



REPUBLIC OF THE MARSHALL ISLANDS LAW REPORTS VOLUME 1 (REV.)

Opinions and Selected Orders August 1982 through June 1993

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***Publisher's 1993 Note to the
Marshall Islands Law Reports Vol. 1***

The development and proper operation of a judicial system in which decisions are based upon precedent, as well as upon the constitution, statutes, customary law and traditional practice, demand that court decisions interpreting and applying the sources of law be readily available for the information and guidance of concerned persons. These include citizens, government officials, members of the Nitijela, judges and lawyers. Other than a slim volume reporting a few selected decisions of the High Court, published under the direction of Chief Justice John C. Lanham in 1985, decisions of the courts of record of the Marshall Islands have not heretofore conveniently been available. This volume will remedy that deficiency with respect to the decisions of the Supreme Court issued prior to mid-1993.

The able assistance of Ms. Linda Wingenbach of the Micronesian Legal Services Corporation and Ms. Jerrlyn Sengabau of Palau and the William S. Richardson School of Law, in drafting summaries and digests for many of the earlier cases in this volume, is gratefully acknowledged.

Special thanks for their extensive efforts in preparing the material in this volume for publication are extended to the staff of the High Court and to my extraordinary secretary, Mrs. Clara Kam.

Clinton R. Ashford
Chief Justice, Supreme Court

***Publisher’s 2004 Note to the
Marshall Islands Law Reports Vol. 1 (Rev.) and Vol. 2***

As the late Supreme Court Justice Clinton R. Ashford noted in the preface to the 1993 Marshall Islands Law Reports (“MILR”) “[t]he development and proper operation of a judicial system in which decisions are based upon precedent, as well as upon the constitution, statutes, customary law and traditional practice, demand that court decisions interpreting and applying the sources of law be readily available for the information and guidance of concerned persons.” However, since the 1993 publication of the MILR, the decisions of the Supreme Court have not been published or made readily available. The 2004 revision of Volume 1 incorporates decisions included in the original MILR Vol. 1 and decisions issued prior to mid-1993 that were not located for the MILR’s publication. Volume 2 incorporates decisions issued after mid-1993 publication through mid-2004.

The revised Volume 1 and Volume 2 follow the format, and are built upon the foundation, established by Justice Ashford and his colleagues who produced the 1993 MILR. To them all legal practitioners in the Marshall Islands owe a debt of gratitude, and I would like to take this opportunity to recognize their contributions and to thank them.

Also, my thanks go to High Court staff who assisted me in locating decisions, especially Assistant Clerk of the Courts Ms. Lena Tiobech, and special thanks go to Supreme Court Chief Justice Daniel N. Cadra, High Court Associate Justice Richard Hickson, and President of the Marshall Islands Bar Association, Scott H. Stege, who assisted in proof-reading revised Volume 1 and Volume 2, although all errors are my own.

Carl B. Ingram
Chief Justice, High Court

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**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**IN RE NITIJELA
DISSOLUTION ACT OF 1981**

S.CT. CIVIL NO. 82-01

JUDGMENT

AUGUST 13, 1982

BURNETT, C.J.

SUMMARY:

The Constitution of the Marshall Islands provides for an automatic dissolution of the Nitijela on the thirtieth day of September in the fourth year following the year in which the last preceding general election was held. The Court, pursuant to Article IV, § 12(2), of the Constitution, held that the first Nitijela, elected April 10, 1979, was to be automatically dissolved on September 30, 1983.

DIGEST:

1. NITIJELA – *Powers and Procedures*: Article IV, § 12(2) of the Constitution provides for automatic dissolution on the thirtieth day of September in the fourth year after the year in which the last preceding general election was held.
2. NITIJELA – *Same*: The proviso in Article IV, § 12(2) of the Constitution applies only in the event of a general election pursuant to Article IV, § 13(3) that occurs before the thirtieth day of April.

OPINION OF THE COURT BY BURNETT, C.J.

The captioned Act, P.L. 1981-007, makes provision for an interpretation by this Court of Article IV, § 12, of the Constitution, to determine the date on which the Nitijela will be automatically dissolved.

Election of the Nitijela, the first to act under the Constitution of the Marshall Islands, was held on April 10, 1979, pursuant to P.L. 26-12-1. Transition Resolution No. 4, § 3, declares that,

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for purposes of construing § 12, Article IV, the “last preceding general election” is the election of April 10, 1979.

[1] Article IV, § 12(2), is clear and permits only one answer to the question. Its primary provision is that the Nitijela is automatically dissolved on the thirtieth day of September in the fourth year after the year in which the last preceding general election was held. As noted, this is identified as the election of April 10, 1979; the fourth year after 1979 is, obviously, 1983.

[2] The only possible source of confusion is in the proviso of Article 12, § 12(2) that, if a general election is held on or before April 30 in any calendar year “pursuant to Section 13,” the Nitijela shall be dissolved on the thirtieth day of September in the third year after the year in which “that general election was held.”

Section 13 very clearly refers to an early dissolution of the Nitijela by the President, and a consequent general election to elect a new Nitijela.

The present Nitijela was elected on April 10, 1979. The provisions of § 13 (and thus of the proviso of § 12(2)) have never been called into play. It follows that the “third year” provision has no application to the question before us.

IT IS, THEREFORE, THE JUDGMENT OF THIS COURT that, agreeable to the Constitution, the Nitijela of the Marshall Islands will be automatically dissolved on September 30, 1983.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

ABNER, et al.,

Plaintiffs-Appellants,

-v-

JIBKE, et al.,

Defendants-Appellees.

S.CT. CIVIL NO. 82-02
(High Ct. Civil No. 1980-021)

APPEAL FROM THE HIGH COURT

AUGUST 6, 1984

BURNETT, C.J.

SUMMARY:

In a dispute concerning succession to alap rights, the court found misunderstanding and misstatement of relevant evidence, as well as consideration of out-of-court statements, by the trial court. Concluding that allowing the judgment to stand would be inconsistent with substantial justice, the judgment was reversed and the case remanded for further proceedings.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Identify Errors*: The notice of appeal must contain a “concise statement of the questions presented by the appeal.” The Court may decline to hear an appeal where it cannot be determined from the notice of appeal what the alleged error was.
2. APPEAL AND ERROR – *Review – Harmless Error*: Errors by the court below are not grounds for an appellate court to disturb a judgment unless refusal to do so would be inconsistent with substantial justice.
3. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Fact*: Findings of fact by the trial court will not be set aside unless clearly erroneous.

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4. LAND RIGHTS – *Iroij – Decisions*: The determinations of iroij are presumed to be reasonable unless it is clear that they are not.
5. LAND RIGHTS – *Marjinkot Lands – Termination of Rights*: In order to change rights in Marjinkot lands, in absence of consent, good cause must be shown.
6. LAND RIGHTS – *Possession*: Possession or use of land does not, in itself, convey any rights in the land under the custom.

OPINION OF THE COURT BY BURNETT, C.J.

This appeal is taken from a judgment by the High Court, Republic of the Marshall Islands, on October 27, 1982, holding that the successors to Defendant Jibke have alap and dri jerbak rights to Aibwij, Monke and Lojonen wetos on Bikiej Island, Kwajalein Atoll. The action began originally in the High Court of the Trust Territory and was transferred upon organization of the courts of the Marshall Islands.

Plaintiffs filed the complaint, as successors to Abner, to protest a decision in 1980 by then Iroij Lojellan Kabua that Jibke held the alap rights in the subject lands. Plaintiffs' theory was that the lands had been given as Marjinkot land to Abner's ancestor Laemokmok by Iroij Laninbit, and that a succeeding iroij could not cut off the rights of the bwij without either consent or good cause to do so. They further allege that no reason was given by the iroij for his decision.

Defendants' answer was, essentially, a general denial, followed by a request that the matter be submitted to Iroij Manini for his review.

Following trial in July of 1982, Judgment was entered on October 27, 1982; the record on appeal certified March 17, 1983. Appellants, after two extensions of time in which to do so, filed a brief on appeal August 1, 1983. No responding brief was filed by Appellees, though a requested extension of time for that purpose was granted.

[1] Appellants' brief identified, for the first time, errors of the trial court which they contend resulted in an erroneous judgment. The Notice of Appeal asserted only that both findings of fact and conclusions of law were erroneous. It is obviously not in compliance with Rule 3 of the

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Appellate Rules of Procedure, which requires that it contain “a concise statement of the questions presented by the appeal;” The appeal has been permitted to proceed so that rights may not be lost through the efforts of inadequate counsel.

Before proceeding to consideration of the appeal, notice must be taken of the limits of appellate consideration, imposed both by statute and by decisions of the predecessor court of the Trust Territory.

[2] First, no error with respect to admission or exclusion of evidence, or in any ruling of the court, nor in anything done by either the court or parties can be grounds for an appellate court to disturb a judgment, unless refusal to do so “appears to the court inconsistent with substantial justice.” 6 TTC § 351, *Bina v. Lajou*, 5 TTR 366 (1971).

[3] Findings of fact by the High Court may not be set aside unless “clearly erroneous.” 6 TTC § 355(2). As frequently stated by the Trust Territory courts, the appellate court must refrain from re-weighing the evidence, and must make every reasonable presumption in favor of the trial courts decision. *Olper v. Damarlane*, 7 TTR 496 (App. Div. 1977).

1. Appellant first contends that the trial court was unable to give full and fair consideration to the case as a whole, by reason of confusion concerning “significant portions of the evidence.”

It seems clear that there was a great deal of confusion on the part of everyone concerned, beginning with the difficulty in identifying the real present parties in interest; both of those named, Abner and Jibke, were dead before the case began. The trial court was understandably confused by the pattern of examination, the lack of a systematic development of the case by trial counsel. That there also was difficulty in translation of testimony in an understandable fashion, is obvious.

Even with the benefit of the trial transcript, it is not at all easy to follow the course of the trial. Nevertheless, there are clear misstatements of the testimony contained in the trial court’s opinion, notably that of the plaintiffs’ principal witness, Matrine. Hers was the only testimony as to the years of the deaths of Abner (1977) and Jibke (1958); she is quoted in the opinion as

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saying Jibke outlived Abner, and that he lived on the wetos for eight years after a 1950 survey. She had testified that he lived on Ebeye during that time, and that it is Katmene (from Abner's bwij) who returned to the land after the survey.

Actually no one was allowed to live on the land during the time in question; there was no right of "possession" as such, but only the right to receive payments for land use, and occasional rights to go back for planting. Thus, evidence as to receipt of payments becomes highly significant. The court found, as fact, that Plaintiffs did receive payments, but dismissed the significance of that finding.

2. Appellant next claims error in connection with the parties' attempt to seek a review by the current Iroj Manini, successor to Lojellan.

Prior to conclusion of the trial, the trial counsel, with the court's consent, agreed to submit the dispute to Manini. The transcript makes clear that according to statements of defendant-appellee counsel, Manini was too sick to see them. The court, however, advised counsel that he had been told, out of court, that Manini had refused, saying he had already decided it. The court's decision reflects this understanding. I must agree that the court's reliance on the out of court statement was prejudicial.

3. Finally, Appellant claims error in the court's conclusion that the decision of Iroj Lojellan Kabua in favor of Jibke was reasonable and in accord with customary law of the Marshall Islands.

The primary problem is that there was nothing to show the basis for the decision of Iroj Lojellan, or, as claimed by Appellee, a predecessor iroj.

The court accepted Appellant's contention that the lands had been given to Laemokmok as Marjinkot, and made a specific finding to that effect. The genealogy chart, accepted into evidence, showed descent to Abner and, through him to the Appellants.

No reason was given, or shown, for the decision of Iroj Lojellan, other than his display of the iroj book, without showing it; the book was not introduced in evidence, so there is no way to determine when any pertinent entry was made, nor who made it.

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[4] Thus we do not know whether this is similar to *Anjetob v. Taklob*, 4 TTR 120 (Tr. Div. 1968). There the plaintiffs sought to overturn a decision by the then iroij which was based on that of an earlier iroij long ago. The determinations of an iroij are presumed to be reasonable unless it is clear that they are not. The court then held the prior decision presumption to be reinforced “by a presumption analogous to ‘the presumption of grant’ or ‘doctrine of lost grant.’” That the Plaintiffs had made use of the land at times changed nothing, the court finding that such use does not necessarily show acknowledgment of “any rights in the lands.”

The court gave no consideration to the custom as to Marjinkot lands nor was anything shown as to cause for rights being anywhere other than in the recipient bwij, that of Abner. For discussion of Marjinkot, see J. Tobin, *Land Tenure Patterns* (1956), page 34 *et seq.*

[5] In *Labiliet v. Zedekiah*, 6 TTR 19 (Tr. Div. 1972), the court held that, in order to change rights in Marjinkot lands, in the absence of consent, there must be good cause shown. Here, since the iroij book was not in evidence, we are unable to even tell when, or by whom, the first decision was made to establish Jibke as alap, outside of the recipient bwij.

It is clear that both Abner and Jibke had been “in possession,” at varying times in the past, and that they and their people had received payments for land use. Appellants contended that Jibke was on the land as a Kabincal, that is, one who follows another onto the land, in this case, Nerta who was from Abner’s bwij. The court obviously misunderstood, equating it with inheritance.

[6] As in *Anjetob v. Taklob*, *supra*, possession or use of land does not, in itself, convey any rights in the land under the custom.

Development of the case by counsel was totally inadequate. This, together with the court’s misunderstanding and misstatement of relevant evidence, leads me to conclude that to allow the judgment to stand would be inconsistent with substantial justice.

Accordingly, the judgment in this action is reversed and remanded to the trial court for further proceedings. It is recommended that the matter be referred to the Traditional Rights Court for its action.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**MELA EBOT, Successor
to LEVI LANUIT (Deceased),**

S.CT. CIVIL NO. 83-01
(High Ct. Civil No. 1982-049)

Plaintiff-Appellee,

-v-

JINUNA JABLOTOK,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

AUGUST 6, 1984

BURNETT, C.J.

SUMMARY:

In a dispute over entitlement to senior dri jermal rights, the Supreme Court found ample evidence to sustain the trial court's ruling and no basis for overturning it.

DIGEST:

1. APPEAL AND ERROR – *Review – Questions of Fact*: Appellate courts will not interfere with findings of the trial court which are supported by credible evidence.
2. APPEAL AND ERROR – *Same – Presumptions*: Appellate court has a duty to make every reasonable presumption in favor of the correctness of the decision of the lower court.
3. APPEAL AND ERROR – *Same – Discretionary Matters – Continuances*: Abuse of discretion is the standard of review of trial court's declining to grant a continuance and allowing a trial assistant to sit at counsel table with appellee's counsel.
4. APPEAL AND ERROR – *Questions Reviewable – Asserted Below*: Matters as to which no objection was made at trial will not be considered on appeal.

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5. WAR CLAIMS ACT – *Judicial Review of Awards*: Although the War Claims Act contains provisions that make all awards final, not subject to judicial review, this finality provision applies only as to claims against the United States. The court cannot be precluded from determining who actually owned the land, or was entitled to share in the claim.
6. LAND MANAGEMENT – *Regulation No. 1– Finality of Determinations*: Courts will not be bound by the finality provisions of Land Management Regulation No. 1.

OPINION OF THE COURT BY BURNETT, C.J.

This appeal is taken from a judgment of the High Court entered December 8, 1982, holding that the Appellee has senior dri jermal rights in Loelen weto, Majuro, Marshall Islands. A supplemental order staying execution of judgment was entered February 24, 1983, and the record certified May 18, 1983.

The complaint, filed originally in the High Court of the Trust Territory, claimed both senior dri jermal and dri jermal rights. Evidence on trial was focused on which of the competing parties was senior, and the court's decision, correctly I think, found that to be the sole issue before him.

The basis for the trial court's decision is two-fold. First, both the extra-judicial and judicial admissions of defendant-appellant Jinuna compelled his conclusion, and second, he found a preponderance of the evidence in favor of plaintiff-appellee. He resolved the conflicts in the evidence, and made extensive findings of fact leading to judgment for Mela.

[1] Appellate courts have consistently held that they will not interfere with findings of the trial court which are supported by credible evidence. *See Techong v. Peleliu Club*, 7 TTR 364, 367 (App. Div. 1976).

This court has repeatedly held that the findings of the Trial Court will not be set aside unless clearly erroneous. *Helgenberger v. Trust Territory*, 4 TTR 530 (App. Div. 1969); 6 TTC § 355(2). The function of the Appellate Court in reviewing the evidence is clearly set forth in *Arriola v. Arriola*, 4 TTR 486 (App. Div. 1969), and we have reviewed the record and find the facts sufficient to support the judgment.

MARSHALL ISLANDS, SUPREME COURT

[2] A review of the record here reveals ample evidence to support the findings of the trial court; this court will not re-weigh that evidence. As said in *Olper v. Damarlane*, 7 TTR 496, 499 (App. Div. 1977), “its duty is to make every reasonable presumption in favor of the correctness of the decision of the lower court,”

[3] Appellant claims error in the court’s refusal to grant a third continuance, requested orally at the time of trial, in order that his client might have other counsel “of his own choosing” present. This is a matter resting in the trial court’s discretion. I find nothing to suggest an abuse of that discretion, noting that trial counsel had represented defendant from the inception of the action. It is clear from the record that he represented his client diligently and well.

There is also no evidence of an abuse of discretion in the court’s allowing one Anibar Timothy to sit at counsel table with Appellee’s counsel. The claimed conflict of interest, if it existed at all, had no relationship whatever with appellant or any of his interests.

[4] No consideration will be given to a point of error raised for the first time on appeal, no objection having been raised on trial. Thus, whether the assessor was present or absent during all, or any part, of trial, has no present relevance. I note that the record contains nothing to reveal the facts as to this specification of error.

The same can be said of the calling of Appellant to the witness stand, by Appellee. No objection was made on the record when he was called, hence no right to claim error was preserved for this appeal.

And again, error is claimed in admission of testimony now claimed to be hearsay; no objection having been made at trial, it will not be considered here.

Mention must be made of Appellant’s contention that “it was error inconsistent with substantial justice for the trial court to re-hear the case outside the courtroom four months after both parties rested I note that the “rehearing” was in fact a conference in chambers, that it was fully recorded, and that counsel participated without registering any objection. The court characterized the hearing as an effort to obtain “a little more guidance from counsel as to the issues and the theory of their cases, and what they think backs up their theory of the case, sort of

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additional argument” Far from being “inconsistent” with justice, the procedure appears to me to represent a conscientious effort to insure that no injustice would be done.

The trial court held that it was not bound by either the findings of the War Claims Commission or the Trust Territory Land Title Officer. I agree.

[5] The War Claims Act contains provisions purporting to make all awards final, not subject to judicial review. The Appellate Division, High Court of the Trust Territory, has held in *Ngikleb v. Ngirakelbid*, 8 TTR 11 (1979) that the finality provision applied only as to claims against the United States, and that the court could not be precluded from determining who actually owned the land, or was entitled to share in the claim.

The matter of the Land Title Determination is more difficult of resolution; the Trust Territory courts have consistently held that such Determinations are final unless appealed within one year. I first note that Appellant is mistaken as to the basis for such Determinations of Ownership. In his brief he assumes that they were issued pursuant to the Land Registration procedure provided in 67 TTC Ch. 3. He cites 67 TTC § 117(1) as to the conclusive effect of a certificate of title issued under that chapter.

In fact, the Determination with which we were concerned was made under Office of Land Management Regulation No. 1. The entire procedure was thus an entirely administrative one.

The purpose of the Regulation, and the Determinations made under it, is significant. In *Ngerdelolek Village v. Ngerchol Village*, 2 TTR 398, 406 (Tr. Div. 1963), then Chief Justice Furber said: “The exception contained in Section 13, and the nature of the whole regulation, seem to indicate an intention to provide for determinations between the government and its agencies or representatives on the one side and those filing claims against it on the other, rather than to provide for determinations of private ownership good against all the world.”

Loelen weto was already occupied by the government at the time of the hearings. It was necessary, in order to regularize that possession as was done by the agreement of August 4, 1959, to determine who the government should deal with.

[6] No one will pretend that the “somewhat hasty meetings” (so characterized by the trial

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court) of the Land Title Officer included the procedural safeguards to be expected on such an important matter as land rights. The record is clear that the procedure was administrative and summary. In short, the courts will not be bound by the finality provisions of Land Management Regulation No. 1.

Obviously, given the many years of government possession, the land has not been utilized in the traditional fashion under Marshallese custom. The land could not be worked by dri jermal, under direction of the alap and iroij, yet the obligation of all to cooperate, and the right of all to share in benefits, remains. It should be clear that future use is subject to the same conditions, and that the judgment does not give Appellee an unrestricted right to determine what that use will be. The primary right of control, to be exercised in a reasonable manner, remains with the alap.

Accordingly, having found no error, the Judgment of the trial court is affirmed.

Benjamin M. Abrams for Plaintiff-Appellee

Philip Okney, Chief Public Defender, for Defendant-Appellant

ED. NOTE: The judgments of the Marshall Islands High Court and Supreme Court were reversed by the Appellate division of the High Court, Trust Territory of the Pacific Islands. The Opinion of that Court is hereinafter reproduced as an Appendix to the Opinion of the Marshall Islands Supreme Court.

See also Langijota v. Alex, 1 MILR (Rev.) 216 (Dec 3, 1990), *infra*.

EBOT v. JOBLOTAK (Appendix)

**IN THE APPELLATE DIVISION OF THE HIGH COURT
TRUST TERRITORY OF THE PACIFIC ISLANDS**

JINNUNA JABLOTOK,

Petitioner,

CERTIORARI NO. C-5-84

(S.CT. 83-01)

(High Ct. Civil No.1982-049)

vs.

**MELA EBOT, successor to
LEVI LANUIT, Deceased,**

Respondent.

BEFORE the Honorable Alex R. Munson, Chief Justice, Richard I. Miyamoto, Associate Justice, and Alfred Laureta, Associate Justice.¹

Appearances: Philip A. Okney, Esq.
for petitioner

Benjamin M. Abrams, Esq.
for respondent

PER CURIAM

Pursuant to Section 5b. of Secretarial Order 3039, a writ of certiorari was issued to the Supreme Court of the Republic of the Marshall Islands in *Mela Ebot, Successor to Levi Lanuit (Deceased) v. Jinnuna Jablotok*, Supreme Court Civil 83-01, to review the Opinion of that court. The Supreme Court had found, in essence, that the Marshall Islands courts were not bound by the finality provisions of Trust Territory Land Management Regulation No. 1 as it applied to the determinations of the Land Title Officer because the hearings were administrative and summary.

