

of not exceeding a \$500.00 fine or a year's imprisonment, or both, may be imposed for violation of the act.

The value of the confiscated beer did not exceed \$90.00 and therefore was well within the maximum fine.

[2] We hold, therefore, that it was a "technical irregularity" that resulted in a "fine" in the amount of the sale proceeds of the seized beer rather than a specified sum up to \$500.00. The difference between the loss of the beer or the payment of a fine in an amount equal to the value of the beer did not cause injury to the defendant. Section 497, Trust Territory Code, provides that a judgment will not be set aside on technical grounds unless the irregularity resulted in injuries to the accused. There being only a technical irregularity without injury to the defendant the District Court judgment is affirmed on review.

TERESIA, Plaintiff

v.

NEIKINIA, Defendant

Civil Action No. 434

Trial Division of the High Court

Truk District

June 24, 1970

Action to determine fishing rights on Sapun reef on the western side of Tsis Island in the Truk lagoon. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held under Trukese custom fishing rights on a reef depend upon transfers from predecessor owners rather than on ownership of abutting land and that decision in case would depend upon evidence relating to prior division of the reef and subsequent transfers.

1. Public Lands—Shorelands

Normally the abutting owner may exercise exclusive fishing rights on the adjoining reef if the water does not exceed four feet in depth at low tide. (T.T.C., Sec. 32)

2. Truk Custom—Fishing Rights

The fishing rights "recognized by local customary law" mentioned in Section 32, Trust Territory Code, under Trukese custom may be separated from ownership of the abutting land. (T.T.C., Sec. 32)

TERESIA v. NEIKINIA

3. Truk Custom—Fishing Rights

Under Trukese custom fishing rights on a reef depend upon transfers from predecessor owners rather than on ownership of abutting land.

4. Evidence—Generally

Where there are two witnesses, one testifying to the occurrence of an event, and the other testifying to its nonoccurrence, and the witnesses are of equal credibility, the testimony of the witness asserting the affirmative of the issue will be accepted.

<i>Assessor:</i>	<i>Presiding District Judge,</i> F. SOUKICHI
<i>Interpreter:</i>	ROKURO M. BERDON
<i>Reporter:</i>	SAM K. SASLAW
<i>Counsel for Plaintiff:</i>	MARSIAN IMMY
<i>Counsel for Defendant:</i>	NAIDARO NAMONO

TURNER, *Associate Justice*

This case arose from a dispute between family members over the fishing rights on Sapun reef on the western side of Tsis Island in the Truk lagoon. From German times, through the Japanese administration until early in the American administration the families of the plaintiff and defendant fished on the reef Sapun in cooperation and harmony.

Sometime before World War II Esechu, spelled in the pretrial order as Esechie, and Onopan divided the reef between the two families. They transferred the northern half of the reef to Uno, mother of the plaintiff, and gave the southern half to Son, who was not closely related but had lived with Esechu and his family since infancy. Son was the father of the defendant Neikinia who claimed all of the reef through him.

The dividing line on the reef commenced at a *mai* built in the center of the reef. A *mai* is a large fish trap made of piled stones. It was described in the testimony as "a place to catch fish". In the northern portion there were 15 weirs or stone piles, called *punupun*, built by the plain-

tiff, her sister, and their mother. The only witness for the defendant, her son, said he counted 51 weirs, apparently on the entire reef as he did not recognize any division.

The trouble between the parties arose as result of dispute over the ownership of the reef Ipat on another part of Tsis Island, and the abutting land to it. The defendant in the present case, Neikinia, with her brother, Tawaich, sued the plaintiff in the present case, Teresia, and her sister, Justina, in Truk District Civil Action No. 13. The plaintiffs in that case claimed the exclusive fishing rights on the Ipat reef and also claimed the abutting land. The decision, entered August 14, 1954 (not published) held that the reef had been divided between the parties and that the defendants, Teresia and Justina, owned all but a small portion of the abutting land. This decision quite obviously did not satisfy Neikinia and Tawaich because thereafter trouble arose in the use of the reef Sapun.

