

[16] Appellants did not properly plead a \$7,000 counterclaim. Trust Territory Rule of Civil Procedure 8(a) requires that each claim include a demand for judgment. Appellants never demanded a \$7,000 recovery for land clearing. The issue was not raised at the pretrial conference on February 16, 1979. Thus, neither the court nor appellee received reasonable notice before trial of the alleged \$7,000 counterclaim. At that point appellants waived any conceivable error. The lower court therefore correctly denied appellants' post-judgment motion for findings on the putative \$7,000 counterclaim.

The judgment is **AFFIRMED AS MODIFIED** as follows:

- 1) Finding No. 7 shall reflect that Malla, Jolet and David have *dri jermal* interests in the *weto*; and
- 2) The judgment shall specifically enjoin appellants from continuing construction on the *weto* or otherwise interfering with appellee's use of it.

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**NIPWECH UNGENI, individually and on behalf of his lineage,  
Plaintiff-Appellee**

v.

**TRUST TERRITORY OF THE PACIFIC ISLANDS,  
Defendant-Appellant**

Civil Appeal No. 284

Appellate Division of the High Court

Truk District

August 22, 1983

Appeal from trial court decision in land ownership dispute holding that title to certain tidelands were vested in individual, and not in Trust Territory Government. The Appellate Division of the High Court, Laureta, Associate Justice, held that Trust Territory Government failed to sustain its burden of showing the existence and substance of alleged Japanese Proclamation relied upon to prove lands belonged to Government, and that doctrine of "prior

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wrongs" was inapplicable to alleged Japanese Proclamation, and therefore trial court judgment was affirmed.

**1. Appeal and Error—Scope of Review—Newly Discovered Evidence**

The general rule is that a party is barred from introducing new evidence at the appellate level.

**2. Appeal and Error—Scope of Review—Newly Discovered Evidence**

Trust Territory Government would not be allowed to prove the existence of a relevant Japanese Proclamation by introducing additional evidence at the appellate level, since such evidence properly should have been introduced at trial, particularly in light of the fact that evidence could have been reasonably discovered by the Government had it exercised due diligence at the time of the trial.

**3. Former Administrations—Official Acts**

Failure by Trust Territory Government to prove the existence of a Japanese Proclamation, which allegedly showed that disputed land was in fact public land, was fatal to any statutory claim the Government may have had over the disputed land. (67 TTC §§ 1, 2)

**4. Courts—Judicial Notice—Foreign Law**

An appellate court cannot take judicial notice of a foreign law that remains unsettled or is capable of varying interpretations.

**5. Courts—Judicial Notice—Foreign Law**

Appellate Division of the High Court would not take judicial notice of an alleged Japanese Proclamation where there was insufficient information in the record with which to finally resolve the critical issue of the foreign law in question.

**6. Former Administrations—Redress of Prior Wrongs—Exception to Applicable Doctrine**

Doctrine of "prior wrongs" was inapplicable to a case where an alleged Japanese Proclamation on or about 1937 declared all property below the high water mark, including tidelands, to be public domain, since such a taking occurred only eight years prior to the succession of the United States and two years after Japan's resignation from the League of Nations, and there existed no practical or viable means by which redress could have been obtained from the Japanese Administration.

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Before MUNSON, *Chief Justice*, and LAURETA\*, *Associate Justice (Temporary)*

LAURETA, *Associate Justice*

The appellant-defendant, Trust Territory of the Pacific Islands ("TTPI"), appeals the decision of the Trial Division of the High Court for the Trust Territory of the Pacific Islands, Truk Division, which held that the title to certain tidelands situated on Dublon Island, Truk, were vested in the appellee-plaintiff, Nipwech Ungeni ("Ungeni"), and that the attempt by the TTPI to exercise ownership over the subject tidelands constituted a taking of property without due process of law. We affirm.

#### I. STATEMENT OF FACTS

Nipwech Ungeni is the leader of his lineage of the Wito Clan on Dublon Island, Truk. Ungeni, together with his lineage, have historically been the owners of the land in question consisting of tideland areas located on Dublon Island, Truk, and commonly referred to as "Neti"; and the clan has owned the land to the exclusion of all others, up to World War II. The TTPI concedes such ownership and does not dispute that prior to World War II custom in Truk provided for private ownership of tideland areas.

Rather, the TTPI alleges that on or about 1937 the Japanese Government issued Imperial Order No. 101 (Proclamation) which the TTPI argues declared all property below the high water mark, including tidelands, to be public

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\* Judge, District Court for the Northern Mariana Islands, designated Temporary Judge by the Secretary of the Interior.

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domain. On or about 1937 the Japanese began to fill the tidelands of Neti and ordered Ungeni and his lineage to leave Neti.

There exists no persuasive evidence that Ungeni was ever compensated for his land nor was he afforded the opportunity to contest the actions of the Japanese or otherwise seek redress from the Japanese.

