

taking carried on for pecuniary profit and for direct or indirect economic benefit. Each Petitioner falls squarely within the definition of a business. Further discussion of this contention is unnecessary.

The relief sought by Petitioners is to be found only with the Congress of Micronesia and not with the Judiciary, and therefore Petitioners' Motion for Summary Judgment must be, and it is denied; Respondent's Motion for Summary Judgment is granted; and

Judgment is in favor of Respondent and against Petitioners, together with costs incurred.

PETER SANDBARGEN, Plaintiff

v.

**CHUTARO GUSHI, Defendant and TRUST TERRITORY
GOVERNMENT, Intervenor**

Civil Action No. 313

Trial Division of the High Court

Marshall Islands District

July 7, 1976

Action for ejectment, restoration of property, mandatory injunction and damages. The Trial Division of the High Court, Brown, Associate Justice, held that where plaintiff offered no documentary evidence of title, there was no record of sale of the land to plaintiff or his alleged predecessor in title, and testimony regarding the history of the property and its possession was not in plaintiff's favor, title in plaintiff was not established.

1. Real Property—Adjudication of Ownership—Evidence

The Grundbuch, published in 1913 during the German administration, is strong, although not conclusive, evidence of ownership of land.

2. Evidence—Weight

In weighing conflicting evidence, court must be guided by the principle that a judgment cannot rest upon conjecture, speculation or guess.

3. Evidence—Preponderance

A party who asserts the affirmative of an issue has the burden of proving it by a preponderance of the evidence, which is that evidence which, when weighed against that opposed to it, has more convincing

force, from which it results that the greater probability of truth lies therein.

4. Real Property—Quiet Title—Burden of Proof

Burden of proof is upon the plaintiff in a quiet title action and he can recover only by showing that title is in himself, not by showing a weakness in defendant's title.

5. Real Property—Quiet Title—Particular Cases

Where plaintiff offered no documentary evidence of title, there was no record of sale of the land to plaintiff or his alleged predecessor in title, and testimony regarding the history of the property and its possession was not in plaintiff's favor, title in plaintiff was not established.

6. Real Property—Lost Grant

Court will not re-establish title in the heirs of one whose ownership of land was wrongfully usurped by the Japanese during their administration by their destruction of a document showing ownership.

7. Former Administrations—Redress of Prior Wrongs

The present government is entitled to rely upon the official acts of the Japanese administration regarding property rights and need not correct wrongs by that administration except where the wrong occurred so near the time of the change of administration that there was no opportunity for it to be corrected through the courts or other agencies of the Japanese administration; the grant of relief in other instances is a matter of discretion of the government.

Reporter:

NONE

Counsel for Plaintiff:

THOMAS G. MATTSO, ESQ. of
Micronesia Legal Services
Corporation

*Counsel for Defendant and
for Intervenor:*

HARLEY EARWICKER, ESQ.

BROWN, [†]*Associate Justice*

Plaintiff, claiming to be the owner of Takewa wato, Takewa Island, Mili Atoll, Marshall Islands District, brings this action for ejectment, for restoration of the said property, for a mandatory injunction, and for damages.

In his Answer, Defendant denies the allegations set forth in the Complaint; and the Intervenor alleges that it is the owner of the land, subject only to a leasehold interest in Defendant. Additionally, the Intervenor pleads two affirmative defenses: (1.) that Plaintiff bases his complaint upon

an act of the former Imperial Japanese Government which is not subject to correction or redress by the Trust Territory courts, and (2.) that Plaintiff is barred by laches.

[1] The Grundbuch, published in 1913 during the German administration, and which is strong, although not conclusive evidence of ownership reveals that in 1866 King Rimone conveyed the property to a Captain Pease who later deeded it to one "Bully" Hayes. Thereafter, A. Capelle & Co. acquired ownership, and in 1887 that company conveyed the land to Jaluit Gesellschaft.

This was the only documentary evidence offered during the trial which in any way traced title to the land. Before the end of the German administration, Jack Sandbargen, a businessman, moved with his family upon the land where he conducted a retail business.

Peter Sandbargen, who was born in 1926, contends that shortly before the end of the German administration, the German company gave the land to Jack Sandbargen and handed to him a document described as a "purchase agreement." Plaintiff also claims that when the Japanese arrived upon the property they confirmed that Jack Sandbargen was the owner. The Sandbargen family as a whole have consistently alleged ownership. He testified that in 1933 a Japanese official came to Takewa and conferred with Messrs. Frank and Henry Sandbargen. The witness, of course, was only seven years old at that time, had had no formal education, did not understand Japanese, and to this day does not know the meaning of the words, "purchase agreement." He stated, though, that during the conversation Mr. Henry Sandbargen went into his residence and returned with a document which Mr. Tanaka read and tore to bits. The witness stated that he believed this to be the "purchase agreement" but admits that his belief is based only upon what he later was told by members of the family.

Another witness, Kathy Simon, who is the former wife of Defendant, testified that when the Japanese came to Takewa they told Jack Sandbargen that he was the owner and handed a piece of paper to him. The testimony of this witness was seriously impeached by a prior inconsistent statement.

Through witnesses called by the Intervenor, evidence was brought before the court to the effect that Japanese records pertaining to certain lands, including Takewa, were destroyed by fire that the property in question here was German land and hence deemed by the Japanese to be government land; that no government land was sold by the Japanese (although certain Japanese companies, including Nanyo Boeki Kaisha, or N.B.K., were allowed to use some of the lands); that while Jack Sandbargen claimed to own Takewa and asserted that a document of title reposed in the Gilbert Islands, he never produced that document; that the people of Mili did not recognize any of the Sandbargens as owners of Takewa but considered it to be government property; that Mr. Frank Sandbargen lived on Takewa and made copra which he sold to N.B.K. which withheld a portion of the selling price to be applied against an existing indebtedness to the predecessor German company; and that the Japanese removed Mr. Sandbargen from Takewa because of inadequate copra production.

