CHUTARO, Appellant
v.
PETER SANDBARGEN, Appellee

Civil Appeal No. 60
Appellate Division of the High Court
August 20, 1971

Appeal from judgment relating to ownership rights in Takewa Island, Marshall Islands. The Appellate Division of the High Court, D. Kelly Turner, Associate Justice, held that in an ejectment action against defendant, where defendant claimed title through the Government, the defendant was entitled to an order making the Government a party.

Remanded for trial.

1. **Ejectment—Generally**

   The basis of a suit in ejectment to regain possession of land is that a defendant in possession is a trespasser as against a plaintiff holding title and right to immediate possession.

2. **Ejectment—Accrual of Action**

   A suit to end wrongful possession is a cause of action arising on the day suit is brought against the possession.

3. **Trust Territory—Suits Against**

   In suit of ejectment against defendant whereby he claimed title through Trust Territory Government, the defendant was entitled as a matter of law to an order making the Government a party defendant at any time up to trial. (6 T.T.C., Sec. 251)

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

TURNER, *Associate Justice*

This is an appeal from a judgment and other proceedings relating to ownership rights in Takewa Island, Mili Atoll, Marshall Islands. The parties were not represented by counsel and they did not appear at the call of the calendar for the Appellate Division in Majuro. This judgment on appeal is therefore based upon the record.

The appeal brings up a record that requires review of more than the judgment. Orders made before and after

entry of judgment require a chronological view of the proceedings before two High Court judges, two different Masters and a District Court judge in a criminal proceeding.

Plaintiff, Peter, filed complaint December 5, 1966, claiming family ownership of Takewa Island as against defendant Chutaro, who was (and is) in possession.

Defendant answered, denying plaintiff's claim of ownership and asserting ownership to be in the Trust Territory Government. He said:—

". . . this complaint should have been made against the government of the Trust Territory. The reason for this is that the government of the Trust Territory gave me (the) right to work on this island since 1947 to today."

A few months later, a Master was appointed and he held a pre-trial conference between the parties at Mili Atoll. He prepared a detailed memorandum of claims, agreed facts and questions to be determined at trial.

Nothing further appears in the record until August 29, 1968, when the then District Attorney filed a motion for dismissal of "any claim against" the Trust Territory Government. Neither the complaint nor answer listed the government as a party defendant, nor is there any court order in the record making the government a party. In accordance with the motion, however, without hearing or appearances of either party or of the government, the "action as to the government" was dismissed.

On the same day as the dismissal, a second order appointing a second Master was made and thereafter on May 29, 1969, the second Master reported he could not hold a hearing because the plaintiff was on Mili and the defendant was on Aur Atoll, but that the defendant had made a motion to dismiss as to him, "on the ground the land does not belong to him."

Then in June, 1969, the trial court approved the "report" of the Master, although none had been made, and

held the defendant, Chutaro, had no title or interest in the land "except as he may hold rights under the Trust Territory Government, which rights have not been adjudicated in this action."

The judgment made no reference to plaintiff's complaint or his claim to ownership. No hearing was held at the time of entry of judgment.

Upon entry of judgment, the plaintiff assumed, it is indicated in the record, his ownership was confirmed because the defendant in possession was said not to have an interest in the land. Accordingly, the appellee entered the property. Defendant-appellant thereafter appeared in Majuro and asked for and was granted a restraining order in the Trial Division that:—

". . . the appellee be and hereby is restrained from interfering with the rights of the appellant . . . until this matter is determined upon the appeal filed herein."

The defendant's appeal, filed immediately after entry of judgment, basically asked for a trial to determine his rights in the land under his lease from the government.

The issuance, on ex parte application without notice to appellee, of a restraining order prohibiting interference with appellant's rights was most inappropriate under the judgment holding the appellant had no rights in the land and which neither sustained or disaffirmed the continued possession of appellant nor the entitlement to possession of the appellee. It was a judgment settling nothing and the restraining order compounded the error.

