by Japanese Government.

11. Marshalls Land Law—“Iroij Lablab”—Powers

Under Marshallese custom, matter of terminating land rights for default should be taken up in first instance with persons entitled to exercise *iroij lablab* powers over land.

12. Marshalls Land Law—“Iroij Lablab”—Powers

Where there is no action by *iroij lablab*, court will not hold that past refusal of *dri jermal* to recognize *alab* has barred their rights nor has past refusal of *alab* to recognize *iroij erik* barred his rights.

13. Marshalls Land Law—“Ninnin”

Under Marshallese customary land law, *ninnin* gifts are not limited to one generation but pass on from one generation to descendants.

14. Appeal and Error—Scope of Review—Facts

Appellate court will not set aside findings of facts of trial court unless clearly erroneous. (T.T.C., Sec. 200)

Assessors: SOLOMON L. and REWA SAMUEL
Counsel for Appellant: LAZARUS SIMON
Counsel for Appellee: LIVAI JEREMAIA

Before FURBER, *Chief Justice*, SHRIVER and MANI-
BUSAN, *Temporary Judges*

FURBER, *Chief Justice*

OPINION OF THE COURT

This is an appeal from a judgment of the Trial Division of the High Court involving ownership of rights in five *wato* (or sections) of Dririj Island and all of Kemen Island, both in Majuro Atoll, in the Ratak Chain, in the Marshall Islands.

In order to understand the case, some knowledge of a few Marshallese terms and the basic features of Marshallese land ownership is essential. During the later years of the Japanese Administration of the Marshall Islands, the commonest kinds of land ownership in the Ratak Chain involved four levels of rights, or owners exercising rights at the same time in the same piece of land. These were the *iroij lablab* (or paramount chief) rights, the *iroij erik* (or lesser chief) rights, the *alab* (or person in immediate charge of a *wato*) rights, and the *dri jermal* (or worker) rights. These four kinds of rights still continue. All four are not found in all land in the Ratak Chain, and the appellant claims there is no *iroij erik* of the land involved in this action. In the Ralik Chain there are regularly three levels, that of *iroij erik* being omitted, and the term "*iroij elap*" is commonly used in place of "*iroij lablab*", but without any change in meaning.

A "*wato*" (sometimes spelled "*weto*") is typically a strip of land stretching crosswise of an island from the lagoon to the ocean, and varying in size from about one to five acres in extent. On some islands which are unusually wide for a coral atoll, the *wato* does not go clear across the island, and some small islands, such as Kemen Island involved in this case, consist of only one *wato*. The *wato* is the typical Marshallese land unit. Each has its own name and history. The term "*alab*" is somewhat confusing because it is also used at times to describe the senior member of a *bwij* regardless of questions of land ownership and sometimes means simply "uncle". A "*bwij*", in its strict or primary sense, is an extended matrilineal family or lineage, but the word is also used at times to refer to an extended patrilineal family or lineage, and in some instances it is used to refer to a particular branch of a *bwij*. Thus, just what people are referred to by the

term "*bwij*", in a particular instance depends on the circumstances with regard to which it is used.

"*Iroi j lablab*" and "*alab*" are old Marshallese terms, and perhaps on that account their rights appear in the minds of many Marshallese to be the outstanding ones. Thus it is frequently said that the *iroi j lablab* will "take care of" the *iroi j erik*, and that the *alab* will "take care of" the *dri j erbal*. "*Dri j erbal*" is a newer term which came into use in connection with the practice of selling copra for cash. Ideally the *dri j erbal* are the members of the extended matrilineal family or lineage whose head is the *alab* of the *wato*, but in some instances the *dri j erbal* are, or include, the children of a male *alab* or previous *alab*, and in other instances they consist of, or include, people who are not relatives of the *alab* at all. It should be noted that typically there will be only one *iroi j lablab*, one *iroi j erik*, and one *alab* at a particular *wato* at any one time, but that there may be any number of *dri j erbal*. There often are more than a dozen and their number increases automatically as births occur among those whose children are entitled to such rights in that particular *wato*. While the term "*iroi j erik*" itself is an old one, it appears to have been applied by the Japanese with an entirely different meaning in an effort to simplify terminology concerning land. In the days before any of the foreign administrations came to the Marshalls, the term "*iroi j erik*" referred only to those directly in line to succeed to the position of *iroi j lablab*, whereas the Japanese very definitely applied the term both to people who had come to be known as *iroi j in tel* (that is, royal collectors) and to *leatoktok* (title of the old-time head of the commoners, and advisors, but not of royal blood) and to others who were allowed to exercise similar powers but had no *iroi j* blood.