Expert testimony indicated that no record of the sale of any Marshallese land by either the Germans or the Japanese is to be found.

[2] In weighing the conflicting evidence, this Court must be guided by the principle that a judgment cannot rest upon conjecture, speculation or guess. *Oldenburg v. Sears, Roebuck & Co.*, 314 P.2d 33, 37 (Cal. App.) (Hearing den.). Only by engaging in conjecture, speculation or guessing can this Court infer that the document destroyed by Mr. Tanaka, if, indeed, he did destroy a document, was

one that established or tended to establish title in any particular person, firm, corporation, or other entity.

[3] So, too, the Court must keep in mind the basic principle that party who asserts the affirmative of an issue has the burden of proving it by a preponderance of the evidence, which is that evidence which, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. *Butcher v. Thornhill*, 58 P.2d 179 (Cal. App.); *Fleming v. Central Cheese Co.*, 164 F.2d 294, 298 (C.A.7). And a defendant is entitled to rely upon the weakness of a plaintiff's proof. *A.L.B. Theatre Corp. v. Loew's, Inc.*, 355 F.2d 495, 502 (C.A.7).

[4] Trust Territory courts, too, have had occasion to consider and to discuss the question of burden of proof in cases involving title disputes. In *Ochebir v. Municipality of Angaur*, 5 T.T.R. 159, 165 (Tr. Div.), the Court correctly stated:

The burden of proof is upon a plaintiff in a quiet title action. He can recover only by showing that title is in himself, not by showing a weakness in a defendant's title.

See also: *Tasio v. Yesi and Nieisich*, 3 T.T.R. 598 (App. Div.).

[5] After considering all of the evidence, it is clear to this Court that Plaintiff has not established his case by a preponderance of the evidence and thus has failed to carry his burden of proof. To find in Plaintiff's favor would require this Court to engage in guessing, speculation and conjecture; and this it neither can nor will do.

[6, 7] Even if it were to be assumed, arguendo, that Jack Sandbargen actually had had title to Takewa conveyed to him by Jaluit Gesellschaft or its successor prior to the establishment of the Japanese administration and that the latter wrongfully usurped ownership of the land by the

destruction in 1933 of a document that established Jack Sandbargen's ownership, this Court could not now re-establish title in Jack Sandbargen's heirs. In 1952, in the case of *Wasisang v. Trust Territory*, 1 T.T.R. 14 (Tr. Div.), it was stated:

So far as property rights are concerned, the present government of the Trust Territory of the Pacific Islands . . . is entitled to rely upon and respect the official acts of the Japanese administration of these islands and is not required as a matter of right to correct wrongs which the former administration may have done, except in those cases where the wrong occurred so near the time of the change of administration that there was no opportunity for it to be corrected through the courts or other agencies of the former administration. The present administration may be willing in some cases to grant relief from hardships imposed by the law in force under the former administration where the present administration is under no obligation to do so as a matter of right. The granting of such relief, however, is a matter of policy to be decided by the law-making authorities and not by the courts.

This ruling was expressly approved in *Kumtak Jatio v. Levi*, 1 T.T.R. 578 (App. Div.) and remains the established law in the Trust Territory.

Since Defendant's rights rest exclusively upon the rights of the Intervenor, it need only be noted that the Intervenor gained its title by succeeding to the ownership formerly held by the Japanese administration. Both the facts and the law as discussed hereinabove establish that ownership; and it follows, then, that the lease between the Intervenor and the Defendant is valid.

Accordingly, it is the Judgment of this Court that:

1. Judgment be, and it is in favor of Defendant and against Plaintiff;
2. The Intervenor is the owner of Takewa *wato*, Takewa Island, Mili Atoll, Marshall Islands District;
3. Said title is subject only to Defendant's leasehold interest;

4. Plaintiff is not entitled to monetary damages from Defendant and Intervenor, or from either of them;
5. Plaintiff is not entitled to ejectment, for restoration of said property, for mandatory injunction, or for other relief and
6. Costs herein are awarded to Defendant and to Intervenor, and to each of them.

JONATHAN NGIRMEKUR, Plaintiff

v.

MUNICIPALITY OF AIRAI by its MAGISTRATE, et al.,
Defendants

Civil Action No. 42-76

Trial Division of the High Court

Palau District

October 8, 1976

Action by person who alleged he was wrongfully evicted. The Trial Division of the High Court, Hefner, Associate Justice, held that where municipality obtained court judgment that clan to which plaintiff belonged did not own the land upon which plaintiff lived, then formed a vigilante committee and proceeded to evict plaintiff without legal process and not in accordance with custom, and the court had not determined that municipality owned the land, only that plaintiff's clan did not, municipality and those who acted in its name were liable for plaintiff's damages.

1. Custom—Burden of Proof

When there is a dispute as to the existence or effect of a local custom, the party relying upon it must prove it by evidence satisfactory to the court.

2. Custom—Generally

Custom is a law established by long usage and is by common consent and uniform practice, so that it becomes the law of the place or the subject matter to which it relates.

3. Custom—Judicial Notice

It is only when a local custom is firmly established and widely known that the High Court will take judicial notice of it, and a new way of doing things does not become established and legally binding or accepted custom until it has existed long enough to have become generally