¹ United States District Judge, District of the Northern Mariana Islands, designated as Temporary Associate Justice by the United States Secretary of the Interior.

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The petitioner contends that a Land Title Officer's determination as to right or title to land between the parties or their successors is final after the appeal has run, and such determination was *res judicata*, pursuant to Secretarial Order 2969.

The facts that bear upon the issue are as follows: On May 21, 1958, pursuant to Office of Land Management Regulation No. 1 issued by the Director of Political Affairs of the Trust Territory government and approved by the High Commissioner on June 29, 1953, Land Title Officer Thomas Gilliland of the Marshall Islands District Administration posted public notices in English and in Marshallese of a series of hearings to be held to determine the ownership of a number of weto on Uliga Island, Majuro Atoll. One of the weto was Loelen weto, the subject of dispute in this case.

The notices declared that the meetings were to be held at the courthouse of the Marshall Islands District in Majuro and that "All persons concerned with this Loelen weto should be present at this hearing to present all evidence concerning ownership of this weto. The ownership determination made at this hearing will be final and binding, unless and until it is overruled by the High Court."

Pursuant to this notice and the informal meetings held on April 4, 7, and 8, 1958, in the conference room of the Administration building in Uliga, Majuro Atoll, a hearing was conducted by the District Land Title Officer at the courthouse on June 10, 1958. In that hearing, Mike, the Iroj Erik of Loelen weto, testified under oath that Jirak was the senior dri jermal of that weto. No one else testified or disputed the statement of the Iroj although given the opportunity to do so. At the end of the hearing, Mr. Gilliland announced his conclusion that Jirak was the senior dri jermal of Loelen weto, and also declared, based on Section 14 of Land Management Regulation No. 1, that "the decision of this hearing may be appealed to the High Court [Trust Territory] providing that the appeal is filed within one year from today." A formal written document known as "determination and Release No. 58-29" for Loelen weto was issued and filed with the Clerk of Court on August 3, 1959. No appeal was filed.

The petitioners are the successors in interest of Jirak, the senior dri jermal named in the

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Land Title Officer's Determination.

On November 2, 1981, more than 22 years after the appeal period had run on the Land Title Officer's determination, the respondent filed a complaint for declaratory relief in the Trial Division of the High Court of the Trust Territory² to determine who had dri jermal and senior dri jermal rights to Loelen weto. The trial judge held that the Land Title Officer's determination was not binding upon the court under the doctrine of *res judicata* or estoppel, and found for the respondent as having senior dri jermal rights to Loelen weto. No counsel or party brought to the attention of the court the existence of Secretarial Order 2969.

Upon appeal, the Marshall Islands Supreme Court affirmed the judgment of the Marshall Islands High Court, declaring that "the courts will not be bound by finality provisions of Land Management Regulation No. 1." It also declared that "No one will pretend that the 'somewhat hasty meetings' (so characterized by the trial court) of the Land Title Officer included the procedural safeguards to be expected on such an important matter as land rights. The record is clear that the procedure was administrative and summary." Once more, no attempt apparently was made to bring to the attention of the court the existence of Secretarial Order 2969.

Secretarial Order 2969 relating to the transfer of Trust Territory public lands to district control authorized, *inter alia*, the respective district legislatures

to establish an adjudicatory body to resolve claims disputes as to title or rights in land transferred to district legal entity; provided, however, that no such body shall have the authority to redetermine any claim or dispute as to right or title to land between parties or their successors or assigns where such claim or dispute has already been finally determined either by a Land Title Officer, by a Land Commission or a court of competent jurisdiction, and all final determinations shall be *res judicata* (italic added)

The source of governmental power over the Trust Territory provided for in the Trusteeship Agreement was delegated by the United States Congress to the President, who, in

²Later transferred to the Marshall Islands High Court pursuant to Secretarial Order 3039.

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turn, designated the Secretary of Navy and later the Secretary of Interior to establish governmental organization necessary to administer the Trust Territory. The Secretary of the Interior, pursuant to Executive Order No. 11021 issued by President John F. Kennedy on July 1, 1962, had been administering the Trust Territory by laws, regulations, orders, appointments and other acts. Pursuant to this authority, Secretarial Order 2969 had been issued.

Section 101 of Title 1 of the Trust Territory Code provides that,

[T]he following are declared to be in full force and have the effect of law in the Trust Territory: (1) The Trusteeship Agreement; (2) Such laws of the United States as shall, by their own force, be in effect in the Trust Territory, including the executive orders of the President and orders of the Secretary of Interior; (3) Laws of the Trust Territory and amendments thereto (underscoring added)

Clearly, Secretarial Order 2969 is a valid law in the Trust Territory and cannot be ignored by any governmental entity, including the three political subdivisions established by Secretarial Order 3039, so long as the Trust Territory exists as a legal entity under the Trusteeship Agreement.

Thus, it is clear that Secretarial Order 2969, which declares that all rulings made by a Land Title Officer not otherwise overruled or amended by the High Court of the Trust Territory, must stand, and this is the situation in this case. The fact that the hearings were administrative or summary in nature and were based on regulations of the High Commissioner do not derogate the importance of the decisions made by the Land Title Officer. It is clear that the intent of such a law is to bring to finality any divergent claims of ownership to land. This intent has support in the concept of *res judicata* which is universally accepted and followed.

As to the other issue of whether the respondents were parties or successors or assigns of the parties then in contention in 1958 when the Land Title Office had his hearing and made his determination, the records of the trial indicate that respondent Mela Ebot's family was represented at the 1958 hearings through her cousins Levi Lanuit and Abij, who are brothers. From the foregoing, it is clear that the respondents were successors to the parties then in

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contention and were present in 1958 to contest the claims of the petitioner's ancestor, but had failed to do so.

From all of the foregoing, the provisions of Secretarial Order 2969 regarding Land Title Officers' rulings must prevail. The matter of the jermal rights of Loelen weto had been determined by the Land title Officer in 1958 and this determination was never appealed. This determination then became *res judicata* which all courts of the Trust Territory, including the courts of the Republic of the Marshall Islands, must recognize.

The decision of the Supreme Court of the Republic of the Marshall islands is hereby reversed.

Entered: October 22, 1985

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

REPUBLIC OF THE MARSHALL ISLANDS

S.CT. CRIMINAL NO. 83-01
(High Ct. Crim No. 1982-008)

Appellee,

-v-

BIRTHOOVEN AMACIO DIGNO,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

AUGUST 6, 1984

BURNETT, C.J.

SUMMARY:

In this case, the defendant was charged with murder and found guilty of voluntary manslaughter. The Supreme Court found that for a murder case the High Court was not constituted as required by law and consequently lacked jurisdiction. The Supreme Court set aside the judgment of the High Court and remanded the matter for further proceedings consistent with the Court's decision.

DIGEST:

1. **APPEAL AND ERROR** – *Questions Reviewable* – *Questions of Law*: Generally, the Supreme Court will not consider a matter which has not been raised by way of objection in the trial court; however, an appellate court may take up a question of law on its own motion, if there is a basis for it in the record.

2. **COURTS** – *Composition*: A trial court not constituted as required by law lacks jurisdiction determine cases before it.

RMI v. DIGNO

OPINION OF THE COURT BY BURNETT, C.J.

Appellant Digno was initially charged by Information with the offense of Murder in the First Degree. A second amended Information charged, in Count One, Murder in the Second Degree and, in Count Two, Assault and Battery with a Dangerous Weapon. Following trial to the High Court, jury having been waived, he was found, as to the first count, not guilty of Murder, but guilty of the lesser and included offense of Voluntary Manslaughter; as to count two, he was found guilty as charged.

Timely Notice of Appeal was filed, following an extension of time within which to do so, and after certification of the record, Appellant's brief was timely filed. No brief was filed by Appellee, though granted an extension of time for that purpose.

Numerous specifications of error are made. Only one need concern us, that trial court was not constituted according to then-applicable law. I note that this claim of error was neither urged at trial, nor included in the grounds asserted in the Notice of Appeal; it appears for the first time in the appellate brief.

[1] Generally it can be said that the Court will not consider a matter which has not been raised by way of objection in the trial court. The Appellate Division, High Court of the Trust Territory, however, has held that an appellate court may take up a question of law on its own motion if there is a basis for it in the record. *Crisostimo v. Trust Territory*, 7 TTR 375 (App. Div. 1976). Such a rule is particularly appropriate to the error here claimed which presents a question as to the jurisdiction of the trial court, as it was constituted at the time of trial.

The general rule that an objection that the trial court was without jurisdiction of the subject matter may be raised for the first time in the appellate court would seem to be applicable in the case where such want of jurisdiction is due to the constitution of the court or tribunal rendering the judgment complained of. 5 Am Jur 2d, Appeal and Error § 584

To the same effect, *see* 4A C.J.S. Appeal and Error § 691:

The record on appeal is fatally defective if it fails to show that the lower court . . .

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was presided over by the judge or judges lawfully designated for that purpose.

Also, *see* 4 Wharton's Cr. Law and Proc., Sec. 1464, which refers to the absence of an associate or side bar judge as "fatal."

Under the Constitution, the High Court consist of "a Chief Justice and such number of other judges as may from time to time be prescribed by Act." Article VI Section 3.

The Constitution also provides, in Article XIII Section 1(1) (A) "the existing law shall, until repealed or revoked, and subject to any amendment thereof, continue in force in and after the effective date of this Constitution." Article XIV defines existing law as "the law in force in the Marshall Islands immediately before the effective date of this Constitution"

At the time of trial, 5 TTC § 204 provided: "(2) when a murder case is assigned for trial, the judge of the high court . . . shall assign two of the special judges . . . to sit with him in the trial thereof. The special judges shall participate with the presiding judge in deciding, by majority vote, all questions of fact or sentence If the trial is by jury, however, the special judges shall participate only as assessors and in deciding on the question of sentence."

5 TTC § 204 was "existing law" under the Constitution, was in effect at the time of trial, and remained applicable until its repeal by Public Law 1983-8, the "Judiciary Act 1983."

There is the temptation to hold that the defect was cured when the court, sitting alone, found appellant guilty of Voluntary Manslaughter, an offense which did not require the special judges. Such a conclusion would, however, miss the point – the court never acquired trial jurisdiction.

And, of course, we are unable to give effect to the Judiciary Act, since it came long after the act which appellant was charged with having committed. *See* the "ex post facto" clause contained in the Constitution, Article II Section 8(1).

[2] I conclude that the trial court was not constituted as required by law, and consequently lacked jurisdiction. The judgment must be, and hereby is, set aside, and the matter remanded for further proceedings in accord with the views I have expressed herein.

IT IS SO ORDERED.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

LILLY LORENNIJ,

Plaintiff-Appellant,

-v-

HENRY MULLER,

Defendant-Appellee.

S.CT. CIVIL NO. 85-01

(High Ct. Civil No. 1983-057)

ORDER DISMISSING APPEAL

AUGUST 31, 1985

BURNETT, C.J.

SUMMARY:

Appeal dismissed because Plaintiff-Appellant failed to prosecute “with due diligence” and to comply with appellate rules of procedure.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Pay Fees and Costs*: Rule 16 of Appellate Rules of Procedure allows thirty (30) days from service of notice of estimated cost of transcription for appellant to make payments.
2. APPEAL AND ERROR – *Dismissal, Grounds for – Noncompliance with Rules*: Rule 20(a) provides that failure of appellant to comply with the rules after filing notice of appeal is ground for dismissal of the appeal.

Judgment was entered in this action on December 3, 1984. Notice of appeal was filed March 7, 1985, following denial, February 17, 1985, of a motion for new trial.

Appellee has moved for dismissal of the appeal on the grounds that Appellant has failed

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to prosecute “with due diligence,” and failed to comply with applicable laws and Appellate Rules of Procedure.

[1] Rule 16 of the Appellate Rules of Procedure allows thirty (30) days from service of notice of estimated cost of transcription for Appellant to make payment. The Notice in this appeal is dated April 12, 1985; while the record does not show the exact date of service, the clerk’s affidavit makes clear that personal service was made on counsel later in that month. At this point, four months later, the estimated cost has still not been paid.

[2] Rule 20 (a) provides that failure of appellant to comply with the rules after filing notice of appeal is ground for dismissal of the appeal. I see dismissal as particularly appropriate here.

While this action is, on its face, a dispute over senior dri jermal rights in Monkono weto, the immediate concern is entitlement to some \$6,000.00 held by the Trust Territory Attorney General for payment to the dri jermal. These funds bear no interest, so there should be an expeditious resolution of the dispute.

On March 11, 1985, the trial court issued an amended stay of judgment, conditional on deposit of \$6,000.00 cash as security for satisfaction of the judgment, costs, interest and “damages for delay.” No security deposit has been made; while failure to do so does not directly affect the appeal, it is further evidence of lack of diligence on the part of appellant.

I have, therefore, concluded that this appeal must be, and it hereby is, Dismissed. So Ordered.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

KABUA KABUA,

S.CT. CIVIL NO. 85-06
(High Ct. Civil Nos. 1984-98 and
102)

Petitioner,

-v-

**HIGH COURT OF THE REPUBLIC
OF THE MARSHALL ISLANDS,
THE HONORABLE NELSON K. DOI
Chief Justice, and THE HONORABLE
HERBERT D. SOLL, Associate Justice,**

Respondents,

**IMADA KABUA and KWAJALEIN
ATOLL CORPORATION,**

Real Parties
in Interest.

ORDER DENYING PETITION FOR A WRIT

JANUARY 23, 1986

BURNETT, C.J.
LANHAM, A.J.

On consideration of petitioners' petition for Writ of Mandamus or prohibition, and of the pleadings filed with respect thereto,

IT IS HEREBY ORDERED that the aforesaid petition for Writ of Mandamus or prohibition is denied.

The Court reserves the right to file its opinions at a later date.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**CAROLSON COMMERCIAL
CORPORATION,**

S.CT. CIVIL NO. 84-01
(High Ct. Civil No. 1984-081)

Plaintiff-Appellant,

-v-

SAWEJ BROTHERS COMPANY,

Defendant-Appellee.

APPEAL FROM THE HIGH COURT

FEBRUARY 4, 1986

BURNETT, C.J.

SOLL, A.J., and TENNEKONE, A.J. (sitting by designation)

SUMMARY:

Appellant sought to enforce judgment against Appellee in the amount of \$3,488.11 with interest at the rate of 9%. Appellant earlier waived right to receive interest, but on condition of receiving regular payments by specific dates. The court ruled that Appellee's failure to make timely payments automatically reinstated interest obligation.

DIGEST:

1. STATUTES – *Construction and Operation*: Title 8, § 1 of the Trust Territory Code provides every judgment for the payment of money bears an interest rate of 9% a year from date it is entered.
2. STATUTES – *Same*: Neither 8 TTC § 55 nor 8 TTC § 75 authorizes a court to forgive any part of a judgment obligation absent consent of the holder of the judgment.

OPINION OF THE COURT BY BURNETT, C.J.

On October 19, 1981, Appellant had judgment against Appellee in the amount of

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\$3,488.11 including costs, with interest at the rate of 9%.

The matter next came before the court March 1, 1983, on Appellant's Motion for an Order in aid of Judgment. The parties stipulated in open court for payment of the amount then due at the rate of \$600.00 per month, commencing April 1, 1983, and on the first day of each month thereafter until final satisfaction. Appellant further agreed to waive interest on the judgment if all payments were so made; failure to pay on or before the dates due would result in reinstatement of the interest obligation. The court approved the stipulation, and entered its written Order on March 15, 1983, in confirmation of that approval.

With exception of the first, succeeding payments were made late by periods ranging from 5 to 39 days, the last having been made on September 9, 1983. Appellant returned to the trial court seeking enforcement of the Order. It was denied on April 13, 1984, and this appeal followed.

It is clear that the amount in dispute represents interest which Appellant claims is due by reason of Appellee's failure to make payment on the dates ordered.

It is equally clear that, prior to the court's Order of March 13, 1983, and the stipulation on which that Order was based, Appellant had a fixed and certain right to the payment of interest. This right was based not only on the judgment but on statute as well.

[1] Title 8, § 1 of the Trust Territory Code, provides:

Every judgment for the payment of money shall bear interest at the rate of nine percent a year from the date it is entered

The right to receive interest could, of course, be waived by the Appellant, and he did so, conditioned on receiving regular payments on the judgment, and by specific dates. The court could not have entered its Order providing for the conditional waiver had it not been agreed to by the parties. To do so would be violative of the due process clause of the Constitution, Article II, § 4(1).

[2] The Order was obtained by Appellant under 8 TTC § 55 which requires the court to

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“determine the fastest manner in which the debtor can reasonably pay a judgment” Nothing is said which might purport to give the court authority to forgive any part of the judgment obligation.

Appellee urges that 8 TTC § 55 authorizes the court to “modify” an Order in Aid of Judgment. In the ordinary situation there is no doubt the court can modify a schedule of payments, both as to time and amount, as changed circumstances and justice may require. Aside from the fact that neither Appellee nor the court took any steps to “modify” the Order, this is not the typical situation. Only Appellant held the right to waive any part of the obligation – neither Appellee nor the court had the power to do so.

Appellee’s failure to make payments at the times ordered automatically brought to bear the final sentence of the Order: “then the judgment shall bear interest as provided in the judgment.”

Appellant was entitled to enforce the judgment. It was error to refuse to do so.

Reversed and remanded to the trial court for further proceedings consistent with the views expressed herein.

Michael A. White for Appellant
Joseph C. Lehman for Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

KABUA KABUA,

Petitioner,

S.CT. CIVIL NO. 85-05
(Original action concerning
High Ct. No. 1984-098, 102 and -
108)

**HIGH COURT OF THE REPUBLIC
OF THE MARSHALL ISLANDS,**

Respondent,

**IMADA KABUA AND KWAJALEIN
ATOLL CORPORATION,**

Real Parties
in Interest.

OPINION AND ORDER

MARCH 17, 1986

BURNETT, C.J.
LANHAM, A.J.

SUMMARY:

Petitioners filed an original action in the Supreme Court seeking Writs of Prohibition and Mandamus directed to the High Court. The Supreme Court declined to issue a writ because the petition sought relief from an interlocutory order and petitioners, if prejudiced, had a remedy by appeal from a final judgment.

DIGEST:

1. **CLERKS OF COURTS – Duties – Performance:** Complaints concerning failure of or refusal by the Clerk of Courts to accept a Notice of Appeal or to certify the record should be presented to the Supreme Court by a motion, supported by affidavit and exhibits, and proposed order.

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2. WRITS, EXTRAORDINARY – *Power to Issue*: The power of the Supreme Court to issue writs is not unlimited or without boundaries, but is limited to cases where they are necessary to aid its appellate or other jurisdiction or to enforce the Constitution.
3. WRITS, EXTRAORDINARY – *Requirements – Matters of Public Importance*: Writs of *mandamus* and prohibition are discretionary and generally will be issued only in cases of public importance or of exceptional character or to enforce a prior order of the court.
4. WRITS, EXTRAORDINARY – *Same – No Other Adequate Remedy*: Writs of *mandamus* and prohibition may not be used as substitutes for appeal. Further, they generally will not be issued unless there is no adequate remedy available on appeal.
5. WRITS, EXTRAORDINARY – *Same – Same*: The party seeking a writ of *mandamus* or prohibition must show there is no other means of obtaining the desired relief and has the burden of showing his right to the writ is clear and indisputable.
6. WRITS, EXTRAORDINARY – *Writs In Lieu of Interlocutory Appeals Disfavored*: Wise and practical policies dictate that requirements for obtaining writs directed against interlocutory orders are even stricter.

OPINION OF THE COURT BY LANHAM, C.J.

This is a petition filed on behalf of Kabua Kabua, the Petitioner herein, requesting that this Court issue a Writ of Mandamus and/or a Writ of Prohibition directing the High Court of the Republic of the Marshall Islands, Respondent in this case, to vacate the orders issued by that court which disqualify Attorney Benjamin M. Abrams from participating as attorney for Petitioner Kabua Kabua in the cases of *Kabua Kabua v. Imada Kabua*, Civil No. 1984-98, *Kabua Kabua v. Kwajalein Atoll Corporation*, Civil No. 1984-102, and in *In Re The Kwajalein War Claim*, Civil No. 1984-88. These disqualification orders were issued because of the trial court's finding that Attorney Abrams had made unauthorized communications with an opposing party, Imada Kabua, to that party's detriment. If granted, as requested these Writs would in effect reinstate Attorney Abrams as attorney for Petitioner Kabua in these cases.

Filed with this petition was a "Memorandum In Support of Petition" which states that the "July 29 Transcript" was attached to the Petition as Exhibit 2. If so, it is not part of the record or

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file submitted to the Court. Also thirteen other exhibits referred to in the Petition are not part of the record, including a “September 9 Transcript.” The Petition also designates an “Affidavit of Counsel” as being part of the Petition, but that also is not in the record or file transmitted to this Court.

The memorandum accompanying the Petition states that the Chief Justice of the High Court issued the order disqualifying Attorney Abrams in Civil No. 1984-98 after a July 29, 1985, hearing and on August 13, 1985, Attorney Allan B. Burdick (one of Petitioners present counsel) filed an interlocutory appeal from that disqualification order and, pursuant to the provisions of Rule 8(a) of the Appellate Rules of Procedure regulating stays of judgments pending appeals, moved the High Court for a stay of execution of the order disqualifying Attorney Abrams. After hearing on the motion to stay held on September 9, 1985, it is stated that the Chief Justice of the High Court denied the motion to stay, and “purported” to strike Petitioner’s appeal, characterizing it as a “sham.” It is also claimed in the memorandum that as early as September 9, 1985, Petitioner’s lead attorney (Mr. Cushnie) requested the Clerk of Court to certify the record in Civil No. 1984-98, insofar as it relates to the motion to disqualify Attorney Abrams, and that to date that record has not been certified.