After World War II Ungeni and his clan returned to the Neti and have occupied the property to this day. In 1968 Ungeni first learned of the TTPI's claim that the government and not Ungeni owned the tidelands of Neti. The TTPI argues, in essence, that since it is the successor government to the Japanese the TTPI now owns all tidelands. Ungeni attempted to recover damages from the TTPI in 1972 but the TTPI denied the claim.

On October 4, 1974, Ungeni filed this action. Trial was held before the Trial Division of the High Court, Judge Burnett, presiding, January 14 through 22, 1976. On December 15, 1978, the trial court affirmed Ungeni's title to Neti holding that the attempt by the TTPI to claim ownership of Neti constituted a taking of property without due process. In addition, the trial court ruled that the TTPI failed to produce the Proclamation at trial and, as such, found that any reference to it was mere speculation.

### II. ISSUES PRESENTED FOR REVIEW

In the first instance, this Court must decide whether the TTPI may claim ownership to the tidelands of Neti by virtue of the Japanese Proclamation coupled with the fact that the TTPI is the successor sovereign to Japan over the Trust Territory. In the second instance, this Court must decide whether the attempt by the TTPI to exercise ownership over the tidelands of Neti constitutes a taking of property without due process of law.

## III. ANALYSIS

The threshold issue implicates the question of whether the TTPI sustained its burden before the trial court in proving the existence and substance of the Japanese Proclamation. The record reveals that the TTPI clearly failed to do so and the issue now is whether the TTPI will be permitted to prove its case on appeal.

[1] The general rule is that a party is barred from introducing new evidence at the appellate level. *Utah Department of Transpor. v. Fuller*, 602 P.2d 814 (Utah S. Ct. 1979); *Crook v. Anderson*, 565 P.2d 908, 115 Ariz. 402 (1977); *Cooper v. Leslie Salt Co.*, 451 P.2d 406, 75 Cal. Rptr. 766 (1969); *Eveready Freight Service Inc. v. Public Utilities Commission*, 280 P.2d 442, 131 Colo. 172 (1955).

[2] The TTPI cannot be heard now at the appellate stage of the proceedings and in effect be given a second chance to prove the existence of the Japanese Proclamation by introducing additional evidence which more properly should have been introduced at trial. This is particularly true in light of the fact that the evidence which the TTPI seeks to introduce at the appellate level could have been reasonably discovered by the TTPI had it exercised due diligence at the time of the trial.

Because the TTPI failed to prove the existence of the Japanese Proclamation the TTPI has, therefore, also failed its concomitant duty to prove that Neti is "public land" for the purposes of 67 TTC § 1<sup>1</sup> and 67 TTC § 2.<sup>2</sup>

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<sup>1</sup> 67 TTC § 1. "Public lands" defined. Public lands are defined as being those lands situated within the Trust Territory which were owned or maintained by the Japanese Government as government or public lands, and such other lands as the Government of the Trust Territory has acquired or may hereafter acquire for public purposes.

<sup>2</sup> 67 TTC § 2. Rights in areas below high water mark. (1) That portion of the law established during the Japanese Administration of the area which is now the Trust Territory, that all marine areas below the ordinary high water mark belong to the government, is hereby confirmed as part of the law of the Trust Territory . . . .

[3] Based on the foregoing, this Court concludes that the inability of the TTPI to sustain its burden of proof before the trial court by failing to produce the Japanese Proclamation is fatal to any claim that the tidelands of Neti are public lands pursuant to 67 TTC § 1 and 67 TTC § 2.

Despite the failure of the TTPI to prove the existence of the Japanese Proclamation, the TTPI attempts to excuse its negligence by urging this Court to take judicial notice of the Japanese Proclamation.

[4] It is well established that an appellate court cannot take judicial notice of a foreign law that remains unsettled or is capable of varying interpretations. This is especially significant in the present case because the law of Japan as it relates to the Japanese Proclamation is certainly not as well settled as alleged by the TTPI. See affidavit of Dan F. Henderson and affidavit of Hideshige Haruki.

The Supreme Court of the United States has repeatedly held that the laws of a foreign nation must be proved as facts and may not be judicially noticed by the courts of other countries. *Talbot v. Seeman*, 1 Cranch 1, 2 L. Ed. 15 (1801); *Hanley v. Donoughe*, 116 U.S. 1, 29 L. Ed. 535, 6 S. Ct. 242 (1885); *Liverpool and Great Western Steam Co. v. Phoenix Insurance Co.*, 29 U.S. 397, 32 L. Ed. 788, 9 S. Ct. 469 (1889); *Lloyd v. Matthews*, 155 U.S. 222, 29 L. Ed. 128, 15 S. Ct. 70 (1894); *Brougham v. Blanton Manufacturing Co.*, 249 U.S. 490, 63 L. Ed. 722, 39 S. Ct. 336 (1919). Also in accord are the Federal Courts in *Cosulich Societa Triestina Di Navigazione v. Elting*, 66 F.2d 534 (2d Cir. 1933); *Ozanic v. United States*, 165 F.2d 738 (2d Cir. 1948); *Philp v. Marici*, 261 F.2d 945 (9th Cir. 1958).