Traditionally, most of the land was family land, that

is, the rights in it at any particular level were usually held by or in a *bwij* and were inherited in the maternal line; but a man might, and still may, in some circumstances, with the consent or acquiescence of his *bwij*, give land rights to one or more of his children. Land in which this is done is then known as "*ninnin*" land as to the level of rights given to the man's child or children, and there are special rules as to the inheritance or transfer of those rights thereafter concerning which there seem to be many disputed points, only one of which is involved in this appeal. *Ninnin* land is sometimes loosely described as land in which the rights "pass from father to son", but that does not tell the whole story accurately. Both family land and *ninnin* land are well recognized today.

For a very helpful detailed anthropological study of this whole matter of Marshallese land ownership, see "Land Tenure of the Marshall Islands" by J. E. Tobin, issued by the Pacific Science Board as Atoll Research Bulletin No. 11. A discussion of it, with particular reference to Majuro, by another scientist will be found in the section on "Land Tenure and Lineage", beginning at page 160, in "Majuro, a Village in the Marshall Islands", by Alexander Spoehr, published by the Chicago Natural History Museum as Volume 39 of *Fieldiana: Anthropology*.

For purposes of this appeal the parties may be divided into two groups, all the members of one of which make a consistent set of claims as to who owns each of the four levels of rights, while all the members of the other group make a different set of claims as to who owns each of the four levels (except for agreement as to the *dri jermal* rights in some *wato*). There have been a number of substitutions of parties caused by deaths while the action has been going on, but to avoid unnecessary confusion, the claims will be spoken of in this opinion as if made by or against the present parties where there is agreement as

to who has succeeded a deceased party. The effect of the Trial Division's judgment was to find basically in favor of the claims of the appellant Kumtak's group as to the *alab* rights in all the land and the *dri jermal* rights in three *wato*, and in favor of the claims of the other group as to the *iroij lablab* and *iroij erik* rights in all the land and the *dri jermal* rights in three *wato*. Those opposing Kumtak claimed in the Trial Division he had lost any right he might otherwise have because of his predecessor's persistent refusal to pay the *iroij erik's* share of copra from the land in question. If this were correct, it would seem that the same principle would have cut off the *dri jermal* rights of those who had refused to recognize and work under Kumtak or his predecessor as *alab*. The Trial Division, however, held that owing to the widespread doubt there had been about these rights, these refusals had not yet deprived the parties of their rights, but that a continuation of the refusal would do so. The judgment accordingly gave Kumtak, as *alab*, three months in which to recognize the *iroij erik* and gave the *dri jermal* who had been opposing Kumtak six months in which to recognize him or his possible successor. Those of the *dri jermal* who are now before the court (the head of one *bwij* has died and there is dispute as to who his successor is) have indicated their complete willingness to accept the decision and work under Kumtak as *alab*. Kumtak, as *alab*, however, has brought this appeal. He objects both to recognizing that the *iroij lablab* and *iroij erik* rights are held as determined by the Trial Division and to permitting the *dri jermal* who formerly opposed him, to now work under him on the *wato* in which the Trial Division has found they have *dri jermal* rights.

[1-4] So far as the *iroij lablab* and *iroij erik* rights are concerned, the appellant Kumtak is asking us to upset a special arrangement set up by the Japanese Government

in the 1920's for roughly one-half of Majuro Atoll and consistently maintained (except for a change in 1933 as to the handling of funds which does not affect the ownership of the rights now in question) right up to the end of the Japanese Administration. The appellant claims that this special arrangement was contrary to Marshallese custom. We agree that it was a departure from Marshallese custom, but hold that that is not a valid objection to it. This arrangement, clearly determined upon by the authority then administering the Marshall Islands, changed the law and created a new way of exercising the *iroij lablab* powers in that part or "side" of Majuro Atoll, by giving them to the government, the *iroij erik* on that "side", and the group ("*droulul*" in Marshallese) consisting of those holding property rights there. The appellant further claims that this special arrangement and the recognition of the *iroij erik* rights now in question, under it, were induced by misrepresentations. If that is so, the parties or their predecessors had plenty of time to have these matters corrected by the Japanese Administration. We fully concur with the conclusions of law in *Wasisang v. Trust Territory of the Pacific Islands*, 1 T.T.R. 14, cited by the Trial Division in this case and also cited with approval by the Saipan Court of Appeals (Appellate Division) in *Cabrera v. Trust Territory of the Pacific Islands*, Civil Action No. 2. The present government of the Trust Territory is entitled to rely upon and respect the official acts of the Japanese during their administration of what is now the Trust Territory and is not required as a matter of right to correct wrongs which the Japanese or any other former administration may have committed many years before the United States took over control of these islands. We therefore hold that any upsetting that is to be done now of the special arrangement made by the Japanese for what is commonly called "Jebrik's side" of Majuro Atoll,

including the land now in question, is a matter for determination by the law-making authorities and not by the courts. See Volume 30 of American Jurisprudence, page 207, paragraph 47 of the article on "International Law", Section 24 of the Trust Territory Code continuing the land law in effect on December 1, 1941 "except insofar as it has been or may hereafter be changed by express written enactment made under the authority of the Trust Territory of the Pacific Islands".