Subsequent motions to disqualify Attorney Abrams as Kabua Kabua’s attorney in Civil No. 1984-102 and 1984-88 were granted on November 7, 1985 and October 24, 1984, according to the memorandum, on the same grounds.

[1] We view this Petition as an original petition before this Court requesting that a Writ of Mandamus or Prohibition be issued by this Court directing the High court to vacate its orders disqualifying Attorney Benjamin Abrams from these cases, and view that as being the only issue before this Court in this Petition. While Petitioner does, in his memoranda, complain about the “purported” striking of a Notice of Appeal by the High Court, and the failure of the Clerk of Court to certify and forward to this Court the record in Civil No. 1984-98, no relief is requested by Petitioner for these alleged matters, so this Court will take no action thereon. We do hold, however, that, until otherwise provided, complaints concerning any failure or refusal on the part

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of the Clerk of Court to accept a Notice of Appeal or to certify the record should be presented to this Court by a Motion accompanied by an affidavit and supporting exhibits or orders and a proposed form of the order which it is requested that this Court issue.

We deny the Petition for a Writ of Mandamus and/or Prohibition, and Petitioner's request that Attorney Abrams be reinstated as attorney for Petitioner Kabua Kabua.

[2] Article VI of the Constitution vests the judicial power of the Republic of the Marshall Islands in the Supreme Court, a High Court and other designated courts with the Supreme court having the appellate jurisdiction and the final authority to adjudicate all cases and controversies properly brought before it. Article VI, § 1(2) of the Constitution, and § 63 of P.L. 1983-18 (The Judiciary Act of 1983) confers upon the courts the power to issue "all writs . . . not inconsistent with law" so long as such writs are "required for the administration of justice and the enforcement of this Constitution." The power of the Supreme Court to issue writs is, therefore, not unlimited or without boundaries, but is limited to cases where they are necessary to aid in its appellate (Article VI, § 2, Constitution) or other (Article VI, §§ 2(c) and (3), Constitution) jurisdiction or to enforce the Constitution.

[3-6] Additionally, the writs of *mandamus* and prohibition are discretionary writs and the Supreme Court will, as a general rule, issue such writs only in cases of public importance or of exceptional character (*Ex Parte Fahey*, 332 U.S. 258, 67 S.Ct. 1558 (1947); *Ex Parte Peru*, 318 U.S. 578, 63 S.Ct. 793 (1943); *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 90 S.Ct. 1648 (1970)) or to enforce its own prior orders. Further, as these writs are extraordinary remedies they must be reserved for really extraordinary cases, and not as substitutes for appeals. (*Ex Parte Fahey, supra*). A further consideration is that since these writs savor of the nature of equitable remedies they generally will not be issued unless there is no adequate remedy available on appeal. (*Ex Parte Fahey, supra; Ex Parte Peru, supra*). The party seeking these writs must show that there is no other means of obtaining the relief he desires and generally must bear the burden of showing that his right to issuance of the writ is "clear and indisputable." (*Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665 (1978); Stein, Appellate Practice of the U.S.,

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p. 75). In cases where, as here, the petition for such extraordinary writs is directed against an interlocutory order issued by a judge the requirement for obtaining these writs is even stricter, because we must commence with the general rule that interlocutory orders are not appealable (*Cobbledick v. U.S.*, 309 U.S. 323, 60 S.Ct. 540 (1940); *In Re Continental Inv. Corp.*, 637 F.2d 1 (1980) for three reasons:

- (1) The strong legislative policy against piecemeal appeals;
- (2) The policy against obstructing ongoing judicial proceedings by interlocutory appeals, and
- (3) The unfortunate result that when such a writ is directed against the trial judge it makes that judge a party litigant whereby he must seek his own counsel and prepare his own defense. (*Ex Parte Fahey, supra*).

These are wise and practical policies this Court must consider in determining this Petition.

We have carefully considered the Petitioner's Petition and Memorandum and find that the Petition is from an interlocutory order of the High Court in a matter which can be brought before this Court on appeal should Petitioner lose in the trial court and elect to appeal his case to the Supreme Court. (*In Re Continental Inv. Corp., supra*). Petitioner therefore has an adequate remedy by means of appeal if the disqualification complained of was erroneous and prejudicial, and cannot petition for an extraordinary writ of *mandamus* or prohibition in the absence of a showing that the issue raised by this Petition is of public importance or involves exceptional circumstances. The order which the Petition asks us to vacate was issued by the High Court Chief Justice after motion and hearing, and involved questions well within the discretion and jurisdiction of that court. Although we do not have the transcript of the hearing, it appears from Petitioner's memorandum that the factual issues presented at the hearing were not unusual in a contest involving the disqualification of an attorney. We, therefore, conclude that the Petitioner has failed to show any entitlement to either of these extraordinary writs under the criteria discussed in this opinion.

The Petition is, accordingly, DENIED.

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David Lowe and Roy A. Vitousek III for Real Parties in Interest
Douglas F. Cushnie and Alan B. Burdick for Petitioner

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

IMADA KABUA, *et al.*,

Petitioners

S.CT. CIVIL NO. 86-06
(Original Action)

-v-

**HIGH COURT CHIEF JUSTICE
TENNEKONE, *et al.*,**

Respondents.

ORDER DENYING PETITION FOR WRIT OF PROHIBITION

MARCH 20, 1986

BURNETT, C.J.
LANHAM, A.J.

SUMMARY:

A petition for a Writ of Prohibition was filed with the Supreme Court to prohibit Respondents, Justice Tennekone of the High Court, Presiding Judge Koenig of the Kwajalein Community Court, and the High Court and Community Court, from allowing prosecutions to proceed against petitioners based on charges brought by law personnel on Kwajalein Missile Range. The petition was denied because the respondent courts had neither acted in excess of their jurisdiction, nor yet had acted at all, and the right to appeal would provide an adequate remedy.

DIGEST:

1. **WRITS, EXTRAORDINARY – *Requirements – In General:*** In order for the Court to issue these prerogative, discretionary writs, the petitioner must show that respondent is about to exercise judicial power, that the exercise of such power is unauthorized by law, and that it would result in injury for which there is no other adequate remedy.

2. **WRITS, EXTRAORDINARY – *Power to Issue:*** The power to issue writs is discretionary and it is sparingly exercised.

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OPINION OF THE COURT BY BURNETT, C.J.

This is an original action in this court, brought by an undated Petition for Writ of Prohibition, received by the Chief Justice on March 16, 1986. It asks that the Respondents, Justice Tennekone of the High Court, Presiding Judge Koenig of the Kwajalein Community Court, and the High Court and Community Court be prohibited from allowing prosecutions to proceed against petitioners based on charges brought by law personnel on Kwajalein Missile Range.

Petitioners are alleged to be, with a single exception, not relevant to this proceeding, holders of land rights within Kwajalein atoll. Each (with the exception of four charged with more serious offenses) has been charged with violations of Marshall Islands trespass law. The four have been charged with interference with a public officer and assault and battery.

The contention is that KMR has no present authority to so charge; since the Interim Use Agreement had expired, Petitioners had every right to return to the land.

The question of issuance, or denial, of Prohibition has been considered previously, frequently by the Courts of the United States, as well as by the High Court of the Trust Territory.

[1] Wherever, and whenever, the matter of the great prerogative writs has been raised, the answer has been the same:

“the petitioner must show that the respondent is about to exercise judicial power, that the exercise of such power is unauthorized by law, and that it would result in injury for which there is no other adequate remedy” *Arriola, et al. v. Robert A. Hefner*, 7 TTR 437 (App. Div. 1976).

[2] To the same effect, (and, perhaps more fitting here) *see Lajuan v. Makroro*, 6 TTR 209, 213 (App. Div. 1972), where it is said, citing *Parr v. United States*, 351 U.S. 513, 76 S.Ct. 912, 917 (1956):

“Such writs may go only in aid of appellate jurisdiction The power to issue them is discretionary and it is sparingly exercised This is not a case where a

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court has exceeded or refused to exercise its jurisdiction, nor one where appellate review will be defeated if the writ does not issue.”

Here there is nothing to show that the respondent courts have acted in excess of their jurisdiction, nor does it appear, from the Petition, that they have been yet given an opportunity to determine the question, or have acted in any manner.

We cannot assume that the trial courts will act improperly. If there should be error in the trial process, it can be dealt with through ordinary appellate procedure. Nothing is shown here to warrant departure from the procedure. In short, the right to appeal provides an adequate remedy; there is thus no need to the exceptional remedy afforded by prohibition.

For our view as to the use of these prerogative, discretionary, writs, see our opinion in *Kabua v. High Court, et al. (2)*, 1 MILR (Rev.) 27, 30 (Mar 17, 1986).

Accordingly, we must, and hereby do, DENY this Petition.

George M. Allen for Petitioners

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

REPUBLIC OF THE MARSHALL ISLANDS

S.CT. CRIMINAL NO. 84-01
(High Ct. Crim. No. 1984-007)

Respondent,

-v-

JURIA MENKE,

Appellant.

APPEAL FROM THE HIGH COURT

JULY 24, 1986

BURNETT, C.J.

TENNEKONE, A.J., and KONDO, A.J. (sitting by designation)

SUMMARY:

High Court decision affirmed. The Supreme Court rejected Appellant's two assignments of error. Appellant did not object to the admission of self-incriminating statements at trial, and Appellant did not renew his objection to the prosecution's expert when the trial court suggested to the prosecutor that he proceed with direct examination.

DIGEST:

1. APPEAL AND ERROR – *Assignment of Errors – Objections*: Counsel has a duty to protect his record by timely objection is one such rule.
2. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of fact*: Findings of fact of the High Court cannot be set aside unless clearly erroneous, P.L. 1983-18.
3. APPEAL AND ERROR – *Review – Harmless Error*: To warrant appellate intervention, error in admitting or excluding evidence, or in any ruling or order of the court must be so prejudicial to the rights of a party as to be inconsistent with substantial justice, 6 TTC Section 351.

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PER CURIAM:

This appeal is taken from a jury verdict finding Juria Menke guilty of Murder in the second degree.

Two assignments of error were asserted in appellant's brief and argued on hearing in this Court; neither need long detain us.

Appellant claims error in the Trial Court's having overruled [an] objection to admission of his statements against self interest, first because he was not competent to make them, and then that they were not corroborated.

No question was raised on trial as to appellant's competence at the time his self-incriminating statements were made, nor as to their corroboration. Consequently, nothing is preserved for our review. We have, nevertheless, examined the record; we find nothing to warrant questioning appellant's competence and find ample evidence to corroborate his statements.

Appellant's final assignment of error is in the admission of expert testimony over objection by defense counsel. In this, counsel misstates the facts as to what transpired on trial.

At an early stage in examination of the witness, trial counsel objected on grounds that the prosecution had not laid a proper foundation for the testimony. Counsel was permitted to *voir dire*, after which he renewed his objection. While not ruling directly on the objection, the trial court suggested that prosecution continue direct examination. The objection was not renewed at any time, either following conclusion of direct examination or extended cross examination, thus no error is preserved for our review.

[1-3] Certain rules of appellate review are so universally followed, and so frequently stated, as to require no supporting citation. That counsel has a duty to protect his record by timely objection is one such rule. Findings of fact of the High Court cannot be set aside unless clearly erroneous, P.L. 1983-18, Section 66. And, to warrant appellate intervention, error in admitting or excluding evidence, or in any ruling or order of the court must be so prejudicial to the rights of a party as to be inconsistent with substantial justice, 6 TTC Section 351.

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In an exercise of caution, given the serious nature of the offense, we have carefully examined the entire record. We find no error.

We affirm.

Joseph C. Lehman, Assistant Public Defender, for Appellant
Gregory J. Danz, Attorney General, for Respondent

ED'S NOTE: THIS OPINION APPEARS IN THE FILE UNSIGNED.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

REPUBLIC OF THE MARSHALL ISLANDS,

S.CT. CRIMINAL No. 85-02
(High Ct. Crim. No. 1984-023)

Appellee,

-v-

LEJOLAN KABUA,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

JULY 5, 1986

BURNETT, C.J.

TENNEKONE, A.J., and KONDO, A.J. (sitting by designation)

SUMMARY:

The Supreme Court set aside a conviction for sodomy and affirmed convictions on kidnaping and assault and battery with a dangerous weapon. Also, the Court ruled the High Court is not authorized to suspend sentence on one count until the sentence on another has been served; the High Court erred in finding the defendant guilty of multiple offenses from what was a single act; and sodomy, as defined in 11 TTC § 1303, does not include digital manipulation.

DIGEST:

1. CRIMINAL LAW AND PROCEDURE – *sodomy*: The Sodomy statute, 11 TTC § 1303, which defines sodomy as “sexual relations of an unnatural manner” and proscribes, as included within the term sodomy, “any and all parts of the sometimes abominable and detestable crime against nature” is sufficient to withstand constitutional challenge.
2. CRIMINAL LAW AND PROCEDURE – *Sentencing*: The High Court is not authorized to suspend sentence on one count until the sentence on another count is served.
3. CRIMINAL LAW AND PROCEDURE – *Convictions*: The High Court erred in finding the defendant guilty of multiple offenses, Sodomy and Assault and Battery, from what was, in

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fact, a single act.

4. APPEAL AND ERROR – *Questions Reviewable – Questions of Law*: The Supreme Court is free to consider questions of law not considered in briefs or argument. The Court is free to recognize clear error.

5. CRIMINAL LAW AND PROCEDURE – *sodomy*: The Sodomy statute, 11 TTC § 1303, which defines sodomy as “sexual relations of an unnatural manner” and proscribes, as included within the term sodomy, “any and all parts of the sometimes abominable and detestable crime against nature” does not include digital manipulation.

OPINION OF THE COURT BY BURNETT, C.J.

This appeal is taken from judgment in the High Court, following a jury trial finding Appellant Lejolan Kabua guilty of Kidnaping, 11 TTC 801, Sodomy, 11 TTC 1303, and Assault and Battery with a Dangerous Weapon, 11 TTC 204. He was sentenced to a term of imprisonment of ten (10) years on the Kidnaping charge. The court suspended imposition of sentence on the remaining counts until the full ten (10) years imposed had been served.

Notice of appeal was filed, asserting seven statements of error; of these only two were briefed or argued – a third was briefed, though not included in the questions submitted.

[1] We consider, briefly, the question not included in the statement of error, that of the constitutionality of the Sodomy statute, 11 TTC § 1303. The Statute refers to “sexual relations of an unnatural manner,” and later, proscribes, as included within the term of Sodomy, “any and all parts of the sometimes abominable and detestable crime against nature.”

All reported challenges to the language, as unconstitutional, have been regularly rejected, 70 Am Jur 2d, Sodomy § 11, the description being accepted as constitutionally sufficient in terms of due process.

We find that the description of the offense, in terms known to the Common Law, 70 Am Jur 2d, is sufficient to withstand constitutional challenge.

The facts of the case are relatively simple.

Appellant was observed, by two prosecution witnesses, as he arrived at the Lanwi

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residential area. Both of these recognized, and identified, Appellant, who went to the house, asked for George Lanwi (Pr. witness # 1), and was told he was not available. A second inquiry brought the same response.

Shortly thereafter, both Lanwi and the second Prosecution witness, Atra Lang, observed Appellant carrying the victim away. After sending a boy to the house to check on whether the girl was there, both Lanwi and Atra gave chase. She was found alone on the beach, some distance away, naked and bleeding from her privates.

The child was medically examined, and found to have a “superficial tear and a bruise in her vaginal area.” The only suggestion as to what caused the injury was medical testimony that it was caused by an object “thin enough to enter the vaginal tract .”

The child’s mother was permitted to testify as to what the child had told her, identifying Appellant, and saying that he had done it with this hand.”

This testimony was objected to, upon the principal ground that the trial court refused to examine the child to determine her competency as a witness. The trial court held that it was admissible as an “excited utterance,” and that no test of competency as a witness was required. We agree.

Even if we did not agree with the trial court’s view, we would necessarily say that, if it were error, such error was harmless. Appellant was fully identified by two witnesses (their credibility unchallenged).

We must address further issues, not spoken to in either Appellant’s nor Appellee’s submissions.

[2] We first consider whether the court was authorized to suspend sentence at the counts charging Sodomy and Assault and Battery with a Dangerous Weapon, until all time sentenced on Count I (ten years) had been served.

The only authorization given, by law, for suspended imposition of sentence, is found in 11 TTC § 1460. The clear import is that suspended imposition is for the purpose of granting probation for a period of time, following which the defendant may be discharged with vacation of

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his conviction.

“§ 1460 Probation - (1) . . . the court . . . may suspend the imposition of sentence . . . for a period of time, not exceeding the maximum term of sentence which may be imposed . . . and shall place the person on probation . . .” (emphasis added)

The maximum sentence for Sodomy is ten years, thus even in an appropriate situation, the suspension of imposition (had probation been granted) could not have exceeded that term.

This is obviously not the situation here. We can only speculate as to the court’s reason for deferring sentence. The only reason that comes to mind is that he wished to insure that Appellant be precluded from any possibility of parole. This is not a proper objective – the court’s responsibility, and jurisdiction, ends when sentence is pronounced, (or should be pronounced) *See* 5 Wharton’s Cr. Law and Proc., Sec. 2179.

[3] Next, it seems clear that both Sodomy and Assault and Battery charges arise from a single act, that is, from whatever the instrument was used to produce harm to the victim. It was, we think, error to charge, and find guilt, of “multiple offense” for what was, in fact, a single act. 5 Wharton’s Cr. Law and Proc., Sec. 2189. 22 C.J.S. Criminal Law § 9(1). *See also, Bell v. U.S.*, 349 U.S. 81 (S.Ct. 1955) “Several criminal offenses cannot be carved out of what is, in fact, one transaction.”

It follows that Appellant could not properly have been convicted of two different crimes, both arising from the same act; one of the two counts must fall.

[4] We should note that both the prior question, and that which follows, while not considered in briefs or argument, may still be considered by this court. We are necessarily free to recognize clear error. As to the multiplication of charges, we have no doubt that this was wrong, and that we should correct it.

[5] Appellant’s contention, as to the unconstitutionality of the Sodomy charge, might better have been directed to question whether the act charged was, in fact, Sodomy.

The most that can be said, in this case, is that accused/appellant used his finger on this little girl. Abhorrent as it may be, the question remains – is that Sodomy?

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There is little light to be found in the “variations” found in state statutes as to what constitutes “Sodomy.” Beginning with original definitions, we start with Black’s, which defines, first, “an unnatural offense: the infamous crime against nature, i.e., Sodomy or buggery. And then; “Sodomy. A carnal copulation by human beings with each other against nature”

The varied interpretations of state statutes have turned on whether “Sodomy” has been, by court interpretation, extended to include *per os* acts in addition to the Common Law *per annum*. Neither of these concern us here.

“In the absence of statute, there is a conflict of authority whether a penetration other than *per anum* constitutes the crime of Sodomy” Wharton’s Cr. Law and Proc., Sec. 752.

There is nothing in our statute which would extend the offense beyond the common law. To prohibit “sexual relations of an unnatural manner” says no more than to prohibit an “abominable and detestable crime against nature.”

Our statute is, unfortunately, limited. Where the common law has been extended, by statute, it has been done so by explicit prohibition. Other Jurisdictions have been more solicitous of innocent victims. Digital manipulation, however decried, has never been found to be within the definition of ‘Sodomy,’ unless specifically made so by statute. Nor has the use of a foreign object (i.e., “non body” intrusion), been so held.

In *State v. Anthony*, (Ore.) 169 P.2d 587, the defendant was charged with having used a “foreign” object. The act was found not to be within those parts of a statute prohibiting Sodomy or the crime against nature. The portion of the statute which prohibited “acts of sexual perversity,” was made applicable. Our statute contains no language appropriate to this situation. We conclude that Appellant’s conduct did not constitute Sodomy, within the terms of 11 TTC § 1303. Accordingly, the Sodomy conviction most fall. We then consider the charge of Kidnaping (11 TTC 801). The primary claim by Appellant is that there was not a sufficient period of restraint to support the charge, i.e., that there was not a physical restraint for an appreciable period; citing *Chatwin v. United States*, 326 U.S. 455 (1946).

Appellant misses the main point, that what is an appreciable period is not the same in all

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cases. The primary question is whether the restraint is of such duration as to increase the threat of harm to the victim – here it obviously was. We find nothing to suggest that the Kidnaping was merely “incidental” to another offense, and thus subsumed. *See*, for example, *Yescas v. People*, 593 P2d 358 (Colo. 1979). Also, *Beck v. United States*, 402 A. 2d 418 (1979 D.C. App).

We, therefore, affirm the conviction of Kidnaping (on which sentence was passed); reverse and set aside conviction of Sodomy; and affirm conviction of Assault and Battery with a Dangerous Weapon.

Since sentence must be pronounced in open court, we remand so that the Appellant may be sentenced on his finding of guilt of Assault and Battery with a Dangerous weapon in accord with 11 TTC 204.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

REPUBLIC OF THE MARSHALL ISLANDS

S.CT. CRIMINAL No. 85-01
(High Ct. Crim. No. 1985-023)

Appellee,

-v-

TEEN LANGLEY,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

JULY 22, 1986

BURNETT, C.J.

TENNEKONE, A.J., and KONDO, A.J. (sitting by designation)

SUMMARY:

The Supreme Court affirmed jury findings of guilty for attempted murder in the second degree, assault and battery with a dangerous weapon, and rape. In affirming the jury's findings, the Supreme Court repeated the often stated rules (i) an appellate court will not set aside findings of a trial court unless they are clearly erroneous and (ii) an appellate court will not re-weigh evidence. The Supreme Court also ruled that where there is overwhelming evidence to support the verdict rendered, the High Court's failure to include in the jury instructions a lesser included offense is not reversible error and that where the High Court did not impose the maximum sentences authorized by law nor make the sentences imposed to run consecutively, the High Court's failure to grant the defendant credit for pre-sentence detention, in the absence of a statute requiring such a credit, was not error.

DIGEST:

1. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of fact:* An appellate court will not set aside findings of fact of a trial court unless they are “clearly erroneous.”
2. APPEAL AND ERROR – *Review – Questions of Fact:* An appellate court does not

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weigh the evidence.