Regardless of what rights appellee was restrained from interfering with, it is evident from the record he was not present when the order was entered, that he was not given notice of the application for it, and that it was not served upon him after it was issued.

However, on January 21, 1970, the appellant filed a complaint for "criminal contempt" in the District Court

against the appellee, alleging that appellee, on September 11, 1969, the date the restraining order was issued, failed to obey the restraining order. The appellee was in Majuro at the time and he appeared in court the next day, January 22, 1970, and plead guilty. He was not represented by the Public Defender or by other counsel. He was sentenced to six months' imprisonment, the first two of which he served and the last four of which were suspended.

There is nothing further of significance in the record and it must be concluded:—

(a) There was no trial, either before the court or a Master, on the merits of the complaint.

(b) There was no Master's Report on which a judgment could be founded.

(c) There was no hearing before the trial court at the time of entry of judgment. The appellee was in court but the appellant was not.

(d) Dismissal as to the real party in interest, the Trust Territory Government, was error and contributed to the injustices rampant in the case.

(e) It was error for the Trial Division judge to permit the District Court to impose sentence for purported violation of the Trial Division restraining order.

The record of unconscionable proceedings, unfairness and miscarriage of justice generally is sufficient in itself to justify remanding the case for a trial on the merits, a matter which has not been granted the parties.

The error with which we are most concerned, however, is that the Trust Territory Government is not now nor never has been a party in the case. This, in spite of the fact the action was dismissed against the government because the action "did not fall within the provisions of Public Law 3-21" (6 T.T.C. Sec. 251).

The absence of the government from the litigation places an unfair burden upon the appellant. He, as tenant, must defend his landlord's title as against the plaintiff's claim of ownership.

This is an action similar to the common law suit in ejectment by one claiming title and right to possession against another who is in possession of the land in question.

As to defendant's obligation, it is said in 25 Am. Jur. 2d, Ejectment, Section 20:—

> "In accord with the rule that the plaintiff in ejectment must recover upon the strength of his own title, and may not rely upon the weakness of the defendant's claim, it is held that if the case depends upon the legal title, the defendant may show an outstanding title in some third person . . . ."

This burden, of proving title in the government, is unfair to a Marshallese defendant who is not represented by counsel. From the record, it is obvious the defendant was not sufficiently learned nor sophisticated to adequately meet the obligation of showing an outstanding title in some third person, i.e., the government.

The one party in interest, the government, who could have insisted that a record be made of all essential evidence and that a considered judgment on the merits be issued, excused itself from participation and the court approved, without hearing.

It is evident neither the government nor the Court gave any consideration to the patent unfairness of the government absenting itself from the case. The legal justification was that statutory consent to a suit against the government for money damages contained in 6 T.T.C., Section 251 conditioned the consent to actions or claims "accruing on or after September 23, 1967." This action was not within the consent statute, the government said, because "all events occurred before 1967."

Although the question before this Court raised on appeal is whether plaintiff's cause of action accrued after the

time specified in the consent statute, there is an entirely different question not raised by the government nor considered by the trial court as to whether ejectment against the government, or in this case the government's tenant, is within the purview of the consent statute regardless of when the cause of action arose.

There is a conflict of authority on the point. *Malone v. Bowdoin*, 369 U.S. 643, 82 S.Ct. 980, held that a suit in ejectment against a Federal officer holding forest land was a suit against the United States and could not be maintained without specific consent of the sovereign. This case, however, recognized the principle set forth in *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, and specifically did not overrule the *Lee* case which held suit could be brought against a United States officer holding land in behalf of the government which was acquired without payment of just compensation contrary to the United States Constitution. The same principle would apply in the present case if it is established the government acquired the property contrary to the Trust Territory Bill of Rights, 1 T.T.C., Section 4: " . . . nor shall private property be taken for public use, without just compensation; . . . ."