[5] So far as the *dri jermal* rights question in this appeal are concerned, the appellant Kumtak appears now to take a different view from that which he advanced in the Trial Division. It is recognized that counsel involved in this case, both in the Trial Division and on appeal, lacked anything like the education and training expected of a lawyer in the United States; that trained lawyers were not readily available to the parties, and generally are not available to most Micronesians as a practical matter for civil actions in most parts of the Trust Territory. We have endeavored to make allowance for these facts, but attention of all who act as counsel in Trust Territory courts is called to the well established principle that the theory on which a case is tried should be strictly followed on appeal. Counsel should therefore try to present in the Trial Division all of the claims and the reasons for them that they believe deserve consideration in the case, and should not advance certain reasons before the Trial Division and then expect that if those fail they can advance new ones on appeal which were not presented at the trial. See Volume 3 of American Jurisprudence, page 35, paragraph 253 of the article on "Appeal and Error".

As stated in paragraph 6 of the pre-trial order Kumtak claimed that his *bwij* "has the *dri jermal* rights in Jitlokkan and Dremjelan, and is entitled to exercise the *dri jermal* rights in Minkibwe, Elelan, and Keman Island be-

cause the persons otherwise entitled to the *dri jermal* rights in these three pieces of land refuse and fail to work these lands under Konou as *alab* and the exercise of the *dri jermal* rights in these lands has been given by the *alab* to the *bwij* of which Konou is a leader." Konou is one of the parties who has died, and it is agreed Kumtak has succeeded to whatever rights Konou had in the land. The *dri jermal* rights in Minkebwe, Elelan and Keman Island are the ones concerning which question is raised by this appeal. In paragraph 10e of the pre-trial order it is further stated, "Kumtak and Konou recognize that the plaintiff Levi's family group is entitled to the *dri jermal* rights to Elelan, the defendant Bolos' *bwij* to the *dri jermal* rights to Minkibwe, and the defendant Jeko's *bwij* to the *dri jermal* rights to Keman Island, provided each of these will work their lands under Konou as *alab*". Nothing appears in the record to show that anything came up during the trial to throw any doubt on these statements, except that the argument raised by those opposing Kumtak that he had lost his rights because of his refusal to recognize the *iroij erik* would seem on principle to apply equally to the *dri jermal* who had refused to recognize Konou as *alab*.

In this appeal, now that the *dri jermal* concerned are willing to work under him as *alab*, Kumtak not only claims that Levi, Bolos, and Jeko and their respective *bwij* have lost their *dri jermal* rights by refusal to recognize and work under Konou, but also makes the following claims:—(1) that under Marshallese custom, as it has now developed, the *alab* has become "the owner" of the land of which he is *alab*, may put the *dri jermal* off if they do something wrong to him, and may also disregard an *iroij erik* who has been "made" since the *alab* rights were established; and (2) as to Elelan *wato* and Keman Island, that these were given as *ninnin* to Levi's mother and Jeko respectively and that, apparently on this account, each of these gifts passed

only a life estate, which has now been terminated by the death of Levi's mother and Jeko respectively.

[6-11] The court takes judicial notice that the view that the *alab* is "the owner" has had some support in remarks by a number of Americans who have seemed to feel that it is necessary to find some one in Marshallese land law to whom the conventional American idea of a private absolute owner (subject only to the rights of the government) can be applied. We believe that any such attempt is misleading, unnecessary and unsound, and that it should be frankly recognized that there is no analogy between the common American idea of an absolute owner and the Marshallese idea of the holder of any one of the levels of rights in the common kinds of land ownership in the Marshalls. The present Marshallese system of land ownership is basically feudalistic. So far as we can determine, there is no helpful general analogy between the Marshallese system of land ownership and anything common in English-American history since the days of feudalism. The *alab* is only one of the owners of the land. All the different levels of owners have rights which the courts will recognize, but they also have obligations to each other which severely limit their control over the land. There is a duty of loyalty all the way up the line *dri jermal*, to *alab*, to *iroij erik*, to *iroij lablab*, a corresponding duty of protection of the welfare of subordinates running down the line, and a strong obligation of cooperation running both ways. Thus the rights involved are a combination of strictly private or property rights and rights of powers somewhat like those going with a public office. The court completely rejects the appellant's claim that an *alab* may put *dri jermal* off the land without obtaining anyone else's consent, and also rejects his claim that an *alab* may at will disregard the rights of an *iroij erik* established by, or recognized by, the Japanese Government during its adminis-

