

lant, having been ill and unemployed, was unable to pay the \$45.00 estimated cost of transcript.

The reason given is without merit. The Public Defender's Office, through the Assistant Public Defender assigned to the Palau District, has obtained relief from the obligation to pay cost of transcript by appropriate motion in at least three cases. These cases were appealed to the Appellate Division and the file was lodged with the Clerk of that Division in Saipan where they were available to inspection by a representative of the Public Defender's Office. These cases contain memorandum opinions in explanation of the order granting appellant copies of the trial transcript without payment of the cost. Appellant's counsel, by making the most cursory inquiry, could have learned the appeal here could be perfected without payment of cost of transcript in accordance with Rule 32f(1), Rules of Criminal Procedure, also applicable to Civil Procedure, and 6 T.T.C., Section 406, both of which relate to "due process" under 1 T.T.C., Section 4.

The motion to set aside fails to set forth adequate facts or law warranting reconsideration of the dismissal. It is, therefore,

Ordered that appellant's motion to set aside the order dismissing the appeal for failure to perfect appeal be and the same hereby is denied.

HENOS, Appellant

v.

KAIKO, Appellee

Civil Appeal No. 70

Appellate Division of the High Court

May 10, 1971

Appeal from judgment establishing *dri jermal* rights on Tojlok *Wato*, Utrik Atoll, Marshall Islands. The Appellate Division of the High Court, D. Kelly Turner, Associate Justice, remanded the case, holding, among other things,

HENOS v. KAIKO

that the decision appealed from left the various land rights in conflict and the judgment was based on inconsistent findings.

1. Marshalls Land Law—"Iroij Lablab"—Powers

Under Marshallese custom the *iroij*, for good cause and upon the exercise of fair and reasonable judgment, settle controversies over interests in land and the court will recognize and uphold those determinations of the *iroij* unless successfully challenged as unreasonable and arbitrary.

2. Marshalls Land Law—"Iroij Lablab"—Powers

Under the Marshallese system of land tenure, there is a strong obligation on the part of all of those holding various rights in a piece of land at the same time to cooperate in a friendly and reasonable manner.

3. Marshalls Land Law—Use Rights

Under Marshallese system of land tenure, there is an obligation on all those holding various rights in a piece of land at the same time to be loyal to those up the line and to protect welfare of those down the line.

4. Appeal and Error—Scope of Review

It is not the function of the appellate court to ascertain whether the evidence "supports" one side or the other.

5. Appeal and Error—Scope of Review

The appellate function is to determine whether there is any evidence supporting the judgment.

6. Marshalls Land Law—"Iroij Lablab"—Powers

The determination of land rights by the *iroij lablab* will be presumed correct and will be upset only when there is clear evidence one way or another.

7. Courts—Records

Complete release of material from a case file is contrary to judicial practice pertaining to retention by the court of case records and if an item is to be released it should be released on the condition that an accurate copy is retained in the file.

Counsel for Appellant:

KONAME YAMAMURA

Counsel for Appellee:

MONNA BUNITAK

Before BURNETT, *Chief Justice*, TURNER and BROWN,
Associate Justices

TURNER, *Associate Justice*

This appeal is by the defendant below from a judgment holding that the plaintiff is entitled to *dri jermal* rights on Tojlok Wato, Utrik Atoll, Marshall Islands.

The judgment fails to grant all the relief appellee asked for, and in accordance with the partial relief granted,

was entitled to. As the judgment stands there is a most serious conflict between appellant, who holds the position of *alab* on the land in question, and the appellee, whose claim to be *dri jermal* on the land was affirmed.

Appellant had been exercising the rights of both *alab* and *dri jermal*. Appellee's complaint asked that appellant be "sent away from the *wato*" which in effect sought the removal of appellant Henos as both *alab* and *dri jermal*. The *Leroij lablab* Limojwa determined (and the determination was part of the record made by the Master) that "Aiben, the younger brother of Enos (Henos) is the rightful *alab* of said land, while Kaiko is the rightful *dri jermal*." The judgment, however, only held appellee Kaiko to be *dri jermal* and overlooked or ignored his complaint asking the appellant Henos be "sent away" from the *wato* and further ignored or overlooked the *leroi j lablab* determination that someone else was the rightful *alab*.

[1] The judgment, being incomplete, leaves the parties in a most unfortunate situation. Being incomplete, it also is contrary to applicable Marshallese custom that the *iroij*, for good cause and upon the exercise of fair and reasonable judgment, shall settle controversies over interests in land. The court will recognize and uphold these determinations of the *iroij* unless successfully challenged as unreasonable and arbitrary.

A further problem under the custom created by the incomplete judgment is that it leaves the *alab* and *dri jermal* in personal conflict unless the parties agree to recognize each other's rights and generally to cooperate. There was no indication at the appeal hearing that this had occurred. If it were not necessary to remand this decision for further consideration, this court would leave it to the parties to reach agreement in accordance with the custom. Since the decision is being sent back, the remand is with instructions that the existing conflict between *alab* and *dri jermal* be resolved as directed by *Leroij* Limojwa or,

if that is not appropriate, then by obtaining agreement between the parties.

[2, 3] *Lalik v. Lazarus S.*, 1 T.T.R. 143, 145, points up the customary law in this situation.

“The power of an *iroij lablab* to take away subordinate rights in land for a good reason, is a time honored one. The reason given for taking away the rights in this instance was that Litarel, the acting *alab*, and Jatios as *dri jermal*, could not get along peaceably together on the land, and Lanimon (the *alab* for whom Litarel was acting) did not succeed in controlling the situation. Under the Marshallese system of land tenure, there is a strong obligation on the part of all of those holding various rights in a piece of land at the same time to cooperate in a reasonable and friendly manner. There is an obligation of loyalty up the line, and an obligation to protect the welfare of those down the line. The *iroij lablab* is also expected, among other things, to make a reasonable effort to maintain peace and order on his lands.”