3. CRIMINAL LAW AND PROCEDURE – *Jury Instructions – Lesser Included Offense*: Where there is overwhelming evidence to support the verdicts rendered, the High Court’s failure to include in the jury instructions a lesser included offense is not reversible error.

4. CRIMINAL LAW AND PROCEDURE – *Sentencing*: Where the trial court did not impose the maximum sentences authorized by law nor make the sentences imposed to run consecutively, the trial court’s failure to grant the defendant credit for pre-sentence detention, in the absence of a statute requiring such a credit, was not error.

OPINION OF THE COURT BY BURNETT, C.J.

Teen Langley was charged in a three-count information with the offenses of Attempted Murder in the Second Degree (Count One) 11 TTC Section 4 (2) (b) and Section 752, Assault and Battery With a Dangerous Weapon (Count Two), 11 TTC Section 204, and Rape (Count Three), 11 TTC Section 1302. Count Three was severed for purposes of trial; he brought this appeal from jury verdicts finding him guilty on all three counts.

Appellant’s first assignment of error, that the weight of the evidence did not support the verdict on any of the three charges, is a true exercise in futility.

[1] We are prohibited, by Section 66 of the Judiciary Act, PL 1983-18, from setting aside findings of fact of the High Court unless they are “clearly erroneous.” This provision does no more than set out the rule universally followed by appellate courts:

“[W]here the evidence is in substantial conflict, the finding of the judge or jury on issues of fact will not be disturbed.” *TTPI vs. Macaranas*, 7 TTR 350, 353 (App. Div. 1976)

[2] It has even been said that if there is any evidence to support the jury’s findings, the verdict must stand. In short, an appellate court does not weigh the evidence.

The law and the rule are founded in reason. A printed record is a poor substitute for the opportunity given a jury to observe witnesses, their demeanor, and to evaluate their credibility.

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We will interfere only where there is clear error; we find none here.

We consider first this assignment of error in relation to Counts One and Two, in the first trial.

A brief summary of the events taking place on the night of January 17 and early hours of January 12, 1985, as disclosed by the record, will disclose the overwhelming nature of the evidence produced against the appellant before the jury.

I.

In order to develop the proper chronology, it is necessary to begin with Count Two. On the night of January 17, a number of people, including the victim Mike Musgrave, Elenor Mack (victim in Count One) and appellant Langley together with three Gilbertese friends, were drinking in the Rainbow bar. Musgrave testified that he did not know Langley or his friends, while Langley claimed that he had met Musgrave at least twice previously. In any event, there was no evidence of any conflict among them while inside the Bar.

At about midnight, Musgrave left the Bar. Immediately thereafter he was struck from behind and knocked to the ground where he was subjected to a continuing attack, being kicked repeatedly. While trying to rise, he received one final kick just below his left eye, resulting in what medical testimony referred to as a “blowout” fracture, rupture of one of two sinuses. He was unable to identify his assailants.

Two witnesses testified that the final kick was delivered by Langley following a run from approximately 10 feet away. According to one, Langley was wearing grey tennis shoes.

Langley was the sole defense witness on Count Two. According to his story, he left the Bar about 11:45 and returned around midnight; at the time he left his car, Musgrave was already on the ground, being kicked by Langley’s Gilbertese friends. He denies ever kicking Musgrave, and insists that he played the role of a peacemaker, stopping the “fight” and getting his troublesome friends into the car.

Obviously the jury found the witnesses for the prosecution to be more credible, and chose

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to believe them.

The crux of his argument as to the evidence is Langley's assertion that a tennis shoe cannot be termed a "dangerous weapon."

The Court instructed the jury that "a dangerous weapon is a weapon likely, in the natural course of things, to produce death or great harm, when used in the manner in which it was used in each particular case." This instruction is derived from Trust Territory High Court case law, and is consistent with holdings in other jurisdictions.

Initial inquiry must be as to the nature of the determination whether a particular article is a dangerous weapon, or not. Is the question one of law, or of fact?

As the manner of use enters into the consideration as well as other circumstances the question is often one of fact for the jury, but not infrequently one of law for the court." (Citations omitted.) *Black's Law Dictionary, Fourth Edition*.

It would appear that, logically, the question will frequently be a mixed one. That is, the court will determine whether, as a matter of law, the article in question is a dangerous weapon if used in the manner and under the circumstances urged by the prosecution; it would remain for the jury to determine the facts as to its use and the surrounding circumstances.

In effect, that seems to be precisely what happened here. The jury found, as fact, that Langley delivered a vicious kick to the eye of a helpless victim; the shoe, used in that manner and under those circumstances, could well be thought likely to produce "great harm." We are unable to find such error as to warrant "appellate intervention."

II.

Appellant's contention that the evidence did not support the verdict in Count One must also fail.

After Langley had collected his friends and got then into the car, he backed his car around from in front of the bar, preparatory to driving on the main road in the direction of Delap. Had he taken the short, direct, route to the road, all would have been well; instead he drove off at an

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angle to pass directly in front of a small take-out stand located about 30-35 feet from the Bar.

Prosecution witnesses testified that there were a number of people standing in a group directly in front of the take-out, and thus in the line of Langley's travel. All agreed that he was traveling at a high rate of speed. One member of the group was brushed by the car and knocked to the ground. At that time, the car "almost stopped," then went forward again, knocking Elenor Mack to the ground and driving completely over her.

Two witnesses described the manner in which Langley revved his engine to a high rpm before letting out the clutch, resulting in an immediate start at high speed. Langley agreed, on cross examination, that he started that way, to go "too quick."

Appellant makes the specious argument that "attempt" was a legal impossibility under the facts shown, since there was no evidence of an external interruption of his course of action. The answer is simple – by reason of prompt medical intervention, Elenor Mack did not die. Had she succumbed, there can be little doubt that the charge would have been murder.

Appellant next urges that there was no evidence of malice, and obviously no showing of ill will towards the victim. Clearly, no such showing was required.

Without objection, the court instructed the jury that malice is implied by an act "involving a high degree of probability that it will result in death, which act is done for a base, anti-social purpose and with a wanton disregard for human life" It would be difficult to find a more appropriate set of facts to justify a jury finding of implied malice.

To the same effect, *see Trust Territory vs. Techur*, 7 TTR 412, 421 (App. Div. 1976) , which also makes the point that the element of malice aforethought "does not necessarily require ill will toward the victim"

A further note should be made of testimony by Appellant Langley's wife, who related a visit to Elenor Mack in the hospital, prior to her evacuation to Hawaii, and Mack's purported statement that she was at fault. Even if the jury had believed her, such a statement was conclusory only, and had no probative value.

Appellant's second assignment of error, that the jury should have been instructed as to

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lesser included offenses, is somewhat more difficult of resolution. Certainly we may all agree that no fault could be found with a trial court that, in an exercise of caution, so instructed as a matter of course; in a close case, he probably would be required to do so.

We examine first the question whether counsel preserved this assignment of error for our review.

It is clear that the desired instructions were not submitted in written form. Prior to closing argument, counsel raised the question for the first time, still without appropriate instructions prepared for the court's consideration. Then, following the court's reading of instructions to the jury, counsel said: "Your Honor, we approve the instructions as read."

Did counsel waive his objection? We are inclined to believe that he did, but we nevertheless consider the issue in order to determine whether the court's decision not to so instruct, *sua sponte*, was such egregious error as to warrant our correction. 6 TTC Section 351.

It is interesting to note that the lesser included offense doctrine was developed at common law "to assist the prosecution in cases where the evidence failed to establish some element of the offense originally charged . . ." *Keeble vs. United States*, 93 S.Ct 1993 (1973).

The right of a defendant, in a federal case, to a lesser included instruction is granted by Rule 31 (c) of the Federal Rules of Criminal Procedure. The Court in *Keeble, supra*, went on to say that it had never decided whether the Due Process Clause of the Fifth Amendment guarantees a defendant the right to the lesser included instruction. Thus, the claimed right rests on rule, rather than being grounded on constitutional values.

See also Pilon vs. Bordenkircher 593 F.2d 264 (1979) where it is said that, under Rule 31 (c) F.R.Cr.P., "The Supreme Court has always held that there must be evidence which would permit the jury to rationally find the defendant guilty of the lesser included offense and acquit him on the greater offense before he is entitled to the lesser included offense instruction." (Citation omitted). To the same effect, *see* C. Wright and A. Miller, *Federal Practice & Procedure: Criminal* Section 515, p. 372.

Those states which mandate the inclusion of a lesser included offense charge to the jury

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generally do so on the basis of a specific rule or statute. We have no such rule or statute on which to rely.

[3] It is clear, of course, that the evidence would have supported a conviction of the lesser offenses. It is equally clear that, given the overwhelming evidence on which the verdicts were based, such instruction would have been nothing more than an invitation to the jury to show mercy. This is not a permissible basis to justify such an instruction. *Kelly vs. United States*, 370 F2d 227 (1966).

Appellant's third assignment of error, applicable to all three counts, is the Court's denial of credit for pre-sentence detention.

[4] Langley was in custody for 116 days prior to sentencing. On Count One he was sentenced to 30 years, 20 of which were suspended. On Count Two, he received 5 years, with 4 suspended. On Count Three, 20 years, with 10 suspended. All three sentences run concurrently. The basic sentence on Counts One and Two are statutory maximums. Count Three is 5 years less than the maximum. In each, of course, substantial portions were suspended, so that Langley faces only a total of 10 years imprisonment.

Those cases cited by Appellant are from jurisdictions having a statutory basis for the desired credit, and generally deal with situations where the statute mandates a maximum and minimum. One, *Reanier vs. Smith*, Wash., 517 P2d 949, concerned discrimination under such a statutory scheme. We have no such statute here.

In point of fact, Langley did not receive the maximum sentence authorized by law. His sentences could have been made to run consecutively, in which case his claim might have more validity.

In this case, and on these facts, we are not disposed to go in search of a constitutional issue which is nebulous at best.

III.

In the second trial, of Count Three, the only error assigned is that the weight of the

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evidence did not support the verdict.

As we have said repeatedly, we do not weight the evidence, and we cannot upset a jury's findings unless they are clearly erroneous.

Here there is ample evidence to support the finding of guilt. Langley's only complaint (not judicially cognizable) is that the jury chose not to believe him.

Having found no reversible error as to any of the three Counts:

We Affirm.

Joseph C. Lehman, Assistant Public Defender, for Appellant
Witten T. Philippo, Assistant Attorney-General for Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**REPUBLIC OF THE MARSHALL
ISLANDS,**

S.CT. CIVIL NO. 86-09
(High Ct. Civil No. 1986-044)

Plaintiff-Appellee,

**LUJANA BALOS, HANDEL DRIBO,
KAJILE DRIBO, LIEBRO SAMUEL,
ROSA STEPHEN, and JOHN DOES
1-1,000,**

Defendants-Appellants.

PER CURIAM ORDER DISMISSING APPEAL

JULY 25, 1986

BURNETT, C.J., AND LANHAM, A.J.

SUMMARY:

The Supreme Court dismissed an appeal from an Order for Possession issued by the High Court in an eminent domain proceeding because it was not an appealable final order.

DIGEST:

1. **APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination:*** An Order for Possession issued by the High Court in an eminent domain proceeding is not a final order and is not appealable.

On June 2, 1986, counsel for the above-named Defendants filed a Notice of Appeal in this matter from an Order for Possession issued by the Chief Justice of the High Court, under the authority of 10 TTC § 51-59, and from denial by the court of the Defendants' motion to amend that order.

[1] The Order appealed from is not a final order and is not appealable. (Nichols on Eminent

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Domain, §§ 26.71 and 26.73).

The Defendants have their rights to a trial to determine the proper damages to be assessed for the taking of their rights in this eminent domain proceeding, and to appeal from any final judgment on Order therein, but not at this stage.

For the foregoing reasons, it is hereby ORDERED that the Notice of Appeal is hereby dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

SAM F. LEON, *et al.*,

S.CT. CIVIL NO. 85-07
(High Ct. Civil No. 1983-73)

Plaintiffs-Appellants,

-v-

ATAJI BALOS,

Defendant-Appellee.

ORDER DISMISSING APPEAL

NOVEMBER 6, 1986

BURNETT, C.J.

SUMMARY:

The Supreme Court dismissed the appeal for appellants' failure to pay the costs of the transcript.

DIGEST:

1. **APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Pay Fees and Costs:***
Failure to timely pay the cost of the transcript of trial court proceedings is grounds for dismissal.

Appellant filed timely notice of appeal from Summary Judgment entered May 20, 1985. Simultaneously, he designated, as the record which he desired considered on appeal, the entire court file and “a transcript (if such can be obtained) of the proceeding on May 23, 1985.” It does not appear that the designation was served on appellee by appellant as required by Rule 16(a) of our appellate rules.

[1] Through some inadvertence, the Clerk did not “forthwith” notify appellant of the cost of

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the transcript, as our rules require him to do. This omission was finally cured on May 29, 1986; appellant has not responded, and I can only conclude that the appeal has been abandoned.

It is unfortunate that this matter has been so long delayed, particularly since the transcript requested (of proceedings on May 14, 1985, not May 23) could not conceivably have been of any value in appellate consideration.

The granting or denial of summary judgment rests upon consideration of opposing affidavits, made on personal knowledge and showing affirmatively that the “affiant is competent to testify to the matters stated therein.” Rule 45(e) Rules of Civil Procedure. Unsworn statements of counsel, made in the course of hearing or otherwise, can be given no weight whatever.

Accordingly, It is Ordered, that this appeal must be, and it hereby is, Dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION,**

S.CT. CIVIL NO. 86-11
(High Ct. Civil No. 1984-072)

Plaintiff-Appellee,

-v-

**TRANS ATOLL SERVICE
CORPORATION, *et al.*,**

Defendant-Appellant.

ORDER DISMISSING APPEAL

NOVEMBER 12, 1986

BURNETT, C.J.

SUMMARY:

An appeal from an order granting summary judgment was dismissed for failure of counsel to designate, as part of the record on appeal, the motion and supporting and opposing affidavits.

DIGEST:

1. **CIVIL PROCEDURE – *Motions – Summary Judgments:*** Summary judgment is determined on the basis of the record, including affidavits. Unsworn statements of counsel will not be considered.

This appeal is taken from Summary Judgment entered September 22, 1986, pursuant to Rule 45, Marshall Islands Rules of Civil Procedure. That rule requires that a motion for summary judgment be supported by affidavit(s) showing that there is no material fact in issue, and that the moving party is entitled to judgment as a matter of law.

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An opposing party may file countervailing affidavits, setting out specific facts to show that summary judgment is not appropriate. Should he be unable, within the time set for hearing, to present facts so showing, the court may order a continuance to “permit affidavits to be obtained or depositions to be taken or discovery to be had . . .” Rule 45(f).

The notice of appeal does not show that opposing affidavits were filed, and affirmatively represents that neither Appellant nor his counsel appeared at hearing.

Counsel demonstrates woeful ignorance of the Rules. He first suggests that he should be granted relief under Rule 48(a)(1), for “mistake, inadvertence, surprise, or excusable neglect.” First, this is a trial court rule, and an appropriate motion should have been filed in that court. Then, the way being open for counsel to have moved for a continuance under Rule 45(f), counsel elected not to do so, and did not even appear for hearing.

He then suggests that the court was “hasty,” and ignored counsel’s previous objections, and that a financial statement could have been presented in court, had Appellant not been ill. None of these objections were supported by affidavit as the rule requires.

[1] Summary Judgment is determined on the basis of the record. Unsworn statements of counsel are not sufficient, and are not to be considered.

Appellant’s designation of the record includes only a transcript of the September 22, 1986, and June 19, 1986, hearings. Neither could conceivably contribute to appellate consideration, particularly in the absence of a full record, including the motion and supporting affidavits.

Accordingly, there being nothing presented for appellate review, this appeal is Dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**ATKIM LEON, individually and as
Representative of the Estate of
TIEN LEON, Deceased,**

S.CT. CIVIL NO. 85-03
(High Ct. Civil No. 1984-008)

Plaintiff-Appellant,

-v-

**REPUBLIC OF THE MARSHALL
ISLANDS, JOHN IAMON and
LUDMILLA PINGOL,**

Defendants-Appellees.

APPEAL FROM THE HIGH COURT

JANUARY 27, 1987

BURNETT, C.J.,
SOLL, A.J., and TENNEKONE, A.J. (sitting by designation)

SUMMARY:

Plaintiff-Appellant appealed the trial court's dismissal of this medical malpractice case. Judgment was reversed and the case remanded to the trial court to determine the point in time when the claim of negligence in medical treatment arose. Any determination of this question must rest on the findings of fact.

DIGEST:

1. TORTS – *Government Liability Act – Scope*: The Act does not address the issue whether government has sole liability for torts of its employees. It was error to dismiss action as to employees.
2. TORTS – *Medical malpractice – Time claim accrues*: Rule established by the U.S. Supreme Court in *United States v. Kubrick*, 444 U.S. 111, 62 L.Ed. 2d 259, 100 S.Ct. 352

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(1979), that cause of action accrued when claimant knew both the existence and the cause of injury, is not inflexible. It must necessarily be applied to varying fact situations.

OPINION OF THE COURT BY BURNETT, C.J.

On January 16, 1984, Appellant filed this action to recover damages for the death of Tien Leon, alleging negligence in his medical treatment while a patient in a hospital owned and operated by the Republic of the Marshall Islands. Appellees Iamon and Pingol are employed as doctors in the hospital; it is alleged that decedent was under their care.

The Attorney General moved to dismiss, on behalf of all defendants, for failure to comply with the Government Liability Act 1980, P.L. 1980-19. On March 12, 1985, the trial court granted the motion and dismissed the action. This appeal followed.

I

Appellant first claims error in the dismissal as to the individually named Defendants, Iamon and Pingol. The court below did not discuss the issue, but apparently placed all three defendants on equal footing under the Liability Act.

[1] A careful reading of the Act reveals nothing whatever with respect to the liability of an employee of the government. Nowhere is there any suggestion that the government shall be solely liable for the torts of its employees; the Act simply does not address the issue.

In contrast, the Congress of the United States enacted specific legislation making action against the United States, under the Federal Tort Claims Act, 48 U.S.C. 2671 *et seq.*, the exclusive remedy where malpractice is alleged against its employees. See, for example, 10 U.S.C. 1089 as to medical personnel of the Veteran's Administration (enacted 1965). The legislative history of the act to immunize medical personnel of the armed forces makes clear that the employees were personally liable in the absence of legislation. See 1976 U.S. Code Cong. and Admin. News, page 4443. *Hernandez v. Koch*, 443 F.Supp. 347 (1978).

We hold it was clear error to dismiss as to Defendants Iamon and Pingol.

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II

Section 9 of the Act provides: “(a)ll tort and contract claims must be filed with the Attorney-General within six (6) months from the date when the claim arose.”

Death occurred on January 30, 1983. The administrative claim was filed January 9, 1984. The Attorney General urged, and the trial court held as grounds for dismissal, that compliance with § 9 of the Act is jurisdictional, and that the “claim arose” on the date of death. Appellant contends that the claim did not arise until she had the benefit of expert medical evaluation of the hospital records.

Thus, the crucial question in an action for medical malpractice is the time when that cause of action accrues. It cannot be assumed to be the date of the allegedly faulty treatment. Instead, its determination requires factual inquiry; since this matter comes to us following a dismissal, there are no facts in the record on which that determination might be made.

[2] The U.S. Supreme Court, in *United States v. Kubrick*, 444 U.S. 111, 62 L.Ed. 2d 259, 100 S.Ct. 352 (1979) cited with approval the trial court’s “concession” that the general rule throughout the lower federal courts is that a claim accrues when “the claimant has discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice,” 435 F.Supp. 166, 180 (ED Pa, 1977).

The Court of Appeals, 581 F.2d 1092 (1978), affirmed, holding that, as had the District Court, the claim did not accrue until the time claimant was informed that his treatment was improper.

The Supreme Court reversed, and stated the rule to be that the cause of action accrued when the claimant knew both the existence and the cause of injury, rather than the time when he actually learned that the injury may have resulted from medical malpractice. It thus established a standard under which one who has the facts concerning his treatment and his injury must institute prompt inquiry to determine whether that treatment was proper. In so doing, however, it pointed out the obvious – that the facts may be in the possession of the defendant and thus, at the very least, be difficult to obtain. Any such situation would, of course, toll the statute.

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We may also note that the Supreme Court was concerned about any undue extension of a 2-year limitation period under the Federal Tort Claims Act, particularly since that Act waived the immunity of the United States. That is far from our situation. Here the Government is specifically denied immunity, and has established only a 6-month limitation period for filing claims.

Clearly the *Kubrick* rule is not an inflexible one, since it must necessarily be applied to varying fact situations. *See Dubose v. Kansas City Southern Railway Co.*, 729 F.2d 1026 (5th Cir., 1984).

Any determination here as to the point in time when the claim arose must rest on a finding of the facts. That is the function of the trial court.

We do not now reach the constitutional issues raised by Appellant, since it is unnecessary to do so.

Reversed and remanded to the trial court.

Michael A. White for Plaintiff-Appellant
Philip A. Okney for Defendants-Appellees

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**AMRAM ENOS AND BINA ENOS,
individually and as legal guardians
and next friends of Moana Enos,
a minor child,**

S.C.T. CIVIL NO. 85-04
(High Ct. Civil No. 1984-007)

Plaintiffs-Appellants,

-v-

**REPUBLIC OF THE MARSHALL
ISLANDS,**

Defendant-Appellee.

APPEAL FROM THE HIGH COURT

JANUARY 29, 1987

BURNETT, C.J.

SOLL, A.J., and TENNEKONE, A.J. (sitting by designation)

SUMMARY:

The trial court dismissed a tort action for failure to comply with the six-month time requirement under § 9 of the Government Liability Act 1980, P.L. 1980-19. The Supreme Court found the six-month time limitation unconstitutional, as it unduly restricted a constitutional right guaranteed by Article I, § 4(c), which provides specifically that the Government of the Marshall Islands shall not be immune from suit. The judgment was reversed and the case remanded for trial.

DIGEST:

1. TORTS – *Government Liability Act – In General*: The Act did not grant a right to sue, but, to the contrary, severely limited the pre-existing constitutional right of an individual to seek judicial redress against the Government or its agent.
2. TORTS – *Same – Procedural Requirements*: Because of problems encountered in

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attempting to timely file a claim, the six-month time limitation in § 9 is unduly restrictive and therefore unconstitutional.