[1, 2] As to the question actually raised below—accrual of the cause of action—it is evident the Court and the government ignored the nature of a suit in ejectment to regain possession of land. The basis of a suit in ejectment is that a defendant in possession is a trespasser as against a plaintiff holding title and right to immediate possession. A trespass is a continuing wrong. Suit to end trespass can be brought at any time while the wrong continues. A suit to end wrongful possession is a cause of action arising on the day suit is brought against the possession. *Middleton v. Wiley*, 195 F.2d 844.

[3] As a matter of law, then, this case is within the consent statute and should not have been dismissed

against the government on that ground. As a matter of law, the defendant was entitled to an order making the government a party defendant at any time up to trial, if there had been a trial. A court alert to the requirements of fairness would have made the necessary order without a motion.

On retrial, the government should move to intervene to defend its title, if it claims ownership of the island. At the very least, the government should furnish counsel to its tenant in opposing plaintiff's claim of ownership and right to possession.

The plaintiff also, after all the troubles he has had, should have learned by now that he needs assistance from experienced counsel. If government counsel appear in behalf of the defendant, the plaintiff is entitled to the services of the Public Defender.

The judgment of the Trial Division is a nullity and need not be reversed. The case is remanded for trial and entry of judgment on the merits.

Concurring Opinion by BURNETT, *Chief Justice*:

While I join in the opinion of the court, I wish to add a few words concerning certain basic considerations which, in my view, require restatement and further emphasis.

The complaint alleged family ownership of Takewa Island. Defendant's answer specifically disavowed any personal claim of title, and made clear that he relied on a right of possession given him by the government. Plaintiff agreed at pre-trial conference that defendant held under the government; thus, though not named as a party, it was clearly the government's claim of title which was in question.

The District Attorney, by his motion to dismiss as to the government, chose to abandon the government's tenant, and the court permitted him to do so. What he, and the court, apparently failed to realize, was that, if the gov-

ernment's title was immune from question, the claim of defendant was likewise invulnerable.

Had the District Attorney framed his motion to seek dismissal of the action as being, in reality, an unconsented suit against the government, the issue would have been squarely presented. While it would have been error in any event to grant the motion without a hearing to determine the facts, at the very least the matter could have been brought before this court without the unfortunate delay which has marked its progress to date.

This appeal provides yet another graphic illustration of the burden that rests upon the court, to take care that rights of parties are not lost through lack of a sophisticated response to the quirks of judicial procedure. Their confusion is understandable and forgivable; that of American trained counsel is not.

The "Judgment" in this action in fact confirmed the right of defendant to continue in possession, but was couched in language which convinced him (and the plaintiff) that he had lost! Thus defendant appealed, though the judgment did no more than restate what he had set forth in his answer two and a half years earlier: that the government owned the land and that he claimed under the government!

I share the concern, well stated in the court's opinion, that the government was permitted to absent itself from the proceedings. As noted in the opinion of Justice Turner, the principle stated in *United States v. Lee*, 106 U.S. 196, 1 S.Ct. 240, is still the law, and suit can be maintained if it is alleged that the government acquired the property contrary to the Trust Territory Bill of Rights.

As a concomitant, it would seem to me to follow that the plaintiff should have an opportunity to show that there was never, in fact, a governmental taking (by the previous administering authority) at all. Certainly the fact

that the "owners" were not on the land at the time American forces drove out the Japanese is not, in itself, sufficient to establish that there had been a governmental taking.

Likewise, where record title is in a party, he cannot be precluded from showing that title in an action against a government officer, or tenant. See, for example, *Andros v. Rupp*, 433 F.2d 70 (9CCA—1970), where officers of the United States had asserted dominion over the land in question for over sixty years; the plaintiff was nevertheless held to be entitled to assert his claim.

For an authoritative review of the rules which determine sovereign immunity, see *Malone v. Bowdoin*, 369 U.S.—643, 82 S.Ct. 980 (1962); for the view that I would wish to see followed in the Trust Territory, see the dissenting opinion of Mr. Justice Douglas, at page 984.