The evidence shows that sometime after the 1954 decision the *punupun* or fish weirs built by Teresia and her mother, Uno, were damaged or destroyed by scattering the rocks. Also the defendant Neikinia undertook to assert exclusive rights to use and control the reef. Neikinia required other residents of Tsis Island to obtain permission from her to use any part of the reef.

In spite of this worsening state of affairs plaintiff and her sister continued using their division of the reef until just prior to filing this action in 1967.

[1] The abutting land to the reef in question, the land also is known as Sapun, is owned by the defendant and her family. Normally the abutting landowner may exercise exclusive fishing rights on the adjoining reef if the water does not exceed four feet in depth at low tide. Section 32, Trust Territory Code provides in part:—

“ . . . that all marine areas below the ordinary high water mark belong to the government . . . with the following exceptions:

* * *

“(b) The right of the owner of abutting land to . . . such fishing rights on, and in waters over reefs where the general depth of water does not exceed four feet at mean low water, as were recognized by local customary law . . . where such rights are not in conflict with the inherent rights of the Government”

[2] The fishing rights “recognized by local customary law” mentioned in the statute under Trukese custom may be separated from ownership of the abutting land. This was illustrated by Civil Action No. 13 wherein the defendants in the present case did not own abutting lands but obtained judgment for ownership of fishing rights in half of the adjoining reef Ipat.

[3] Since under Trukese custom fishing rights on a reef depend upon transfers from predecessor owners rather than on ownership of abutting land the decision in this case must depend upon the evidence relating to the division of the reef in Japanese times by Onopan and Esechu and transferred to the predecessors of the plaintiff and defendant.

[4] The only evidence offered by the single witness for the defendant was negative evidence. The witness said he did not know of the division and that he did not see the plaintiff and her sister fishing on the reef. Such negative evidence does not establish the affirmative fact that there was not a division or that the plaintiff did not gather fish from the reef Sapun. The rule is set forth in 30 Am. Jur. 2d, Evidence, § 1092:—

“. . . where there are two witnesses, one testifying to the occurrence of an event, and the other testifying to its nonoccurrence, and the witnesses are of equal credibility, the testimony of the witness asserting the affirmative of the issue will be accepted.”

Therefore, in accordance with the testimony having the greater weight or greater probative value and in accordance with Trukese customary laws, it is,

JUDGMENT

Ordered, adjudged, and decreed, that the plaintiff Teresa and all those claiming under her have exclusive fishing rights and control of the northern half of the reef Sapun commencing from the *mai* built in Japanese times in the approximate center of the reef; and

That the fishing rights and control of the defendant, Neikinia, and all those claiming under her in the reef Sapun is limited to the southern portion extending from the above-mentioned *mai*.

YANO K. MARIUR, Plaintiff

v.

IBEDUL NGORIAKL and ROMAN TMETUHL, Defendants
and ROMAN TMETUHL, Complainant

v.

NGIRAMECHELBANG, Third Party Defendant

Civil Action No. 395

Trial Division of the High Court

Palau District

June 30, 1970

Action to determine ownership of certain lots in Palau. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that while court would not upset public and official designation of land in question as chief's title land such property could not be taken from the individual owner for public use without just compensation.

1. Trust Territory—Land Law

Section 24 of the Trust Territory Code established the land law as that which was in effect as of December 1, 1941, until changed by statute and Japanese land law which recognized and approved, prior to December 1, 1941, transfer in question was binding. (T.T.C., Sec. 24)

2. Palau Land Law—Chief's Title Land

Under Palauan custom, clans and lineages within clans set aside chief's title houses or sites for title houses and when an *Ibedul* is authorized to do so the court will not upset his public and official declaration that he holds such property as titleholder for the clan.