3. TORTS – *Same – Severability*: Section 9 with the six-month limitation is severable from the balance of the Act and may be stricken while leaving the balance of the Act intact.

OPINION OF THE COURT BY BURNETT, C.J.

The action below was brought in the High Court to recover for injuries sustained by the minor Plaintiff-Appellant on June 10, 1983. On motion of Appellee, the court dismissed for failure to comply with the time requirements of the Government Liability Act 1980, P.L. 1980-19.

For reasons that follow, we reverse.

It is not disputed that a formal claim was not filed with the Attorney General as required by § 7 of the Act, until January 18, 1984, thus beyond the six-month period allowed for filing by § 9.

In moving for dismissal, the Appellee urged that the timely filing of a claim is jurisdictional, and equated the Act with the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* While the trial court noted a clear distinction between the two, it nevertheless cited numerous decisions of Federal Courts in FTCA cases to support the proposition that “failure to properly and timely file the claim with the proper government official deprives the court of jurisdiction”

The nature of the distinction between the two Acts must first be made clear.

Prior to enactment of the FTCA, the government of the United States was shielded from tort claims by the doctrine of sovereign immunity. The effect of the Act was to waive that immunity, thus requiring the Courts to strictly construe its provisions, and hold them to be jurisdictional.

[1] That is not our situation. Article I, § 4 (c) of the Constitution of the Marshall Islands provides specifically that the Government of the Marshall Islands shall not be immune from suit.

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It follows that, in the absence of the Liability Act, anyone feeling himself injured by acts of the Government or its agents had clear right to seek judicial redress. Consequently, the Act did not grant a right to sue but, to the contrary, severely limited the pre-existing right held under the Constitution. As a result, any reliance on the jurisdictional standards of the FTCA is misplaced; the two Acts rest upon entirely different footing.

[2] Taken in that light, the standard which must be observed is clearly one calling for close examination of the extent to which the basic constitutional right has been limited.

The record contains nothing to evidence a reason for the § 9 requirement that a claim be filed within six months. The trial court felt “personally” that the period was “a bit short because of the vast distance between atolls and the lack of speedy transportation.” He suggested “up to a year for such filing, as paper work does not move with great speed in RepMar.” (In this instance, the ‘paper work’ either moved in the wrong direction or not at all). He nevertheless found that “six (6) months to file a claim meets constitutional muster.”

A brief review of this matter will demonstrate the problems of one wishing to make a claim particularly from an outer island (this incident occurred on Jaluit).

On August 5, 1983, Appellant Amram Enos filed a claim with the Minister of Education, routing the letter through the Secretary of Education, Chief of Secondary and Elementary Education, Supervisor Elementary Education and Principal Jaluit Atoll, with copy to the Teacher Jaluit Elementary School. We may note, parenthetically, that had he been filing in the United States under the FTCA, he would have been perfectly correct; that Act requires claims to be filed with the responsible department.

What happened to Appellant’s letter-claim is not known; he received no answer, nor was he able to obtain any guidance from anyone as to the proper office in which to file. It is not enough to say that “ignorance of the law is no excuse.” There are no lawyers in Jaluit, and few in Majuro outside of Government service; Appellant was unable to obtain counsel locally.

His counsel, from Saipan, was similarly frustrated in attempts to obtain information even as to the existence of a Liability Act, receiving no response to written inquiries directed to

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officials of the Government. That this is true is not surprising, given the position taken by Government counsel “that it would appear to be a conflict of interest” for the Attorney General or his staff to provide counsel with the requested information. Such a position is inconceivable and unconscionable.

If this is the course taken with respect to a claim arising in Jaluit, it takes little imagination to discern the difficulty which would confront a claimant from one of the more remote atolls. Compliance with the six-month requirement would be an impossibility, even if full information were available to the injured party, a proposition that is highly unlikely.

The need to carefully investigate, to determine the cause and extent of injury as well as the possibility of Government liability, is just as great for the claimant as for the Government. In addition, § 16 limits an action to the sum contained in the claim presented to the Attorney General, unless the claimant is able to meet a newly discovered evidence test, not always an easy task.

We conclude that the six months time limitation unduly restricts, and is destructive of a right guaranteed by the Constitution.

[3] The next inquiry must be whether § 9, with the six-month limitation, is severable from the balance of the Act. We conclude that it is, thus the whole Act need not fail.

Section 7 is procedural only, and contains no reference to time.

Section 15 authorizes suit after notice of rejection of his claim, in whole or in part, or three months after filing the claim under § 7.

Section 23, the Statute of Limitations, bars any suit not commenced within one year from the date of filing the claim, or within six months from notice that the claim has been rejected.

None of these sections or any of the balance of the Act are dependent on § 9. Thus, consistent with § 28, Severability, only § 9 need be stricken as unconstitutional.

Also applicable is the Limitations of Action provision of 6 TTC § 303(4) which would bar any action not commenced within two years from the date the claim arose.

Reversed and Remanded.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**REPUBLIC OF THE MARSHALL
ISLANDS,**

S.CT. CIVIL No. 87-01
(High Ct. Civil No. 1986-044)

Plaintiff-Appellee,

-v-

LUJANA BALOS, et al.,

Defendant-Appellants.

ORDER DISMISSING APPEAL

JANUARY 30, 1987

BURNETT, C.J.
LANHAM, A.J., and KONDO, A.J. (sitting by designation)

SUMMARY:

The Supreme Court declined to hear an appeal from a High Court order scheduling a trial date.

DIGEST:

1. COURTS – *Supreme Court – Jurisdiction*: Article VI, § 2(2) of the Constitution provides that an appeal lies only from a final decision of the High Court or any court.

Per Curiam: Appellants filed what counsel characterizes an “Emergency Appeal,” taken from an Order of the High Court which, in the absence of agreement of counsel, declined to vacate a previously set trial date in the captioned matter. He moves this Court to “determine this matter forthwith on January 30, 1987,” and to vacate that appearance date.

In our view, it would be inappropriate for this Court to interfere with the High Court in its case-load scheduling, nor do we have jurisdiction to do so.

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[1] Article VI, § 2(2) of the Constitution establishes the general jurisdiction of the Supreme Court. In every instance, save one, it is provided that an appeal shall lie only from a final decision of the High Court or any court. (The exception refers to questions which the High Court may remove to the Supreme Court for decision as to the interpretation or effect of the Constitution in any pending proceedings).

We are aware of no law of the Marshall Islands which would expand the general jurisdiction as so established.

Accordingly, we must deny the motion and Dismiss this appeal.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

ISAEEL LOKKON,

Plaintiff-Appellee,

-v-

NENE NAKAP,

Defendant-Appellant.

S.CT. CIVIL NO. 86-01

(High Ct. Civil No. 1982-006)

APPEAL FROM THE HIGH COURT

FEBRUARY 5, 1987

BURNETT, C.J.

TENNEKONE, A.J. and GUNATILAKA, A.J. (sitting by designation)

SUMMARY:

Defendant-Appellant appeals a High Court judgment holding Appellee Isael Lokkon to be alap on Monjelar and Monjeltak wetos. The iroij determinations found that Appellee is in the proper maternal line to hold alap position. Judgment is affirmed because Appellant, in the male line, failed to support his claim, which is contrary to the Marshallese customary pattern of matrilineal descent of rights in land.

DIGEST:

1. APPEAL AND ERROR – *Questions Reviewable – Contained in Notice*: Rule 3 of the Rules of Appellate Procedure provides that “only questions set forth in the notice of appeal or fairly comprised therein will be considered by the court.”
2. APPEAL AND ERROR – *Assignment of Errors – Objections*: When error is claimed in receipt of evidence or in any other ruling by the trial court, it is counsel’s duty to protect his record, and preserve the question for appellate review, by timely objection.
3. LAND RIGHTS – *Alap – Succession of Rights*: Marshallese customary pattern provides for matrilineal descent of land rights.

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4. CIVIL PROCEDURE – *Motions – Continuance*: A motion for continuance is addressed to the sound discretion of the court.
5. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Fact*: Findings of fact of the High Court in trials before it shall not be set aside by the Supreme Court unless clearly erroneous.

OPINION OF THE COURT BY BURNETT, C.J.

On December 6, 1985 the High Court entered its Findings of Fact, Conclusions of Law, and Judgment holding Appellee Isael Lokkon to be alap on Monjelar and Monjeltak wetos, Roi Namur, Kwajalein. This appeal was taken from that judgment.

We first review, for the benefit of Appellant, certain principles which govern the conduct of an appeal.

[1] Rule 3, Rules of Appellate Procedure, provides, in pertinent part, that “(o)nly questions set forth in the notice of appeal or fairly comprised therein will be considered by the Court.” Appellant’s brief goes far beyond the questions set forth in his notice of appeal.

[2] When error is claimed in the receipt of evidence or in any other ruling by the trial court, it is counsel’s duty to protect his record, and preserve the question for appellate review, by timely objection. Counsel will not be permitted to sit passively and permit the court to proceed, without objection, on a course later claimed to be erroneous. Again, much is contained in Appellant’s brief concerning claimed errors as to which there was no objection.

In paragraph 4 of his notice, Appellant purports to “specifically reserve the right to notice, brief, and argue issues beyond this notice of appeal” From Rule 3 and what I have said, it should be clear that no such right exists.

It follows that this Court is under no obligation to consider much of that which is now claimed to be error. In an excess of caution, we have nevertheless examined the entire record to determine whether there is such error as to be inconsistent with substantial justice. 6 TTC § 351. We find no such error, and affirm the judgment below.

With the foregoing in mind, and a word of caution to counsel as to the course to be

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followed in future appeals, we will consider those questions addressed by Appellant's brief. First, error is claimed in the court's order that the matter be referred to the iroij of each of the two wetos. The short answer is the parties stipulated to entry of that order, and the iroij determinations were received without objection. The specious suggestion that the court was in error in permitting the parties to agree must fall of its own weight. The iroij determinations found the Appellee as being in the proper, maternal, line to hold the alap position. Even if those determinations were excluded, other evidence amply sustains the Appellee's claim.

[3] It is undisputed that Appellee is in the maternal, and Appellant in the male, line. Appellant offered nothing to support a claim which is contrary to the Marshallese customary pattern of matrilineal descent of rights in land.

Appellant's objection as to consideration of the alap medals (not raised on trial) goes not to their admissibility, but rather to the weight to be accorded them. They were clearly competent evidence, and the trial court gave them little weight; no mention of them is made in the court's Findings of Fact.

This action concerned only the alap rights. The court however, also enjoined distribution of the Senior Dri Jerbal share of payments due for the use of the subject wetos. Appellant neither objected nor brought the court's attention to its error. In any event, it is not relevant to the determination which concerns us here. Nothing appears in the record to show Appellant to be the Senior Dri Jerbal; he consequently has no standing to raise the question here.

Appellant's reliance on *Korab v. Nakap*, 6 TTR 137 (Tr. Div. 1973) is misplaced, first because these wetos were not in issue in that case. Any reference to the alap of either Monjelar or Monjeltak demonstrates nothing more than that Court's predilection to dicta.

Further, neither Appellee nor anyone in privity with him was a party to *Korab*. The doctrine of *res judicata* has no application here.

With respect to any Determination made by the Land Title Officer, it should be clear that a recital in Appellant's brief is not acceptable as a substitute for evidence in the record; there is none.

MARSHALL ISLANDS, SUPREME COURT

Appellant sought a continuance so that he could obtain the testimony of his final witness who, in addition to being old, making travel difficult, had no notice of the trial date. Apparently counsel made no note of the trial date when it was announced in open court, and professed not to have received written notice from the court.

Counsel made no offer of what he intended to establish by this witness. Nevertheless, the court invited him to file a motion showing his position and to show why he was prejudiced, thus giving further opportunity to demonstrate for the court the vital evidence he wished to present. When five weeks passed with nothing being presented, the court proceeded to make its findings and conclusions, and enter judgment. It is difficult to conceive in what way the court could have shown the Appellant more consideration.

Counsel's response to this Court's inquiry was: "I just got mad and decided to wait for the appeal." This is hardly the manner in which to serve the best interests of a client; as we have seen, the appeal is too late to disclose that which has been concealed from the trial court.

Appellant now contends that he was precluded by denial of continuance from bringing Secretarial Order No. 2969 (readily found in Part 1, Volume 1, Trust Territory Code), and the records of the Land Title Determination (available in the custody of the Department of Land Management) to the attention of the court. The absent witness was not required for either purpose.

[4] A motion for continuance is addressed to the sound discretion of the court. There is no showing of an abuse of that discretion, as required to warrant appellate intervention.

[5] Based on the record before it, the trial court made extensive findings of fact. "The findings of fact of the High Court in cases tried before it shall not be set aside by the Supreme Court unless clearly erroneous" Section 66(2) P.L. No. 1983-18. (This is identical to 6 TTC § 355(2)). Those findings led to the inescapable conclusion that Appellee is the proper alap of the disputed wetos. In any event, this Court does not re-weigh the evidence.

There was no error in any relevant sense and the judgment is grounded on ample, competent, evidence. It is, therefore, Affirmed.

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Hemos A. Jack for Appellant
Michael A. White for Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

REPUBLIC OF THE MARSHALL ISLANDS,

S.CT. CRIMINAL NO. 86-03
(High Ct. Crim. No. 1986-189)

Respondent,

-v-

RALPH H. WALTZ,

Appellant,

and

REPUBLIC OF THE MARSHALL ISLANDS,

S.CT. CRIMINAL NO. 86-02
(High Ct. Crim. No. 1986-191)

Respondent,

-v-

TENSON MOLIK,

Appellant.

APPEAL FROM THE HIGH COURT

MARCH 2, 1987

BURNETT, C.J.

LANHAM, A.J., and GUNATILAKA, A.J. *pro tem* (sitting by designation)

SUMMARY:

The Supreme Court set aside findings of guilt and sentences for traffic offenses ruling that the arrests by Local Government Police without warrants were unauthorized and unlawful and that evidence obtained through these unlawful arrests was inadmissible.

DIGEST:

1. COMMON LAW – *In General*: The Supreme Court is obliged to follow common law in

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the absence of any provision in the Republic of the Marshall Islands Constitution, or in any custom or traditional practices of the Marshallese people or act of the Nitijela to the contrary (1 TTC § 103).

2. CRIMINAL LAW AND PROCEDURE – *Arrests – Without Warrants*: Arrests without warrants in felony cases were justified at common law on the theory that dangerous criminals and persons charged with heinous offenses should be incarcerated with all possible haste in the interests of public safety. Whereas the necessity for prompt on the spot action in suppressing and preventing disturbances of the public peace was the factor which justified arrest without warrant in misdemeanor cases involving breaches of the peace.

3. CRIMINAL LAW AND PROCEDURE – *Same – Same*: The rule that a private person may, without a warrant, arrest only for a felony committed, or about to be committed or renewed, in his presence, or for a misdemeanor involving a breach of the peace committed, or about to be committed or renewed, in his presence is the rule we adopt here which is in accord with the overwhelming weight of authority.

4. CONSTITUTIONAL LAW – *Unreasonable Search and Seizure – Exclusion of Evidence*: Since an unlawful arrest is a violation of Article II, Section 3(1) and (2) of the Republic of the Marshall Islands Constitution, all evidence obtained through that arrest is inadmissible (Art. II, Sec. 3(5), Republic of the Marshall Islands Constitution).

OPINION OF THE COURT BY BURNETT, C.J.

Appellant Ralph H. Waltz was arrested¹ on June 4, 1986, for failure to yield the Right of Way, a moving vehicle violation of Section 35, P.L. 1986-5, a Republic of the Marshall Islands National (or Central) government law.

Appellant Tenson Molik was arrested¹ on June 7, 1986, for Unsafe Passing in violation of Section 33, P. L. 1986-5, which is also a Republic of the Marshall Islands National (or Central) –

¹At the Supreme Court hearing of this case it was brought out that the Defendants were not fully arrested in the usual sense of the word, but rather that they were stopped and ticketed. While some jurisdictions call this an arrest, others say it is merely or “accosting” of the Defendants. However, since the statute’s (P.L. 1981-2, Sec. 51) key words provide that local police officers may in no way “enforce” central government laws, the distinction between arrest and accost and ticket is legally insignificant.

MARSHALL ISLANDS, SUPREME COURT

as distinguished from a local Majuro government – law.

Both of these arrests were effected by local Majuro government, and not National, police, and neither of the arresting officers had been deputized by the Central government’s Police Chief to enforce central government law, as required by statute.

The defendants were tried and convicted of these offenses on January 25, 1986, and were fined \$50.00 each. Defendants moved in the High Court to vacate the sentences on the ground that the arrests were unlawful, but were overruled, and have appealed.

The Defendant’s appeals involve the construction of several statutes and the determination of the common law rule relating to arrests.

P.L. 1981-2, Sec. 51, confers upon local governments the power to appoint police officers, and to give them certain powers as such, but it also contains this specific limitation on those powers:

but unless deputized by the Chief of Police for the purpose no peace officer may enforce any Central Government law

The officers who made the arrests complained of were not deputized. The plain language of this statute makes it clear that the arresting local officers in this case had no power as police officers to enforce any Central government law, including those which the Defendants are charged with violating, so if the arrests are to be sustained at all, it must be under some other legal authority.

It is suggested that such authority may exist in that such local officers still retain the same rights and powers to make arrests as do private citizens, and that under the provisions of 12 TTC Section 61 the local policemen, as do private citizens, have that power.

12 TTC § 61 reads in pertinent part:

Sec. 61. Authority to arrest without warrant. Arrest without a warrant is authorized in the following situations:

(2) Anyone in the act of committing a criminal offense may be arrested by any person present, without a warrant (Emphasis supplied).

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While we notice that the chapter of the Trust Territory Code entitled “Crimes and Punishment” (Chapter 11) does not include any traffic offenses, and Sec. 61 of Title 12 had reference to these Title 11 Crimes, and not to traffic regulation violations, (Traffic offenses being referred to in Chapter 83 as “Traffic Regulations”), we do not rest our decision solely on that point. Rather we also construe Section 61 as authorizing private citizens to make arrests only for felonies and misdemeanors involving breaches of the peace which are committed in their presence, and not to arrests for all misdemeanors and violation of ordinances. To hold otherwise would lead to public disorder and would not further the public peace.

[1] Our holding is in accord with the greater weight of judicial authority based upon the common law, which we are obliged to follow in the absence of any provision in the Republic of the Marshall Islands Constitution, or in any custom or traditional practices of the Marshallese people or act of the Nitijela to the contrary. (1 TTC § 103).

The ancient common law rights, commencing as far back as Magna Charta, have always held dear the general rule that ordinarily arrests should not be made without the sanctity of a warrant.² However, through the years some exceptions, based upon human experience, have been grudgingly allowed, as discussed in *State v. Mobley*, 240 N.C. 476, 83 S.E. 2nd. 100:

“Arrests without warrants in felony cases were justified at common law on the theory that dangerous criminals and persons charged with heinous offenses should be incarcerated with all possible haste in the interests of public safety. Whereas the necessity for prompt on the spot action in suppressing and preventing disturbances of the public peace was the factor which justified arrest without warrant in misdemeanor cases involving breaches of the peace.”

²Both arrests and searches without warrant used to be presumptively unlawful under the common law. Even today searches are still presumed to be unlawful if done without a warrant under both the Republic of the Marshall Islands law (Art. II, Sec. 3(2), Republic of the Marshall Islands Constitution) and the United States law (*Stoner v. California*, 376 US 483; *U.S. v. Jeffers*, 342 U. S. 48, and *Coolidge v. New Hampshire*, 403 U.S. 443), unless an exception to that law be shown. Also under Republic of the Marshall Islands law a seizure of a person is deemed to be unreasonable as a matter of law under certain circumstance. (Art. II, Sec. 3(3), Republic of the Marshall Islands Constitution).

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[2] But the common law went no further, and neither do we. The United States Supreme Court has set forth the rule regarding misdemeanor arrests; we understand it to be, citing the English authorities contained in *Halsbury's Laws of England*, Vol. 9, part III, 612.

“In cases of misdemeanors, a peace officer, like a private person, has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence. (*Carroll v. United States*, 267 U.S. 132, 157, 45, S.Ct. 280, 39 ALR 790). (To the same effect is the Restatement of Torts 2d, Sec. 119, p. 194 (C)).

[3] The rule that a private person may, without a warrant, arrest only for a felony committed, or about to be committed or renewed, in his presence, or for a misdemeanor involving a breach of the peace committed, or about to be committed or renewed, in his presence is the rule we adopt here which is in accord with the overwhelming weight of authority. (IV Wharton's Cr. Law and Proc., Sec. 1601-1603, pp. 256-261; 5 Am Jur 2d, Arrest § 34-35, pp 726-727; *Graham v. State* (Ca. 1915) 328, 330; *State v. Mobley, supra*; *Carrol v. United States, supra*. This is the more enlightened rule because it takes into consideration the immediate preservation of the public peace by authorizing arrests for those offenses which are the most heinous and disruptive of the public peace or human safety and yet at the same time leaves the other offenses to the usual more deliberate processes of arrest by the obtaining of a warrant from a judge or other authorized official. Of course, the Nitijela may, by act, authorize arrests by citizens for other misdemeanors under other circumstances which do not offend the constitution, but until it does the common law rule we here iterate controls.

Counsel for the government further argues to the court that Paragraph 2(1) of P. L. 1986-5, eff. 3/6/86, which paragraph defines the word “Policemen” to include “a member of the Police Force of any Local Government Council,” somehow authorized these arrests, or stops, by the local policemen in this case. We see nothing in this definition which does this, and see nothing in the act that affects the arrest limiting provisions of Sec. 51 of P.L. 1981-2, nor did counsel point out to us any language which has that effect.