Further, the principle announced in the *Restatement (Second) of Conflicts* is appropriate and we find that it is clearly applicable to the case at bar pursuant to 1 TTC

§ 103.<sup>3</sup> The relevant language of the *Restatement of Conflicts of Laws* reads as follows:

“[W]here either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law . . . . The forum will usually apply its own local law for the reason that in this way it can best do justice to the parties . . . . When both parties have failed to prove the foreign law, the forum may say that the parties have acquiesced in the application of the local law of the forum . . . .” (*Restatement (Second) of Conflicts of Laws* § 136, comment h, at pp. 378–79 (1971); *id.* at § 6(2)(g), p. 10.)

Similarly, in *Commercial Insurance Co. of Newark v. Pacific-Peru Const.*, 558 F.2d 948 (9th Cir. 1977) the court chose to apply the law of the forum state where there was insufficient information concerning the foreign law in question.

[5] Thus, there can be little doubt that this court should not take judicial notice of the Japanese Proclamation where there exists insufficient information in the record with which to finally resolve the critical issue of the foreign law in question. Consequently, the summary disposition of this cause utilizing the doctrine of judicial notice as advocated by the TTPI would appear to be most inappropriate without the requisite factual foundation. As such, this Court will not take judicial notice of the alleged Japanese Proclamation.

Finally, the TTPI urges this Court to construe Neti tide-lands as public lands pursuant to 67 TTC § 2 by means of the application of the “prior wrongs” doctrine. The TTPI

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<sup>3</sup> § 103. Applicability of common law. The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Trust Territory in applicable cases, in the absence of written law applicable under section 101 of this chapter or local customary law applicable under section 102 of this chapter to the contrary except as otherwise provided in section 105 of this chapter; provided, that no person shall be subject to criminal prosecution except under the written law of the Trust Territory or recognized local customary law not inconsistent therewith.

reasons that because the TTPI succeeded the Japanese Administration, the TTPI may now rightfully declare all tidelands to be public lands on the grounds that the TTPI is not required to correct the wrongs of the former Japanese Administration.

The doctrine of “prior wrongs” first emanated from the Trust Territory jurisprudence in the case of *Wasisang v. TTPI*, 1 T.T.R. 14 (1952). In *Wasisang*, the court held as follows:

The present administration is entitled to rely upon and respect the official acts of the Japanese (and prior German and Spanish) administration of these islands and is not required as a matter of right to correct the wrongs which the former administration may have done, *except in those areas 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.* *Id.* at 16. (Emphasis added.)

[6] The exception expressly stated in *Wasisang* would, however, appear to be dispositive of the present case based upon the evidence adduced at trial. That is, the taking occurred in 1937, only eight years prior to the succession of the United States Administration and two years after Japan’s resignation from the League of Nations, on March 27, 1935, and there existed no practical or viable means by which Ungeni could have sought redress from the Japanese Administration. This being the case, we conclude that the doctrine of “prior wrongs” is inapplicable and the TTPI cannot rely upon the prior acts of the Japanese Administration to secure title to the Neti tidelands.

#### IV. CONCLUSION

The inability of the TTPI to sustain its burden of proof before the trial court by failing to produce the Japanese Proclamation is fatal to any claim that tidelands are public for the purposes of 67 TTC § 2. No purpose would be

served to consider whether the attempt by the TTPI to exercise ownership over the tidelands of Neti constitutes a taking of property without due process of law.

In view of the foregoing, judgment of the Trial Court is hereby AFFIRMED.

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**TRUST TERRITORY OF THE PACIFIC ISLANDS,  
Plaintiff-Respondent**

**v.**

**PETER SUGIYAMA, Defendant-Appellant**

**Criminal Appeal No. 85**

**Appellate Division of the High Court**

**September 7, 1983**

Appeal from conviction for embezzlement. The Appellate Division of the High Court, Laureta, District Judge, held that necessary element of initial "lawful possession" of embezzled property was not proved beyond a reasonable doubt, and therefore conviction was reversed.

**1. Embezzlement—Elements of Offense**

The crime of embezzlement contains three elements: (1) lawfully obtaining the personal property of another; (2) taking and carrying away of that property without the owner's knowledge or consent; and (3) having the intent to convert it to his own use. (11 TTC § 854)

**2. Embezzlement—Elements of Offense**

In order to convict a defendant of embezzlement, it is necessary that the government prove beyond a reasonable doubt each and every element of the crime. (11 TTC § 854)

**3. Statutes—Construction—Strict Construction**

When interpreting a criminal statute, the language of the statute must be strictly construed.

**4. Embezzlement—Elements of Offense**

Public official's conviction for embezzlement was reversed, where the government could not prove the necessary element of initial "lawful possession" of the embezzled property, since uncontradicted evidence showed that another official withdrew funds from an agency account, and gave it to the public official, and therefore the public official never had "lawful possession" of the funds. (11 TTC § 854)