

**NITOKA, Plaintiff**  
**v.**  
**NESEPUER, PAKIRANG, and NIENMILIK, Defendants,**  
**and ANIKISA and NIWIN, Third Parties**

Civil Action No. 95

Trial Division of the High Court  
Truk District

January 23, 1959

Action to determine title and use rights to reef located on Uman Island. The Trial Division of the High Court, Associate Justice Philip R. Toomin, held that plaintiff, who alleged she received gift of reef from head of lineage, had not substantiated gift by clear and convincing evidence, and that plaintiff had no use rights in reef.

**1. Truk Land Law—Lineage Ownership—Gifts**

Under Truk custom, gift by lineage head of use rights or ownership of lineage property must be consented to by all adult members of lineage or must be acquiesced in by them.

**2. Truk Land Law—Lineage Ownership—Gifts**

Under Truk custom, evidence of use of land for some years in common with other members of lineage is insufficient to establish title.

**3. Truk Land Law—Lineage Ownership—Gifts**

Under Truk custom, acquiescence by lineage in ownership by donee of land is negated by deprivation of use rights of donee by subsequent lineage head.

**4. Truk Land Law—Lineage Ownership—Gifts**

Under Truk custom, although chief may enforce gift to one of his children of lineage property, lineage may reclaim property upon chief's death unless gift has been stabilized.

**5. Evidence—Hearsay**

Testimony concerning suit filed before Japanese administrator of which there is no authoritative record of proceeding is subject to objection that it is hearsay.

**6. Truk Land Law—Lineage Ownership—Transfers**

Under Truk custom, where it is established that property was owned by clan or lineage, transfer to child not a member is not to be presumed but must be established by clear and convincing evidence.

TOOMIN, *Associate Justice*

I. FINDINGS OF FACT

1. The reef Nukanapan, located in Sannuk Village, Uman Island, Truk District, was owned by the Nefounkachau Lineage prior to German times.

2. The lineage head during German times, Nikos, attempted to make a gift of this reef to his daughter Notonan, and when the lineage refused to consent to the gift, Nikos installed her in possession thereof nevertheless.

3. During his lifetime Nikos and Notonan controlled the reef, and fished from it, but members of the lineage also used it for fishing. When Nikos died the same uses continued during the lifetime of Notonan. Prior to her death Notonan gave such interest in the reef as she possessed, to her daughter Nitoka, the plaintiff.

4. Nitoka used the reef from her mother's death until 1923 when the senior member of the lineage, one Samy, became angry with her and directed her not to use it any longer. She acquiesced in this direction. Since 1923 plaintiff has not used the reef, and it has been used since then by defendants and other members of the lineage.

5. Toward the end of his life in 1951 Samy desired to restore the use of the reef to plaintiff. This was rejected by members of the lineage who refused to follow his leadership in the matter, on the ground his mental faculties had become impaired.

6. The present head of the lineage, Niwin, who succeeded Samy upon his death in 1953, is opposed to restoring Nitoka's use rights in the reef, as are also opposed, the members of the lineage.

7. The third party claimant Anikisa contends plaintiff gave away her rights in Nukanapan to claimant's mother Nikatoa as payment of marriage-damage under Trukese custom. The evidence on this charge is not convincing,

and in any event, is inconsequential in view of the fact which this court finds, that Nitoka never acquired title to the reef, and that at most she possessed a permissive use, terminable by the lineage at will, and that in fact his use-right was terminated in 1923.

## II. CONCLUSIONS OF LAW

This case involves the question as to whether under Trukese custom consent of the lineage is needed to validate a gift by the lineage head of use-rights or ownership of lineage property, such as a reef used for fishing.

[1] This question has been uniformly answered in the many cases which have passed on it in this court, and in the authoritative texts in the field. It has been held invariably, that the transfer must be consented to by all the adult members of the lineage, or must be generally acquiesced in by them. *Nusia v. Sak*, 1 T.T.R. 446. *Lus v. Totou*, 1 T.T.R. 552. Goodenough: Property, Kin and Community on Truk, p. 36. Fischer: Native Land Tenure in the Truk District, Sec. 5.

[2, 3] To show acquiescence to the transfer in the case at bar, evidence was offered of the use of the reef by the donee for some years, and by plaintiff for some time after her father's death. However, this use was not an exclusive one, but was in common with other members of the lineage. (See Findings of Fact 3, above). And acquiescence by the lineage is further negated by the action of the next lineage head in depriving plaintiff of her use-rights, and her acceptance of this action for some thirty years thereafter.

[4] As described by Fischer, in his study of native land tenure in the Truk Islands, it often happened that a chief of strong personality was able, during his lifetime, to enforce a gift to his children of lineage property against the opposition of the members. However, upon

his death the lineage was usually able to reclaim the property, unless in the interim the gift had been stabilized. That it had not been in the case at bar is shown by the reversal of the gift under the succeeding lineage head, and the passage of many years before plaintiff was able to prevail on the next successor chief to attempt restoration of her use-rights. Plaintiff's conduct is best explained upon the theory that she recognized the right of the lineage to reclaim what it had not willingly given, and of her obligation to continue in the role of a petitioner in order to enjoy a right to which she would become entitled only by permission.

[5,6] Defendants have offered testimony to the effect that plaintiff did, in fact, contest the right of the lineage to reclaim its property, in a suit filed before the Japanese Administrator at Truk in about 1923, and that the decision went against her in this proceeding. However, the proof is subject to the objection that it is all hearsay, and that no authoritative record of such a proceeding and such a decision can now be produced. While this testimony is persuasive in accounting for the years of acquiescence by plaintiff in what she now urges was an unjustified deprivation of her property rights, the court is unable to base its rule of decision on such unsubstantiated evidence. Accordingly, the court is constrained to hold that where it is established that property was owned by a clan or lineage, a transfer to a child of a member is not to be presumed, but must be established by clear and convincing evidence. In this case, the evidence was not convincing in behalf of plaintiff, nor with regard to her theory.

### III. JUDGMENT

It is therefore ordered, adjudged, and decreed as follows:—

1. As between the parties hereto and all persons claiming through them,

(a) The reef Nukanapan, located in Sannuk Village, Uman Island, Truk District, and the use-rights therein, are owned by the lineage Nefounkachou, represented in this proceeding by defendants.

(b) Plaintiff has no right, title, or interest in said reef, nor the right to use it without permission of the lineage.

2. No costs are assessed in favor of or against any party.