The appellee also asked in his complaint that appellant, who had been collecting *alab* and *dri jermal* shares of copra sales, pay back the money thus taken. In view of the judgment it is a legitimate claim but is not mentioned in the decision, presumably because the Master who heard the case did not make a finding upon the point.

Thus far, the court has examined only the necessity for remanding and completing the judgment in behalf of the appellee. This, in the face of the judgment statement that plaintiff-appellee “was satisfied” with the Master’s report. As has been pointed out, if the appellee actually was “satisfied”, it was reached by a sacrifice of rights claimed.

Turning to the appellant’s presentation on appeal, the trial court judgment left unresolved several important questions raised by appellant. The lesser of these issues was the apparent unfairness to appellant with which the proceeding had been held.

Appellant’s answer was filed December 3, 1968, and on February 25, 1969, he moved in writing that the trial be held on Utrik Atoll so that the “real plaintiff” could tes-

tify. As it turned out, the Master's hearing was held on Uliga, Majuro Atoll, (at the Courthouse) on February 16 and 17, 1970, and the "hearing" before the trial judge was held February 24, 1970, at the Majuro Courthouse. Judgment was entered the same day.

The judgment recites:—

"Further, defendant stated that his most important witness did not testify at the hearings (sic) held by the Master."

The court neither accepted nor rejected the statement. It simply made no comment. The point again was raised on appeal and the appellant further stated he had no knowledge as to the hearing before the trial court on the Master's report until twenty-four hours before it was scheduled when he heard an announcement over the radio. Furthermore, at that time he had not received the Master's report. All that the file shows in this regard is that the parties were served with copies of the transcript of the Master's hearing on May 11, 1970, more than two months after entry of judgment.

The trial court should have ascertained at the hearing the nature of the testimony of appellant's "most important witness" and settled the question raised by either permitting the testimony or rejecting it. Treatment of the appellant was so unfair, a remand for reopening of the trial is mandatory.

[4, 5] Further grounds for appeal, as expressed in the notice of appeal, is that the judgment is not supported by the evidence and the decision is not in accord with Marshallese custom. It is not the function of the Appellate Court to ascertain whether the evidence "supports" one side or the other. The appellate function is to determine whether there is any evidence supporting the judgment. In this case, because of the necessity for remanding and reopening, it is unnecessary to search the transcript of testimony before the Master to determine its ultimate effect.

We not only decline to pass upon appellant's contention that the evidence does not support the judgment, but also we must reject the court's adoption of the Master's findings as the basis of the judgment. The judgment recites:—

“The findings of the Master are amply supported by the testimony and exhibits introduced at the hearings,”

The Master found that the appellant was the *alab* but the evidence touching on this point was the determination by *Leroij* Limojwa that Aiben is the *alab*. The court relied on the *Leroij's* determination that Kaiko was the *dri jermal*, but ignored that determination that Aiben was *alab* and approved the Master's finding that Henos, rather than Aiben, was *alab*.

Such conflicting “findings” demonstrate one or the other is in error and therefore neither is binding upon this court. We note in passing the trial court held that the testimony before the Master “amply supported” the findings. The judgment was entered February 24, 1970, but the transcript of testimony before the Master was not docketed until May 4, 1970. It is possible the court affirmed conflicting findings because the transcript was not available when the judgment was prepared.

[6] The same principle applies as to whether the judgment is contrary to Marshallese custom. Many times it has been decided in the courts that the determination of land rights by the *iroij lablab* will be presumed correct and will be upset only when there is clear evidence the determination was improper. We will not search for evidence one way or the other. Upon retrial, the court is admonished to make findings as to whether or not there is any or sufficient evidence to upset the determination of the *leroi j lablab*. The trial court also is reminded it should consider the entire determination of the *leroi j lablab*, not just half of it.

Finally, we note one other point to be resolved at retrial. The judgment recites “the defendant was not satis-

fied with the report (Master's), contending that the Will of Kaiko, made in 1947, and approved by *Leroij* Limojwa, was not valid." No further comment was made. No settlement of the point was made. No determination was made whether the question raised was decisive or not.

[7] There was a will of Kaiko in the record but it was removed from the file March 9, 1970, by Jabwe, the eldest son of Kaiko. The action is contrary to judicial practice pertaining to retention by the court of case records. The trial court should have ordered the release of the will on condition an accurate copy was retained in the file. Without the will and in the absence of understandable testimony concerning it, this court is unable to make any determination relative to it. Because the judgment will be set aside for further hearing, it is unnecessary to say whether the will was invalid or not or what, if anything, its significance might be.

We also are reminded that Kaiko is now deceased. Upon motion in the trial court, his successor should be substituted as plaintiff. Also, this will raise the further question whether the determination of *Leroij lablab* Limojwa is applicable to Kaiko's successor.

The judgment is set aside and the case is remanded for further proceedings in accordance with the foregoing opinion.

LOTON, and JELTAN, Appellants

v.

BARTIMIUS LANGRIN, Appellee

Civil Appeal No. 73

Appellate Division of the High Court

May 10, 1971

Appeal from judgment establishing certain rights in Mwinkuit *Wato*, Rita Island, Majuro Atoll. The Appellate Division of the High Court, D. Kelly Turner, remanded the case because the record was inadequate and incom-