tration of these islands. See Section 24 of the Trust Territory Code mentioned above. Under the Marshallese system of land law, the matter of terminating someone's land rights for alleged default, is a matter which should ordinarily be taken up in the first instance with the person or persons entitled to exercise the *iroij lablab* powers over the land. See *Lalik v. Lazarus S.*, 1 T.T.R. 143.

[12] In the absence of action by those having the *iroij lablab* powers, we see no more reason to hold that the past refusal of the *dri jerbai* to recognize the *alab* has barred their rights than to hold that the past refusal of the *alab* to recognize the *iroij erik* (and impliedly also the holders of the *iroij lablab* powers) has barred his *alab* rights.

[13] The theory that a gift of land rights as *ninnin* can pass only a life estate is so utterly contrary to the whole attitude of the parties indicated in the pre-trial order and at the trial and to practice clearly indicated by other instances of alleged *ninnin* gifts which have been brought to the attention of the courts, that it is hard to understand whether appellant seriously intended to advance it or meant rather to raise a question as to the facts concerning these particular gifts. In any event, we hold that *ninnin* rights are not necessarily limited to one generation but, may, under proper circumstances, and regularly do, pass on from generation to generation among the descendants of the person who originally gave (as commonly understood in this connection in the Marshalls) them to his child or children.

[14] The appellant Kumtak has asked a number of questions relating to the findings of fact. As to these, including any questions he may have intended as to the facts surrounding the gifts of rights in Elelan and Kemen Island as *ninnin*, attention is invited to the provision of Sec-

tion 200 of the Trust Territory Code stating, "The findings of fact of the Trial Division of the High Court shall not be set aside by the Appellate Division of that court unless clearly erroneous, . . .". In this case, we are of the opinion not only that none of the Trial Division's findings of fact are clearly erroneous, but that they are all supported by the evidence or the admissions of the parties.

We agree with the Trial Division's conclusions of law, but in accord with one of the principles there expressed, believe that in view of this appeal and the fact that the appellant Kumtak obviously did not understand his obligation to comply with the judgment so long as it remained in force pending appeal, justice requires that he be allowed a brief further opportunity to recognize the other rights determined by the judgment before his *alab* rights are forfeited. The judgment is considered to have been already modified in effect by the agreement of the parties that Kumtak Jatios has succeeded to whatever rights Konou had in the land in question. No such agreement has been reached as to who has succeeded Jeko, who also died prior to the entry of judgment.

ORDER

It is therefore ordered as follows:—

1. The judgment is modified by substituting the name "Kumtak Jatios" for that of "Konou" each time it appears.

2. The second and third sentences of subparagraph 1c of the judgment are changed to read:—"However, Kumtak Jatios' right to continue as *alab* is contingent upon his willingness to recognize the plaintiff Joab as *iroij erik*, to recognize the plaintiff Levi and the members of his *bwij* as *dri jermal* of Elelan and Minkibwe *wato*, and to fulfill his obligations to both *iroij erik* and *dri jermal*. If Kumtak fails to file with the Clerk of Courts for the Marshall Islands District a written acknowledgment of such

recognition within thirty days after a copy of the order by the Appellate Division modifying this subparagraph is received by him, Joab as *iroij erik* and the *droulul* of those holding property rights on "Jebrik's side" of Majuro Atoll are authorized to proceed, if they so desire, to take away Kumtak's rights as *alab* and choose some other person as *alab*, all subject to any action the Government of the Trust Territory may take on the matter, in accordance with Marshallese custom as modified by the action of the Japanese Government described in the second finding of fact. If Joab and the *droulul* fail to act on the matter within ninety days after Kumtak's failure to file such written acknowledgment, any interested party may apply to the Trial Division for an order of forfeiture of Kumtak's rights and for further relief."

3. The question of who has now succeeded to the rights determined to be in the defendant Jeko, now deceased, and his *bwij*, is referred to the Trial Division for determination with authority to make such changes in the judgment as that determination may require, which are not inconsistent with this opinion and order.

4. Subject to the above, the judgment is affirmed.