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[4] Neither of the two offenses for which the Defendants were arrested constitute a felony or breach of the peace, so we conclude that the arrests were unauthorized and unlawful. Since an unlawful arrest is a violation of Article II, Sec. 3(1) and (2) of the Republic of the Marshall Islands Constitution, all evidence obtained through that arrest is inadmissible (Art. II, Sec. 3(5), Republic of the Marshall Islands Constitution). We have no transcript by which to measure what evidence, if any, remains after eliminating the evidence obtained by the police as a result of the stop and arrest, but counsel impliedly presented the case to us on the assumption that if the arrests were unlawful the convictions would fall for lack of evidence. Ordinarily, that is the case, because the police can usually only identify the driver after the vehicle is stopped, and driver identification is essential to conviction.

For the foregoing reasons, the findings of guilty and sentences in these cases are set aside and the charges are ordered to be dismissed.

David M. Strauss, Chief Public Defender for Appellants
Dennis McPhillips, Assistant Attorney-General for Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

LAIBON JEJO,

Appellant,

-v-

LOBBOKE LOBO,

Appellee.

S.CT. CIVIL No. 86-12
(High Ct. CA No. 1984-024)

ORDER REMANDING CASE FOR PROCEEDINGS UNDER
RULE 48, MARSHALL ISLANDS RULES OF CIVIL PROCEDURE

MARCH 23, 1987

BURNETT, C.J.

Defendant-Appellant Laibon Jejo having filed a Motion for Remand for Disposition of Motion for Relief From Judgment, and the Court having considered the Motion and Memorandum and the files of the case, and good cause appearing therefor,

IT IS HEREBY ORDERED, that this case shall be and hereby is remanded to the High Court for disposition of Defendant – Appellant’s Motion for Relief From Judgment, which shall be filed therein.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

BARO TOBELLER,

Plaintiff-Appellant,

-v-

LIKINIBOD DAVID,

Defendant-Appellee.

S.CT. CIVIL NO. 86-03
(High Ct. Civil No. 1985-008)

APPEAL FROM THE HIGH COURT

APRIL 6, 1987

BURNETT, C.J.

TENNEKONE, A.J., and KONDO, A.J. (sitting by designation)

SUMMARY:

Prior to her death, the alap of Morjinkot land executed a kalimur to transfer the alap rights, by kolotlot, to a younger bwij. The Court held the alap had no authority to unilaterally transfer the inheritance right and declared the transfer not valid.

DIGEST:

1. LAND RIGHTS— *Morjinkot*: Rights in Morjinkot land, a gift from an Iroj as reward for bravery in battle, remain in the bwij and are inherited in the maternal line.
2. LAND RIGHTS – *Alap – Powers and Obligations*: An alap has no authority to unilaterally and without notice cut off the inheritance rights of her bwij.

OPINION OF THE COURT BY BURNETT, C.J.

This appeal is taken from a judgment holding Appellee, Likinbod David, to be the alap of Jeltoken Wetu, Longar Island, Arno Atoll. The case is unusual in the sense that there is no dispute of the facts, so decision must turn on application of Marshallese customary law to those

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facts.

[1] Toklan was alap of this land at the time she died. Her rights, and the rights of her bwij, had their source in Morjinkot, a gift from an iroij as reward for bravery in battle. Rights in Morjinkot land remain in the bwij and are inherited in the maternal line.

Prior to her death, Toklan executed a kalimur to change the rights from bwij to kolotlot, transferring the alap rights to a younger bwij, here represented by the Appellant. No notice was given to her bwij, and no one representing the bwij was consulted.

Appellee is a member of Toklan's bwij, and in the absence of the action taken by her, would have the unquestioned right to recognition as alap. She contends that an alap has no authority, unilaterally and without notice, to cut off the rights of her bwij.

Appellant, while conceding that that is true of Imon Bwij land, insists that the requirement of notice and consultation has no application in the case of Imon Kolotlot. The simple answer is that, until Toklan attempted by her kalimur, to make a change, it was clearly bwij land. Thus Appellant contends for an exception to customary bwij inheritance, based solely on Toklan's decision to change the character of the holding.

[2] Both the Traditional Rights Court and the Trial Court¹ held that Toklan had no authority to unilaterally cut off the inheritance rights of her bwij. That holding is so clearly correct as to require no citation of authority to sustain it. (Note that not even an iroij has the power to cut off vested customary rights without good cause).

We Affirm.

¹The Trial Court, in its Findings of Fact and Conclusions of Law, used the terms "Imon Kolotlot and "Imon Aje" as apparently alternative terms. They are not; Imon Aje refers to a gift from an Iroij for services.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**TRUST TERRITORY SOCIAL
SECURITY SYSTEM BOARD,**

S.CT. CIVIL NO. 87-04
(High Ct. Civil No. 1987-007)

Plaintiff-Appellee,

-v-

JIBA KABUA,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

NOVEMBER 12, 1987

BURNETT, C.J.

TENNEKONE, A.J., and GUNATILAKA, A.J. (sitting by designation)

SUMMARY:

The Court dismissed an appeal taken only from denial of a motion to set aside a default judgment, it appearing that there was no abuse of discretion by the trial court.

DIGEST:

1. **APPEAL AND ERROR – Review – Discretionary Matters – Default Judgments:**
Whether to grant a motion to set aside a default judgment is within the discretion of the trial court. Abuse of discretion is the standard of review.

OPINION OF THE COURT BY BURNETT, C.J.

This action was brought by the Trust Territory Social Security System Board (Appellee) against Appellant Jiba Kabua and three others, doing business as J & P Construction Co., to recover unpaid social security taxes, interest and costs.

Summons and complaint was served on January 10, 1987. Motion for Default was filed

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March 27, and default judgment entered March 30, 1987. Of the four named defendants, only Kabua has appealed, after moving to set aside the judgment.

Notice of Appeal, timely filed, was taken from denial of defense motion to set aside the default judgment, and “on the underlying judgment entered”

The statement of questions presented raises only whether the trial court erred and “allow an injustice in denying Defendant’s motion to set aside Default Judgment given Defendant’s unfamiliarity with legal procedures”

The judgment was, clearly, properly entered, given the seventy six (76) days which intervened between service of process and the motion for default judgment.

[1] Appeal is taken only from the refusal to set aside default judgment which, counsel concedes, was proper. Nothing appears, or is asserted by counsel, to show an abuse of discretion by the trial court in denying the motion to set aside. 11 C. Wright and A. Miller, *Federal Practice & Procedure*, § 2693.

As Appellee notes, p. 9 Appellee brief, we have previously declined to consider issues not set forth in the notice of appeal. *Lokkon v. Nakap*, 1 MILR (Rev.) 69, 70 (Feb 5, 1987).

While refusing to give credence to issues not raised by the notice, I must make mention of counsel’s briefed assertion (repeated on oral argument) that “Defendant’s reasons for not answering . . .” should be “good cause” in the Marshalls, where “the Court System has been largely ignored until recently”

For the, nearly, twenty years that I have been associated with the system in the Marshalls, Trial Assistant and Pro-se defendants have had no difficulty in understanding the Rules, and have, for the most part, answered on time. To allow the exception here urged by Appellant would mean that we have no rule at all. This cannot be.

While unable to grant his wishes, I must say that I, and the whole court, are most appreciative of the good efforts and the candor of Appellant’s counsel.

The decision of the trial court must be, however, Affirmed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

NEMAIAH BOKMEJ,

Plaintiff-Appellee,

-v-

ATONEJ LANG and NITA JAMODRE,

Defendants-Appellants.

S.CT. CIVIL NO. 87-02

(High Ct. Civil No. 1986-134)

ORDER DISMISSING APPEAL

NOVEMBER 13, 1987

BURNETT, C.J.

GUNATILAKA, A.J. (sitting by designation)

SUMMARY:

The Court dismissed an appeal from an order declining to certify a matter to the Traditional Rights Court because the order was not a final decision.

DIGEST:

1. **APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination:*** An order declining to certify a matter to the Traditional Rights Court is not a final appealable order.

This appeal is taken from an Order of the Trial Court which declined to certify the matter to the Traditional Rights Court, and set a trial date. Other issues presented appear to be subsumed within the basic question of referral to the Traditional Rights Court.

Referral to the Traditional Rights Court is a matter resting in the discretion of the trial court. We find nothing to indicate an abuse of that discretion. Constitution, Article VI § 4(4).

[1] The short answer is that the Constitution, Article VI, § 2(2)(a), gives this Court

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jurisdiction only over appeals from final decisions. *RMI v. Balos, et al.*, 1 MILR (Rev.) 67, 68 (Jan 30, 1987). The Orders here appealed from are obviously not final; they do not conclude the matter at the trial level. We very simply, do not have jurisdiction to intervene at this point.

The appeal must be, and hereby is, Dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**REPUBLIC OF THE MARSHALL
ISLANDS,**

S.CT. CRIMINAL No. 86-01
(High Ct. Crim. No. 1986-021)

Respondent,

-v-

BOKMEJ BOKMEJ,

Appellant.

APPEAL FROM THE HIGH COURT

NOVEMBER 27, 1987

BURNETT, C.J.
GUNATILAKA, A.J., (sitting by designation)

SUMMARY:

The Supreme Court held that any possible error by the trial court in proceeding to sentencing without a probation report was cured when a successor judge considered the report on a motion to reduce the sentence. The Supreme also upheld the trial court's restitution order against a claim that it was excessive saying the trial court was not shown to be "clearly erroneous." The Supreme Court did, however, vacate as a condition of suspension of sentence a requirement of restitution in an unrelated case.

DIGEST:

1. **CRIMINAL LAW AND PROCEDURE – Sentencing – Conditions for Suspension:** The trial court cannot impose as a condition of the suspension of a sentence restitution in an unrelated case.

OPINION OF THE COURT BY BURNETT, C.J.

This appeal is taken from judgment and sentence entered upon a plea of guilty to a charge of Malicious Mischief, 11 TTC § 951. The trial court, having first denied a defense request for a

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report from the Probation Officer, imposed a six (6) month suspended sentence, conditioned upon payment of One Thousand (\$1,000) restitution for five (5) pandanus trees which he had destroyed.

Two grounds for appeal are set out:

- 1) That it was error to impose sentence without the requested probation report, and
- 2) The restitution ordered was “clearly” excessive.

A later motion to reduce the sentence, brought before the successor judge, was denied; this followed a post-sentence report by the probation officer.

As to the first issue presented, any error that might have been urged on the basis of proceeding to judgment without a report as to proper restitution was cured by the successor judge’s call for such report following which he refused to modify the sentence.

As to the second issue, we are unable to say that the trial court’s finding was “clearly erroneous.” Sec. 66(2), Judiciary Act, 1983. Even with the benefit of a probation report, the second judge was unwilling to disturb the original finding.

The probation report reference to what “land owners in other situations” ask per tree is of no assistance. The trial judge had testimony before him as to the age of the destroyed trees. He, himself an “island boy,” must necessarily have brought his personal understanding of the loss to bear. “What we know as men, we cannot put aside as judges.”

[1] One element of the judgment and sentence (not raised by counsel) must be set aside. As an additional condition of suspension in this matter, the court ordered restitution in a completely unrelated case. This is obvious error, and cannot stand.

With that exception, we find no reversible error, and the judgment of the trial court is affirmed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

ANTHONY DOMNICK,

Appellee,

-v-

KALORA ZAION,

Appellant.

S.CT. CIVIL NO. 86-07
(High Ct. CA No. 1985-054)

ORDER DISMISSING APPEAL

FEBRUARY 24, 1988

BURNETT, C.J.

Counsel for the Appellant Informed the Court, this date, that the parties have resolved their differences, and orally moved for dismissal of the appeal.

Accordingly, good cause appearing, IT IS ORDERED that Civil Appeal No. 86-07 be, and it hereby is, DISMISSED.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

JERILONG, et al.,

Plaintiff-Appellants,

-v-

HAZZARD,

Defendant-Appellee.

S.CT. CIVIL NO. 86-04
(High Ct. Civil No. 1984-053)

ORDER DISMISSING APPEAL

FEBRUARY 25, 1988

BURNETT, C.J.

SUMMARY:

An appeal was dismissed for Appellant's failures to set forth a concise statement of the questions presented in the notice of appeal, to file a timely brief and to identify errors not merely going to the weight of the evidence.

DIGEST:

1. **APPEAL AND ERROR – Dismissal, Grounds for – Failure to Identify Errors:** The notice of appeal must identify the errors claimed.

On January 8, 1988, Appellee moved to dismiss for failure to prosecute the appeal in a timely manner. His motion was heard February 17, 1988.

As of the date of hearing, 218 days had elapsed since the record was certified, and 158 days since expiration of the 60 days allowed by Appellate Rule 18(b). Appellant made the novel argument that his time was tolled by his filing a motion (never presented to me) for extension of time. Obviously this cannot be, and there is nothing in the Appellate Rules to suggest it.

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Appellant has, at the least, forfeited his right to file a brief. Appellate Rule 20(a). The Appellate Division of the Trust Territory High Court, under essentially the same rules, while regularly showing leniency in granting extension of time for filing briefs, has not hesitated to dismiss in extreme cases. Thus, in *Ngiraked v. Trust Territory of the Pacific Islands*, 7 TTR 205 (App. Div., 1974), Appellant had been granted various extension to August 5, 1973, no brief having been filed, the Court, on September 11, 1974, dismissed for failure to prosecute.

And, in *Trust Territory of the Pacific Islands v. Bermudes*, 7 TTR 230 (App. Div., 1975), 202 days had elapsed since certification of the record with no brief having been filed; the Court dismissed for failure to prosecute.

[1] It is the function of the notice of appeal to give “a concise statement of the questions raised by the appeal” Appellate Rule 3. The brief is then to identify where, in the record, those questions arise, how the trial court decided them erroneously, and how the claimed error “substantially prejudiced the rights of the Appellant.” *Bwanus v. Metsifista, et. al.*, 7 TTR 248 (App. Div. 1975).

In the absence of a brief from Appellant, the Appellate Court must review the entire record in search of error, a task it is ordinarily unwillingly to undertake.

“The Notice of Appeal shall . . . contain a concise statement of the questions presented by the appeal” Appellate Rule 3. In many respects Appellant’s notice falls short of the required standard; had a timely brief been filed, I might well have overlooked the deficiency.

The first assignment of error suggests that the trial court was unable to understand “imon aje” and “katleb,” but does not point to error resulting from such alleged ignorance.

The second assignment is that the court had “limited knowledge” of proceedings before the Traditional Rights Court. There is no claim of error in such proceedings, nor any allegation of error in the High Court resulting from its “limited knowledge.”

Third, Appellant suggests that the court’s decision resulted from its “inability to understand” some evidence presented by the Appellant. We are not told what error resulted from the court’s “inability to understand.”

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Fourth, Appellant challenges only the weight given one of his exhibits.

Fifth assignment suggests only that the court may have been misled by “opposing counsel’s own misleading statement,” but there was obviously evidence on the subject, before both the Traditional Rights Court and the High Court.

The final assignment challenges only the weight given the evidence presented by the parties.

A long, unbroken line of decisions makes clear that an appellate court will not re-weigh the evidence. Section 66(2) of the Judiciary Act makes clear that the Supreme Court cannot disturb the findings of fact of the High Court “unless clearly erroneous” Here, the various assignments of error do not even refer to the court’s Findings of Fact and Conclusions of Law.

For the foregoing reasons, I conclude that Civil Appeal No. 86-04 must be, and it hereby is, DISMISSED.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

KIOS KOROK,

Plaintiff-Appellant,

-v-

NEIWAN LOK, et. al.,

Defendants-Appellees.

S.CT. CIVIL NO. 87-08

(High Ct. Civil No. 1987-013)

ORDER DISMISSING APPEAL

FEBRUARY 25, 1988

BURNETT, C.J.

SUMMARY:

An appeal was dismissed because Plaintiff-Appellant did not set forth in the Notice of Appeal “a concise statement of the questions presented by the appeal,” as required under Rule 3 of the Appellate Rules of Civil Procedure, and because Appellant did not timely pay the estimated cost of the transcript as required by Rule 16(a).

DIGEST:

1. **APPEAL AND ERROR – Dismissal, Grounds for – Failure to Pay Fees and Costs:** Failure to timely pay estimated cost of transcript does not affect jurisdiction to hear appeal, but may be grounds for dismissal.
2. **APPEAL AND ERROR – Dismissal, Grounds for – Failure to Identify Errors:** Failure to include a concise statement of the questions presented, in the notice of appeal, is grounds for dismissal.

Appellee has moved to dismiss the appeal, first for Appellant’s failure to make timely payment of the estimated cost of the transcript as required by Appellate Rule 16(a), and for failure of his notice of appeal to set forth a “concise statement of the questions presented by the

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appeal”

On hearing, Appellee asserts that, on January 14, 1988, “the very last day wherein he [sic – Appellant?] had to pay. . . ,” he got the reporter a check with instructions not to present it until January 22; when presented on that day the check was dishonored, the account having been closed. He [sic – Appellee?] contends that failure to make timely payment is jurisdictional.

Appellate Rule 6(a) provides that the computation of time is to be controlled by Rule 6 of the Rules of Civil Procedure. It follows, therefore, that service of estimated cost having been made on December 14 (excluded in the computation) the final day for making payment was January 13, 1988 (included in the 30 day calculation).

[1] Appellee is in error in his claim that failure to make payment deprives the court of jurisdiction. Those cases which he cites on this issue relate to timely filing of the notice of appeal, which is universally held to be jurisdictional. Failure to comply with other rules only subjects an Appellant to the possibility of dismissal in the discretion of the Court. Appellate Rule 20(a).

Appellee’s position as to the notice of appeal is well taken.

The notice of appeal sets out four “questions presented.” The first claims the judgment to be contrary to Marshallese custom, for three reasons.

The first reason (a) is nothing more than a conclusion that the Court erred in not giving him judgment.

Secondly (b), Appellant claims error in “interpretation of Marshallese custom” without specifying what that error is.

The third (c), relates to a stipulation to which defendants were not a party.

The second question again relates to the stipulation, and claims error in its termination, thus ignoring the fact that Appellees were not parties to it, and that the court did give it full effect so long as both stipulating parties still lived.

The third is once more nothing but a conclusion that the court erred in not ruling in Appellant’s favor.

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[2] As to the final “question,” it is again necessary for me to point out that an Appellant has no right to brief and argue issues beyond the notice of appeal. *See* Appellate Rule 3 which makes clear only that questions included in the notice of appeal will be considered by the Court.

Bearing in mind the circumstances surrounding Appellant’s late payment of the transcript, and with reference to what I have said as to the notice of appeal, I conclude that this appeal must be, and it hereby is, DISMISSED.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

IROIJ LABLAB KABUA KABUA,

Plaintiff-Appellant,

S.CT. CIVIL NO. 86-08
(High Ct. Civil Nos.
1984-098 and 1984-102)

-v-

**IROIJ LABLAB IMADA KABUA,
*et al.,***

Defendants-Appellees,

PEOPLE OF BIKINI,

Intervenor-Appellee,

and

IROLJLABLAB KABUA KABUA,

Plaintiff-Appellant,

-v-

KWAJALEIN ATOLL CORPORATION,

Defendant-Appellee.

APPEAL FROM THE HIGH COURT

APRIL 18, 1988

HEFNER, A.J. (sitting by special appointment)
BURNETT, C.J., and GUNATILAKA, A.J. (sitting by designation)

SUMMARY:

The Supreme Court affirmed trial court rulings on motions for disqualification of the trial

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judge and counsel and reversed the trial court on other procedural matters.

DIGEST:

1. **CIVIL PROCEDURE – *Indispensable Parties – Dismissal for Failure to Join*:** The determination and propriety of a dismissal of an action for failure to join an indispensable party is within the discretion of the trial court and the standard of review is abuse of discretion.
2. **CIVIL PROCEDURE – *Joinder of Parties – Compulsory*:** MIRCivP Rule 19 mirrors Rule 19 of Federal Rules of Civil Procedure and as such MIRCivP Rule 19 carries the construction placed upon it by the Federal Courts.
3. **CIVIL PROCEDURE – *Same – Burden of Persuasion*:** The party asserting the necessity of joinder of indispensable parties must identify them and has the burden of persuading the court that they are actually indispensable.
4. **CIVIL PROCEDURE – *Same – Requirements*:** MIRCivP Rule 19 requires a trial court to engage in a two-step analysis. The first step is to consider whether nonjoinder would prevent the award of complete relief, or the absentee’s interest would otherwise be prejudiced or the persons already parties would be subject to a substantial risk of double or inconsistent obligations. The second step is to decide under MIRCivP Rule 19(b) whether “in equity and good conscience” a court should proceed without absent parties.
5. **CIVIL PROCEDURE – *Indispensable Parties – Dismissal for Failure to Join*:** A court must first order joinder of indispensable parties, and only if plaintiff then fails to comply with the order is the court justified in dismissing the action.
6. **CIVIL PROCEDURE – *Sanctions – Dismissal of Action*:** Dismissal of an action under MIRCivP Rule 11 must be predicated on findings of subjective bad faith in bringing the action and severe prejudice to, or misleading of, the party against whom the action was brought.
7. **APPEAL AND ERROR – *Review – Discretionary Matters – Disqualification of Attorneys*:** The Standard of Review of a court’s ruling on a motion for an attorney’s disqualification is whether the ruling was an abuse of discretion.
8. **ATTORNEYS – *Disqualification – Opposing Former Client*:** Where the cause of action or matters involved in a former suit are substantially related to the present action, an attorney who represented a client in that former suit should not represent his adversary in the present action.

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9. ATTORNEYS – *Same – Code of Professional Responsibility*: Disciplinary Rule 7-104 clearly proscribes negotiations by any lawyer with another person who is represented by counsel without first obtaining the permission of that person’s lawyer.
10. ATTORNEYS – *Same – Communicating With Other Counsel’s Client*: In determining whether an attorney should be disqualified because of an alleged violation of Disciplinary Rule 7-104, three competing interests must be balanced: (1) the client’s interest in being represented by counsel of its choice; (2) the opposing party’s interest in a trial free from prejudice due to disclosures of confidential information; and (3) the public’s interest in the scrupulous administration of justice.

OPINION OF THE COURT BY HEFNER, A.J.

On appeal before this Court are various orders of the trial court in these two consolidated cases. Foremost of those orders is one that dismisses both of these actions for various asserted procedural transgressions committed by the Appellant.

Additionally, in what appears to be a rash of discontent among counsel, there are three orders of disqualification or non-disqualification of counsel.

Finally, there is an order denying the disqualification of a trial judge.

Finding support for the latter four rulings, we affirm those. However, convinced of the trial court’s misapplication and erroneous interpretation of the rules of civil procedure, we reverse the dismissals and remand to trial court for further proceedings.

I. PROCEDURAL HISTORY

In order to properly and completely understand the current posture of this case and the issues presented on appeal it is necessary to set forth the procedural history of Civil Action Nos. 1984-98 and 1984-102 as well as Civil Action No. 1984-84.

A. Civil Action No. 1984-84.

On August 17, 1984, Kabua Kabua (hereinafter “Appellant”) filed Civil Action No. 1984-84 (hereinafter “1984-84”) against the Kwajalein Atoll Corporation (hereinafter “KAC”) and Imada Kabua seeking a declaration that Appellant be recognized as the person entitled to

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receive land use payments from the KAC formerly paid to Irojlablab Manini Kabua.¹ This suit also sought monetary damages against KAC and an injunction preventing the payments to Imada Kabua.

On August 22, 1984, High Court Chief Justice Lanham, *sua sponte*, issued an order requiring, in essence, that Appellant join Irojlablab Amata Kabua as an indispensable party “by appropriate process” and that KAC “inform Plaintiff (Appellant) as soon as practicable of any other persons who are claiming, or whom they believe will claim, the Irojlablab title being contested herein in order that Plaintiff (Appellant) may also join them as indispensable parties defendant in this action.”

On September 19, 1984, a hearing was held on Appellant’s motion for a preliminary injunction. This motion was denied on the grounds that, *inter alia*, certain indispensable parties had not been named in the lawsuit. On October 17, 1984, and before any answer was filed, Appellant voluntarily dismissed the action.

B. Civil Action Nos. 1984-98 and 1984-102.

On October 23, 1984, Appellant filed Civil Action No. 1984-98 (hereinafter “1984-98”) against Imada Kabua seeking a declaration that Appellant is the rightful holder of the Irojlablab title. On October 26, 1984, Appellant filed a “Memorandum Opposing Compulsory Joinder” seemingly in anticipation of arguments that he not be allowed to proceed without joining additional parties as was ordered in 1984-84.

On November 2, 1984, Appellant filed Civil Action No. 1984-102 (hereinafter “1984-102”) seeking an order restraining KAC from distributing land use payments pending resolution of 1984-98. A temporary restraining order was issued in 1984-102 on November 21, 1984, enjoining KAC’s distribution of the money. Subsequently, on January 29, 1985, the trial court granted Appellant’s motion for a preliminary injunction preventing KAC from distributing any of the disputed funds.

¹KAC acts as the recipient of money from the U.S. Government for land use payments and then distributes the money to the landowners.

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In January of 1985, the people of Bikini moved to intervene in 1984-98 on the ground that adjudication of the Irojlablab title might involve Bikini Atoll. None of the parties objected and the trial court permitted their intervention.

On May 5, 1985, then counsel for Appellant, Benjamin Abrams, spoke with Appellee Imada Kabua at the Majuro Airport. Apparently Mr. Abrams sought to elicit information from Appellee regarding 1984-98.

On May 16, 1985, Imada Kabua filed an application for admission *Pro Hac Vice* seeking to have David Lowe admitted as his co-counsel. On May 17, 1985, Appellant moved to disqualify Mr. Lowe from representing Imada Kabua as Mr. Lowe had previously represented Appellant in a criminal action.

On May 28, 1985, Appellant filed a motion to disqualify George Allen, counsel for KAC. On August 2, 1985, the trial judge ordered that Mr. Allen be disqualified as counsel for KAC. This order is not on appeal. Subsequently, on August 27, 1985, Francis O'Brien was retained as counsel for KAC.

On July 10, 1985, Appellee Imada Kabua filed a motion to disqualify Mr. Abrams as Appellant's counsel. On July 29, 1985, hearings were held on the cross-motions to disqualify Lowe and Abrams. The court in a written order dated August 23, 1985, found that on May 5, 1985, Abrams had attempted to discuss settlement with Imada Kabua at the Majuro Airport and that this was done without the knowledge of Appellee's attorney. The court then ordered Abrams disqualified from further participation in 1984-98. On September 9, 1985, Appellant's new counsel, Douglas Cushnie, argued Appellant's motion for a stay pending appeal of the order disqualifying Abrams. This motion was summarily denied.

Also on August 23, 1985, the court issued a written order denying Appellant's motion to disqualify Lowe finding that, *inter alia*, the issues presented in 1984-98 were completely different from those in Appellant's criminal case heard nine years earlier and that Lowe, in the course of this prior representation, did not receive any confidential information about Appellant's genealogy.

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On September 9, 1985, a status conference was held at which the parties were asked to disclose all motions they anticipated filing in 1984-98. A Status Conference Order was filed to this effect on September 10, 1985.

On September 18, 1985, KAC filed a motion to disqualify Abrams from participation in 1984-102. This motion was heard on September 30, 1985, at which time the court entered an order disqualifying Abrams from participation in 1984-102. This order was subsequently filed on December 2, 1985.

On September 30, 1985, Appellant moved to disqualify Judge Doi based on his association with Appellant while Appellant was District Judge in Majuro, claiming that Judge Doi was personally biased against Appellant. On November 6, 1985, a hearing was held before Judge Soll on this motion. On December 2, 1985, Judge Soll issued an order denying Appellant's motion to disqualify Judge Doi.

On November 7, 1985, Appellant's motion to disqualify O'Brien as counsel for the KAC was denied and a written order to this effect was filed December 2, 1985. Also on November 7, 1985, KAC moved to consolidate 1984-98 and 1984-102 and brought a motion to dismiss Appellant's claims for failure to join necessary parties. At this time Appellee Imada Kabua filed a motion to require joinder and a motion to dismiss.

On February 26, 1986, the court granted KAC's motion to consolidate 1984-98 and 1984-102. Also on that date Appellant filed a document entitled "First Amended Complaint" naming as appellees various individuals believed to be claiming the Irojlablab title.

C. The Trial Court's Rulings.

On April 27, 1986, Judge Doi entered his "Findings of Fact and Conclusions of Law"² in

²It is conceded that Appellees prepared this document. As such, these findings and conclusions, prepared by a non-objective advocate, might not fully and accurately reflect the thoughts entertained by an impartial judge at the time of his initial decision. *Industrial Bldg. Materials v. Interchemical Corp.*, 437 F.2d 1336 (9th Cir. 1970). The definite trend, at least in the U.S. federal courts, is to avoid having counsel prepare the findings and conclusions of the court. The chance of an "overkill" is thus avoided. These cases appear to be classic examples of the pitfalls that can occur when zealous advocates prepare a decision for an impartial judge. This

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the consolidated cases. Judge Doi dismissed the actions without prejudice, and attached as a condition to reinstatement of any litigation arising out of Appellant's claim to the Iroijlablab title, the requirement that Appellant pay all costs, including travel costs for parties, witnesses and attorneys, excluding attorney's fees, incurred by Appellee Imada Kabua, KAC, and the People of Bikini in defense of 1984-98 and 1984-102.

Specifically, the dismissal was based on the court's determinations, *inter alia*, that:

1) Appellant was aware of the identities of the certain indispensable parties prior to August, 1984; and

2) The following individuals "are or may be indispensable parties to this action within the meaning of MIRCivP Rule 19: 1) Amata Kabua; 2) Imada Kabua; 3) Michael Kabua; 4) Anjojo Kabua; 5) Kitlan Kabua; 6) Jikul (Seagull) Kabua; 7) The People of Bikini; 8) The Republic of the Marshall Islands; 9) KAC; 10) Drile James." Notably, the court expressed "no opinion" as to whether these individuals or entities may be properly joined as parties to this or any other action relating to the Iroijlablab title. Nor did the court express any opinion as to whether these above-listed individuals and entities are the only indispensable parties; and

3) Appellant's failure to name the indispensable parties in a timely, appropriate fashion was "conscious and deliberate."

court also views the nomenclature used - Findings of Fact and Conclusions of Law - as an anomaly. Rule 41(a), MIRCivP provides for findings and conclusions for any action tried in the High Court and for the subsequent entry of the appropriate judgment based on findings and conclusions. Obviously, such was not the case here. Be that as it may, this panel will review the document as a final order subject to appeal as any other order of dismissal. *See, Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983).

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II. WHAT IS THE EFFECT OF CIVIL ACTION NO. 1984-84 ON CIVIL ACTION NOS. 1984-98 AND 1984-102?

Appellant voluntarily dismissed Civil Action No. 1984-84 in October of 1984 pursuant to MIRCivP Rule 33(a)(1).³ This rule allows an Appellant to dismiss his complaint without any order of the court. This dismissal must be accomplished before the Appellee files an answer. Such was the case in 1984-84.

It is a well settled proposition that if an action is voluntarily dismissed without prejudice pursuant to Federal Rule 41(a)(1), MIRCivP 33(a)(1), the parties are left as if the action had never been brought. *Moore v. St. Louis Music Supply Co.*, 539 F.2d 1191, 1194 (8th Cir. 1976); *Cleveland v. Douglas Aircraft Co.*, 509 F.2d 1027, 1029-30 (9th Cir. 1975); *Hall v. Kroger*, 520 F.2d 1204, 1205 (6th Cir. 1975); See also, 5 J. Moore, Moore's Federal Practice ¶ 41.05(2) (1982). For this reason Civil Action No. 1984-84 is of no consequence for purposes of these actions. Indeed, the court should view 1984-84 as if it had never existed. Therefore, Civil Action No. 1984-84 cannot be said to be determinative of the identity of any "indispensable" party to the present action nor does it provide any basis for collateral estoppel or issue preclusion in any subsequent lawsuit.⁴

³MIRCivP Rule 33(a)(1) is identical to Federal Rule of Civil Procedure 41(a)(1). Except in certain instances, the MIRCivP mirror the federal rules. Therefore this court will look to United States cases for interpretation and application of similar or identical rules. *Kap v. Trust Territory*, 4 TTR 336, 338 (Tr. Div. Truk 1969).

⁴Appellee Imada Kabua claims that the order of Judge Lanham in 1984-84 is determinative for all subsequent proceedings citing *United States v. Mt. Vernon Memorial Estates*, 734 F.2d 1230 (7th Cir. 1984) and *Defenders of Wild Life v. Andrus*, 77 FRD 448 (D.D.C. 1978). A review of those cases does not support this conclusion. The cases were not 41(a)(1) dismissals. Furthermore, the issue preclusion doctrine was applied in those cases because the issues were fully litigated and the decisions were not tentative. See, IB J. Moore, Moore's Federal Practice ¶ 0.441[4].

In his order, Judge Lanham, *sua sponte*, found that Amata Kabua may be an

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III. DID THE TRIAL COURT ABUSE ITS DISCRETION BY DISMISSING APPELLANT'S COMPLAINT WITHOUT PREJUDICE, PURSUANT TO MIRCivP RULE 33, WHERE APPELLANT FAILED TO PROPERLY NAME CERTAIN PARTIES PURSUANT TO MIRCivP RULE 19?

A. Standard of Review.

[1] The determination and propriety of a dismissal of an action for failure to join an indispensable party is within the discretion of the trial court and the standard of review is abuse of discretion. *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982); *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 468 (9th Cir. 1986).

[2] B. MIRCivP Rule 19

Rule 19 of the Marshall Islands Rules of Civil Procedure mirrors Rule 19 of the Federal Rules of Civil Procedure (FRCP). As such, MIRCivP Rule 19 carries the construction placed upon it by the Federal Courts. *See, Kap v. Trust Territory, supra*, 4 TTR 336, 338 (Tr. Div. Truk 1969).

1) Burden of Persuasion

Much has been made of who has the burden of asserting that a non-joined party must be joined as indispensable under Rule 19. The court below found that plaintiffs "refusal" to name the asserted indispensable parties demonstrated "bad faith." However, refusal to join contemplates a motion to require joinder. Although defendant Imada Kabua did file a motion to require joinder coupled with his motion to dismiss, joinder was never actually ordered by the trial

indispensable party. The basis of this determination was a probate case filed in the High Court for the probate of the personal property of Iroj Lojelan Kabua. Exactly how this relates to the successor of Irojlablab Manini Kabua is not discerned. Judge Lanham referred to MIRCivP Rule 21 as authority for his *sua sponte* action. The few cases found which have applied MIRCivP Rule 21 reveal that the cases had proceeded to such a point that either with or without a motion being made, the indispensable party was clearly identified and his/her claim established. See, for example, *Day v. Video Connection*, 602 F.Supp 100 (N.D. Ohio. 1982) and *Lanigan v. La Salle Nat. Bank*, 108 FRD 660 (N.D. Ill. 1985).

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court.

Cases involving MIRCivP Rule 19 seldom address the issue of which party has the burden of naming absent, indispensable parties. The reason for this is obvious. If the plaintiff wishes to sue “indispensable” parties, he/she just names them in the complaint. It is the opposing party who must raise the concern or need to add parties.

[3] The court in *Sierra Club v. Watt*, 608 F.Supp. 305 (D.C. Cal. 1985), found that the burden of joining absent parties rests with the party asserting the necessity of their joinder. The court in *Sierra Club* noted two important reasons for its conclusion. First, that such an allocation is consistent with the allocation of burden in most cases, in that the issue of nonjoinder is ordinarily brought before the court by a motion to require joinder or dismissal and the general rule is that the proponent of a motion bears the burden of proof. Secondly, when a party in a lawsuit has raised the issue of joinder, that party has the burden of persuading the court that joinder is necessary, citing *Provident Bank v. Patterson*, 390 U.S. 102, 111, 88 S.Ct. 733, 738, 19 L.Ed. 2d 936 (1968); *Sierra Club v. Watt*, *supra*, 608 F.Supp. at 320-321 (D.C. Cal. 1985).

Throughout this suit Appellees have asserted that certain parties were indispensable to this action. Yet only Appellee Imada Kabua filed a motion to require joinder. It was the burden of the Appellee to: (1) identify the indispensable parties, and (2) persuade the court that they were actually indispensable.⁵ The court below abused its discretion by not requiring the Appellee to meet this burden and to fulfill its obligation under MIRCivP Rule 19.

2) MIRCivP Rule 19 Requirements

[4] MIRCivP Rule 19 requires a trial court to engage in a two-step analysis. The first step is to consider whether nonjoinder would prevent the award of complete relief, or the absentee’s interests would otherwise be prejudiced or the persons already parties would be subject to a

⁵The MIRCivP Rule 19 motion of Imada Kabua filed on November 6, 1985, is patently defective. It attempts to put the burden on the Appellant to name the indispensable parties and consequently neither names the indispensable parties nor shows why they are indispensable. (*See*, pp. 3, 5, 7 and 8 of Appellees’ motion).

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substantial risk of double or inconsistent obligations. *Bakia v. County of Los Angeles, supra*, 687 F.2d at 301 (9th Cir. 1982). Although there is no precise formula for determining whether a particular non-party should be joined under MIRCivP Rule 19(a), underlying policies include plaintiffs right to decide whom he shall sue, avoiding multiple litigation, providing the parties with complete and effective relief in a single action, protecting the absentee, and fairness to the other party. *Id.*

The second required step is to decide under MIRCivP Rule 19(b) whether “in equity and good conscience” a court should proceed without the absent party. *Provident Bank v. Patterson, supra*, 390 U.S. at 109, 88 S.Ct. at 737. MIRCivP Rule 19(b) then goes on to list four factors to be considered in making this determination.

In the present case, the trial court did not engage in the above-cited required analysis. With regard to the first step, the court found only that certain named individuals or entities “may or may not be indispensable parties to this action within the meaning of MIRCivP Rule 19.” The court then specifically expressed “no opinion” as to whether these individuals or entities could be properly joined to this action or whether they were the only indispensable parties. Consequently, in expressing no opinion as to what, if any, non-joined parties were indispensable to this action, the court was not able to consider whether the non-joinder of these parties would prevent an award of complete relief, whether their interests would be prejudiced or whether the parties to this action would be subject to inconsistent obligations.

Secondly, the court engaged in no analysis as to whether it would be proper to proceed without the individuals or entities which the court found “may or may not be indispensable parties.” Indeed, in failing to determine if any of the named individuals or entities actually were indispensable, the court effectively precluded any finding as to whether the action could proceed without those individuals or entities.

3) MIRCivP Rule 19 Procedure

MIRCivP Rule 19 states that if a person is found to be indispensable within the meaning of the rule, if he has not been joined in the action, “the court shall order that he be made a party”

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(emphasis added).

[5] In this case, the court found that Appellant failed to name indispensable parties to this action. Even if it were incumbent upon Appellant to name these parties, which it was not, the court clearly had an obligation under MIRCivP Rule 19(a) to order that these individuals or entities deemed by the court to be indispensable be joined. Only if the Appellant then failed to comply with the court's order directing the Appellant to amend his complaint to add the indispensable parties would the court be justified in ordering a dismissal of Appellant's action for failure to comply with an order of court. *English v. Seaboard Coast Railroad Co.*, 465 F.2d 43, 47-48 (5th Cir. 1972).

For the foregoing reasons we find that the court below abused its discretion in using Appellant's failure to name certain parties which "may or may not be indispensable parties to this action within the meaning of MIRCivP Rule 19" as a basis for dismissing this action.

IV. DID THE APPELLANT VIOLATE MIRCivP RULE 15 IN FILING HIS BRIEF [sic] AMENDED COMPLAINT?

MIRCivP Rule 15(a) provides that a party may amend his pleading as a matter of course at any time before a responsive pleading is served, or within 20 days if no responsive pleading is permitted and the action has not been placed on the trial calendar. Otherwise, a party may amend his pleading only by leave of court or by written consent of the adverse party.

In this case, Appellant attempted to file an amended complaint without leave of court or the consent of Appellees. The court below found this amended complaint to be a "legal nullity." However, whether Appellant's amended complaint was a legal nullity or not is of no moment here since Appellees, as noted above, had the burden of filing any joinder motions pursuant to MIRCivP Rule 19. Appellant's attempt to amend its complaint to include certain parties which the court found "may be indispensable" appears to be an attempt to do the very thing that court wanted. For the court to then dismiss the action, for Appellant's failure to name necessary parties, misconstrues the court's obligation to order the Appellants to amend their complaint

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pursuant to a finding that these indispensable parties have not been named.

As the Appellant attempted to give the court what it apparently wanted, dismissal of the action was not warranted in the absence of a prior order requiring joinder of specific parties as indispensable.

V. DID APPELLANT'S CONDUCT DEMONSTRATE BAD FAITH IN VIOLATION OF MIRCivP RULE 11?

MIRCivP Rule 11 states that “[t]he signature of a counsel constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed from delay.”⁶

[6] The standard for the imposition of sanctions under MIRCivP Rule 11 is bad faith, *Numeroff v. Abelson*, 620 F.2d 339, 350 [7] (2d Cir. 1980); and the dismissal of an action under such rule must be predicated on a finding of subjective bad faith in bringing the action, *Solargen Elec. Motor Car. Corp. v. American Motors Corp.*, 530 F.Supp 22, 23, n. 1 (S. D. N. Y. 1981). Such a motion should not be granted unless the moving party has been severely prejudiced or misled. *McCorstin v. U.S. Dept. of Labor*, 630 F.2d 242, 244, n. 6[2] (5th Cir. 1980).

In this action the court determined that Appellant's actions were characterized by demonstrable bad faith. The court found that these actions included “the consistently late filing of documents, the failure to apprise the court or opposing counsel of his intentions in a timely fashion, and the refusal to name these indispensable parties.” The latter cannot be deemed bad faith as Appellant was never under any obligation to so name these individuals or entities. It is also noteworthy that the court's “Findings of Fact” are conspicuously void of any findings that the Appellees were prejudiced by Appellant's late filings or failure to apprise the court or opposing counsel of his intentions in a timely fashion. Without such a finding of prejudice the court erred in finding Appellant had acted in bad faith, justifying a dismissal.

⁶MIRCivP Rule 11 is the “old” federal Rule 11 (pre 1983) and therefore any interpretation of the Rule in referring to federal cases must take this into account.

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Finally, it should be recognized that MIRCivP Rule 11 provides that “[for a wilful violation of this Rule counsel] may be subjected to appropriate disciplinary action” (emphasis added). Here it was Appellant, not his counsel, who suffered the effects of the court’s dismissal of the action. The order requires the Appellant to pay the costs incurred in these actions before he may file a new claim for the Iroijlablab title.

The Appellee, Imada Kabua, argues the authority for Judge Doi’s MIRCivP Rule 11 order is found in MIRCivP Rule 33(d) which reads:

(d) Costs of Previously-Dismissed Action. If a Plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The extent of any application of this rule would pertain to only the prior dismissed case 1984-84, and the rule provides no authority for “post-dating” the costs to any potential third lawsuit. Additionally, the unauthorized penal nature of the order for costs is even more evident when it would require the Appellant to pay costs of the Intervenor, People of Bikini, even though that party was not involved in 1984-84.

It is clear that the main thrust and basis of the trial court’s dismissal order was the perceived MIRCivP Rule 19 violation by Appellant.⁷

Accordingly, the court’s dismissal based on any perceived violations of MIRCivP Rule

⁷The motions filed by Imada Kabua and KAC and which resulted in the dismissal of Appellant’s complaints were based on MIRCivP Rule 19 violations. Appellees attempt to argue that the dismissal is also authorized by MIRCivP Rule 33b. This argument appears to be an attempt to sidestep the inability to sustain the order on asserted MIRCivP Rule 19 violations. The briefs filed by all parties accurately reflect that MIRCivP Rule 19 is the crux of the matter. This is what the Appellant focused his attention on and the Appellees and Intervenor so responded.

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11 was improper.⁸

VI. WAS THE COURT'S ORDER DENYING DISQUALIFICATION OF JUDGE DOI AN ABUSE OF DISCRETION?

Chief Judge Nelson K. Doi was the presiding judge in this action from approximately May 1985 until April 1986. He has since resigned from the Marshall Islands judiciary. However, Appellants contend that Judge Soll's order denying Appellant's motion for disqualification of Judge Doi should be reversed as he might possibly be given an assignment relating to this litigation as a retired judge. The standard of review for determining whether Judge Doi should have been disqualified is abuse of discretion. *Weingart v. Allen & O 'Hara, Inc.*, 654 F.2d 1096, 1107 (5th Cir. 1981) .

Appellant claims that Judge Doi's activities in this litigation create an appearance of prejudice requiring disqualification. However, since Judge Doi is no longer on the bench it is difficult for this court to fathom how any refusal to disqualify him would "threaten the purity of the judicial process and its institutions." *Potashnick v. Port City Const. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

In addition, Judge Soll found under the circumstances that there was no basis for the disqualification of Judge Doi. We find no abuse of discretion.

VII. WAS THE TRIAL COURT'S ORDER DENYING THE DISQUALIFICATION OF ATTORNEY LOWE AN ABUSE OF DISCRETION?

[7] The appropriate standard of review of a court's ruling on a motion for attorney disqualification is whether the ruling was an abuse of discretion. *Unified Sewerage Agency, Etc.*

⁸It is also noted that for all practical purposes, the order of the trial court precludes Appellant from ever filing a subsequent action. With this case being dismissed and no order for costs being entered, the Appellant has no basis for determining the amount he would have to pay Appellees prior to filing any subsequent lawsuit.

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v. Jelco Inc., 646 F.2d 1339, 1351 (9th Cir. 1981). The rationale for this standard is that the primary responsibility for controlling the conduct of lawyers practicing before the trial court lies with that court, not with an appellate court. *Id.*; *see also Trone v. Smith*, 621 F.2d 994, 999 (9th Cir. 1980).

Appellants have sought to disqualify Attorney Lowe because he previously represented Appellant when Appellant was prosecuted for homicide.

[8] Where the cause of action or matters involved in a former suit are substantially related to the present action, an attorney who represented a client in that former suit should not represent his adversary in the present action. *T. C. Theatre Corp. v. Warner Bros Pictures, inc.*, 113 F.Supp. 265, 268 (*S.D.N.Y.1953*).

The trial court, in reviewing Appellant's motion to disqualify Lowe, found that the matters presented and the causes of action in the former homicide prosecution and those presented in this action were completely dissimilar. A review of the record presents no basis for finding that the previous ruling was an abuse of discretion.

VIII. WAS THE COURT'S ORDER GRANTING THE DISQUALIFICATION OF ATTORNEY ABRAMS AN ABUSE OF DISCRETION?

Mr. Abrams was the original attorney for Appellant in this action.

The court below found that Abrams had acted unethically in communicating with the opposing party who was represented by counsel, in violation of Disciplinary Rule 7-104 of the Code of Professional Responsibility.

[9, 10] Disciplinary Rule 7-104 clearly proscribes negotiations by any lawyer with another person who is represented by counsel without first obtaining the permission of that person's lawyer. *Kearns v. Fred Lavery*, 573 F.Supp. 91, 96 (E.D. Mich., 1983). Attorneys for Imada Kabua have consistently maintained that Abrams never sought permission to speak with their client, nor does Abrams contend that he ever sought such permission as mandated by DR 7-104. In determining whether an attorney should be disqualified from participating in a lawsuit because

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of an alleged violation of DR 7-104, three competing interests must be balanced: (1) the client's interest in being represented by counsel of its choice; (2) the opposing party's interest in a trial free from prejudice due to disclosures of confidential information; and (3) the public's interest in the scrupulous administration of justice. *Meat Price investigators Ass'n. V. Spencer Foods*, 572 F.2d 163, 165 (8th Cir. 1978).

A balancing of the above-cited interests leads this panel to conclude that the court below did not abuse its discretion in disqualifying Abrams. First, Appellant is being represented by the counsel of his choice despite Abrams disqualification in that Mr. Burdick was representing Appellant prior to his co-counsel Abrams being disqualified. Second, Imada Kabua's apparent disclosure of confidential information to Abrams, whether verbal or nonverbal, ostensibly is of a kind which could prejudice his interests. Finally, the public has a significant interest in deterring attorneys from bypassing counsel and seeking to communicate with opposing parties "as old friends."

Moreover, permitting Abrams to continue as counsel for the Appellant in this case would violate Canon 9 of the Code of Professional Responsibility, which states: "A lawyer should avoid even the appearance of professional impropriety." Ethical Consideration 9-6 mandates that every lawyer "conduct himself so as to reflect credit upon the legal profession and to inspire the confidence, respect and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety."

Based upon these facts, we find that the court below did not abuse its discretion in disqualifying Abrams.

IX. WAS THE COURT'S DECISION NOT TO DISQUALIFY O'BRIEN AN ABUSE OF DISCRETION?

Appellants contend that the court below erred in refusing to disqualify O'Brien as counsel for KAC since he has consistently taken positions adverse to Appellant, and since Appellant is a member of KAC, O'Brien has breached his fiduciary duty to Appellant.

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KAC, not O'Brien as an individual, has taken a position adverse to Appellant. It would appear that disqualifying O'Brien would not effect KAC's position vis-a-vis Appellant. Additionally, the fact that KAC takes a position contrary to one of its members does not preclude KAC from retaining counsel in order to protect its interests.

This case is analogous to a situation in which shareholders bring an action against the corporation in which they own stock. It cannot be maintained that because the shareholders have an interest in the corporation, the corporation, through its attorney, is completely precluded from taking any position adverse to its shareholders. *See, Campbell v. Southwestern Cotton Oil Co.*, 586 F.2d 191 (10th Cir. 1978); *also, Fletcher Cyc. Corp.*, § 6025 (1984).

The order dated December 2, 1985, denying the disqualification of Attorney O'Brien gives no reason for the conclusion reached by the court, but the record reveals no abuse of discretion by the court. The reason for this is that any "conflict" is not O'Brien's, but is what this panel perceives as a blatant disregard by KAC of the preliminary injunction order issued by Judge Lanham on January 29, 1985.

This order, *inter alia*, found that KAC violated its fiduciary duties by distributing money to Imada Kabua when it knew a bona fide dispute existed as to the proper distributee and KAC, through its Board of Directors, directed its attorney to provide a defense against the Irojlablab claim of the plaintiff. Additionally, the trial court found KAC breached the Interim Allocation Agreement by distributing the money when the Iroj title dispute existed.

KAC was enjoined from any further distributions and from making any determination, on its own, as to who is the rightful successor to Irojlablab Manini Kabua. Implicitly, if not expressly, KAC was ordered not to actively oppose the plaintiff's claim. Yet that is exactly what KAC has done. In violation of Judge Lanham's stern admonition, KAC has continued to retain counsel and has filed a brief which, in large part, parrots the opposition filed by Imada Kabua. As aptly pointed out by the trial court, KAC is strictly the stakeholder and its proper position in these cases is to be nothing more than an intervenor and not a partisan or advocate for the interests of Imada Kabua or any other claimant to the Irojlablab title.

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This panel views the actions of KAC to be such an affront and violation of the direction of the trial court that, upon remand, certain action must be taken by the trial court. It shall monitor the activity of KAC closely so that its role in these matters be strictly that of a stakeholder. Within a reasonable time, to be established by the trial court, KAC shall provide an accounting to the court of all expenses (attorney fees, travel costs, and the like) which KAC incurred from January 29, 1985, to the present for the direct and/or indirect opposition to plaintiffs claim in these matters. Upon establishment of the amounts paid, the trial court shall ascertain the amount which should be reimbursed to KAC by the parties affected in the preliminary injunction .⁹

It has also not escaped the attention of the Court that the People of Bikini, as an Intervenor under MIRCivP Rule 24, have taken the role of an advocate in this litigation actively aligning themselves with Appellee Imada Kabua. At oral argument, counsel for the People of Bikini chose not to argue his brief but rather deferred to counsel for Imada Kabua. A review of the brief submitted by People of Bikini demonstrates that the positions taken therein substantially duplicate those of Appellee Imada Kabua.

The People of Bikini appear to have intervened in this action in order to keep apprised as to the specific status, duties, and powers concomitant with the Irojlablab title. They have consistently maintained that any adjudication of the Irojlablab title should have no effect on the rights of the People of Bikini. Therefore, the role of the People of Bikini should be limited to protection of their own interests.

The preceding discussion regarding the proper role of KAC is also applicable to the People of Bikini. Upon remand, the trial court is hereby instructed to monitor the activities of the People of Bikini, through their counsel, in all further proceedings in this matter in order to

⁹The injunction was addressed to KAC, its officers, agents, servants, employees, and attorneys who receive actual notice of the injunction by personal service or otherwise. It will be the duty of the trial court to ascertain these individuals and to assess the amounts to be reimbursed KAC.

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insure that their role is limited to protection of their specific interests and does not include taking any active role in determining the holder of the Irojlablab title.

CONCLUSION

The decisions of the trial court with respect to the disqualification of Abrams and the denial of the motions to disqualify Lowe, O'Brien, and Judge Doi are hereby affirmed.

The order for repayment of costs by Appellant is reversed.

The dismissal of this action pursuant to MIRCivP Rule 33 is hereby reversed and remanded to the High Court with these specific instructions:

1. Appellee Imada Kabua shall have 30 days, upon notice of remand, to file a MIRCivP Rule 19 motion and the trial court shall proceed to resolve this matter as expeditiously as possible. If the court orders joinder, the Appellant shall be provided the right to amend his complaint. Should no MIRCIVP Rule 19 motion be filed within 30 days, the matter shall proceed with the parties of record.

2. Should Appellant desire to amend his complaint, he has 30 days from the notice of remand to file a MIRCivP Rule 15 motion. Any MIRCivP Rule 19 motion and MIRCivP Rule 15 motion can be heard at the same time in the discretion of the trial court and with a view to expediting these proceedings.

3. The preliminary injunction previously entered on January 29, 1985, which prohibits KAC from distributing the disputed land use payment funds, shall be reinstated and is to be deemed the law of this case.

4. KAC will limit its role in this action to that of a stakeholder as mandated by the preliminary injunction order. The trial court is hereby instructed to monitor the role of KAC and its counsel. In the event that KAC continues to strike the pose of an advocate, the trial court should exercise its power to limit KAC's activities to those of a mere stakeholder in this action.

5. KAC will account for all attorney fees and costs expended in opposing Appellant's claim to the Irojlablab title subsequent to January 29, 1985. The trial court will then determine

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whether those fees and costs were incurred in violation of the preliminary injunction order and make an appropriate order for the reimbursement of said amounts.

6. The trial court shall monitor the activity of the People of Bikini in these proceedings as indicated above.

Douglas F. Cushnie and Alan B. Burdick for Plaintiff-Appellant
Roy A. Vitousek, III and David Lowe for Defendant-Appellee
Jonathan M. Weisgall for Intervenor-Appellee
Francis T. O'Brien for Defendant-Appellee KAC

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

PAUL LEJEMAN,

Plaintiff-Appellee,

S.CT. CIVIL NO. 86-13
(High Ct. Civil No. 1985-059)

-v-

TIBERKE LAAKBEL,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

MAY 4, 1988

BURNETT, C.J.

KONDO, A.J. and GUNATILAKA, A.J. (sitting by designation)

SUMMARY:

The trial court held Plaintiff had both the alap and dri jermal rights in a weto. On review, the Supreme Court found the evidence insufficient to sustain that conclusion and sent the case back for a new trial.

DIGEST:

1. **LAND RIGHTS – *Alap – Powers and Obligations:*** It is contrary to custom for an alap to change rights and responsibilities with respect to land without any reference to the iroij or anyone else.

OPINION OF THE COURT BY BURNETT, C.J.

This appeal was taken from judgment in the High Court which held Appellee to be entitled to both alap and dri jermal rights in Aiboj weto on Mejae, Jaluit Atoll, Marshall Islands.

Throughout the trial of this matter, the trial court was obviously frustrated by the ineptness of counsel. It appears also that he was misled by the shifting position taken by the Appellee and his witnesses; as well as inaccurate statements of counsel on, what proved to be,

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the primary basis for the court's decision.

Appellee's complaint for a declaration of his rights related only to his claim to be dri jermal on the land by reason of customary succession. No consideration need be given to his second cause of action, for damages, nor to his third, for injunctive relief, except as they may indicate that Appellant has, in fact, been working the land.

There seems to be no question that Appellee is the alap of Aiboj weto. On trial, for the first time, he claimed his holding of dri jermal rights, as well as, under the custom, as Jurlobren ne, a totally new theory.

The trial court judgment held that plaintiffs claim was "based . . . on the ground that the land in question is what is known as Jurlobren ne in which one and the same person holds both alap and dri jermal rights." Its finding for Appellee rests, principally, on the testimony of Iroj Kabua Kabua.

We look first to the question: What is Jurlobren ne?

The first answer is given by the Appellee, transcript (June 2, 1986) p. 15, 16. That, with such land, the alap holds the dri jermal rights.

Later, pages 19 and 20, transcript June 2, he testified that he received his rights through Labutti, his predecessor alap. Then on page 21, he said: "I acquired that title (dri jermal) through Lininke, the fourth child of Laakbel." (Can land be, or become, Jurlobren ne if the rights are derived from different sources?)

On page 42, the Court is told (by counsel for Appellee): "That's the holding of dri jermal and alap – are for the alap only." And on page 49, (it) . . . "concerns only those who are alaps." The testimony of Iroj Kabua Kabua casts little light on our question, he apparently having little personal recollection of the status of this land. On page 8, transcript June 6: "Paul approached me with a Deed of Sale and said, this land is a Jurlobren ne and I don't have to approach or talk to the dri jermal . . . and I signed that Deed of Sale."

On page 9, Kabua Kabua cross examination, it is suggested, for the first time, that Jurlobren ne is held only by the Iroj. Kabua's response is that "it applies to alap too." There

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the matter was left, except for the further testimony that the “present arrangement was made at the time of the defendant’s father (Labutti).”

[1] Labutti, Appellant’s father, and Appellee’s predecessor as alap, is credited at various points in the testimony with having made the “arrangement.” Kabua did not say, nor was he asked, whether he was Iroj in Labutti’s time. At any rate, it is especially interesting to note that, at no time, was anything said as to Iroj involvement in this “arrangement,” nor was there anything to tell how it came about. All rests on Labutti, the alap, who appears to have been very busy (if we credit the testimony) changing rights and responsibilities without any reference to the Iroj or anyone else. That this is contrary to custom is so obvious that it requires no citation. But, what is Jurlobren ne?

J. Tobin, in *Land Tenure Patterns*, page 49, equates it with “Mo” land: “Mo or kotra (as it is called in Ralik and Radak), and also called jurlobren ne in Radak, is the personal land of the paramount chief.”

On page 58, he translates jurlobren ne as: “Sole of the foot (of the chief only) may touch this land.”

Yet, on page 59, we have the cryptic statement “a type of Jurlobren ne is passed down from alap to alap. Only the chief and the alap possess permanent rights in this type of land.”

Is this what we have here? It seems unlikely, given Appellee’s statement that he succeeded Labutti as alap, and got dri jermal rights from Lininke. Had the land come to him as Jurlobren ne, it would necessarily have been from Labutti.

We, and the trial court, are left totally in the dark as to how Appellee received both alap and dri jermal rights (if he did); whether they came to him by succession as Jurlobren ne from Labutti, or separately, as alap from Labutti and dri jermal from Lininke.

These matters might better have been probed by counsel on trial, but they were not, even with diligent urging by the trial court. It is, consequently, with some reluctance that we conclude that there may well have been an unjust conclusion reached, and that a new trial is warranted.

Reversed and remanded.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**REPUBLIC OF THE MARSHALL
ISLANDS,**

S.CT. CIVIL NO. 87-06
(High Ct. Civil No. 1986-044)

Plaintiff-Appellee,

-v-

LUJANA BALOS, et al.,

Defendant-Appellant.

ORDER DISMISSING APPEAL

MAY 4, 1988

BURNETT, C.J.

SUMMARY:

An appeal was dismissed, for failure to file the notice of appeal on time. The Court stated it had no jurisdiction to hear an appeal that was not timely filed.

DIGEST:

1. **APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Give Timely Notice:*** Timely filing of the notice of appeal is necessary for the appellate court to have jurisdiction to hear the appeal.
2. **JUDGMENTS – *Conclusiveness and Finality – Fees and Costs:*** A judgment is final notwithstanding fees and costs have not been settled.

Appeal is taken from judgment entered in the High Court on October 20, 1987. Notice of appeal was filed on November 25, 1987. Appellee has moved to dismiss, on grounds that timely filing is jurisdictional.

RMI v. BALOS, *et al.* (3)

Appellants' response is, essentially, that they should be, in some manner, forgiven for delay. Our predecessor, Appellate Division of the High Court of the Trust Territory, has recognized late filing only in a situation where the delay was clearly attributable to fault on the part of Court personnel. Nothing indicates any such fault here.

[1] It is not contested that notice was filed late, but Appellants urge that timely filing is not jurisdictional, since it is based on rule rather than statute; that an amendment of the judgment extended time; and that the late filing should be excused. None of these can be given credence.

First, the filing requirement rests in statute: 6 TTC § 352. Our rules simply follow, and thus adopt, the statutory admonition.

The Trust Territory High Court, Appellate Division, has regularly followed the statute, and held late filing to be jurisdictionally defective.

The "amendment" of the original judgment was clearly an amendment of a purely clerical error, did not affect the basic judgment, and obviously did not work to extend time for appeal.

[2] A suggestion that "fees and costs" must be settled before the judgment is final is equally futile.

I conclude that the Court has no jurisdiction, and that this appeal must be, and hereby is, **DISMISSED** for lack of appellate jurisdiction.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

JOHN R. HEINE,

Plaintiff-Appellant,

-v-

**RADIO STATION W.S.Z.O., GENERAL
MANAGER SAMUEL JORDON,**

Defendants-Appellees.

S.CT. CIVIL NO. 87-07

(High Ct. Civil No. 1987-146)

APPEAL FROM THE HIGH COURT

JUNE 6, 1988

BURNETT, C.J.

KONDO, A.J., and GUNATILAKA, A.J. (sitting by designation)

SUMMARY:

Plaintiff-Appellant, a candidate for election to the Nitijela, appeals from an Order of the High Court, which denied his petition for a mandatory injunction to require Appellees to permit access to radio facilities, for broadcast of his political speech. The court found the basic appeal to be moot but agreed with the Appellant's position that compliance of station rules with statutory law is a substantial, recurring matter of public interest.

DIGEST:

1. BROADCAST COMMUNICATIONS – *Candidates Programs – Regulations*: 35 TTC § 51 requires that “free access” be given to any candidate for public office, and that any “program . . . shall be broadcast as submitted without any preview or censorship.” 35 TTC § 52 provides that each station may promulgate rules which limit the duration of programs.
2. APPEAL AND ERROR – *Mootness*: An appellate court should retain jurisdiction in the face of mootness when the matter involves a recurring controversy of great public interest.

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OPINION OF THE COURT BY BURNETT, C.J.

Appellant was a candidate for election to the Nitijela in the November, 1987 election. He appeals from an Order of the High Court which denied his petition for a mandatory injunction to require Appellees to permit him access to radio facilities for the broadcast of his political speech, at his previously scheduled time, 7:15 p.m., November 15, 1987.

The High Court finding was that Appellant had slept on his rights, having chosen to challenge rules of the Appellees too late in the day.

We say, first, that we cannot disturb the ruling of the High Court since the basic issue raised by Appellant is, clearly, moot.

This appeal brings into question the announced rules of the Appellee station as to what was required of candidates wishing to use public broadcast facilities. There appear to be no written rules.

It is agreed that all candidates, according to unwritten policy, were required to submit their tape for broadcast (not more than 30 minutes) before 5:00 p.m. on November 10, 1987. The tape was required to remain in the Appellees' possession until broadcast time, on November 15, 1987.

Having reserved a time slot, and delivered his tape on November 10, Appellant's campaign manager was then returned the tape, being told that the full 30 minutes was not used and that the time could be used with either music, or additional speech. The tape was held and not returned to the station until Appellant learned that his speech would not be broadcast.

Appellant insists that the entire procedure is contrary to law, and cites 35 TTC § 2, still applicable to the Republic of the Marshall Islands.

[1] 35 TTC § 51 requires that "free access" be given to any candidate for public office, and that any "program . . . shall be broadcast as submitted without any preview or censorship"

35 TTC § 52 provides that "(e)ach district administrator may promulgate rules The limit placed upon the duration of programs shall not be less than one hour."

The following section makes clear that any individual "made the subject of criticism shall

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be allowed an opportunity to respond to or rebut such criticism”

It is obvious that, when the prime broadcast time is scheduled for the night before the election (and time limited to only half that required by law) the only opportunity for rebuttal given by 35 TTC § 53 is given those with a late time slot.

We have no particular problem with the pre-broadcast retention of the tape, so long as it is retained only for the purpose of determining the time for scheduling purposes. If used for censorship, it would be clearly improper.

There seems to be no doubt that the announced “rules” for political broadcast do not meet the law.

Having found the basic appeal to be moot, we are left with the question as to whether the fundamental inquiry is of such a nature as to require us to retain it as a matter of “public interest.”

Appellant urges us to decide the basic question of compliance of station rules with the law; as a possibly recurring problem, it could again escape appellate review. We agree.

An appeal is not moot when it involves a controversy which is likely to recur, not as to parties before the court, but with respect to others who are most certainly to be later before the court.

The state decisions on this question are unanimous in holding that an appellate court should retain jurisdiction in the face of mootness, when there is involved a recurring controversy of great public interest. 2 Am Jur 2d, Appeal and Error § 768.

The definitive rule was set by the Supreme Court in *Roe v. Wade*, 410 U.S. 113, 35 L.Ed. 2d 147 (1973).

“The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated”

The *Roe v. Wade* case set forth a classic situation in which there could well be a recurring controversy without effective appellate review, and so held it reviewable.

[2] We find here a situation where there is substantial, recurring public interest, and where in

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the ordinary course of events, the challenge might well escape ordinary appellate review.

We find, therefore, that the question presented is not barred from appellate review as moot; that the decision of the High Court will stand as to the primary challenge; and that the announced rules (or policy) of the Appellees are contrary to law, and cannot stand.

It is therefore, ORDERED, that the appeal is dismissed, as moot. The Appellees will, however, prior to the next scheduled election, promulgate rules to govern succeeding elections and the broadcast of candidates speeches in accord with applicable law. Such rules will be adopted, and promulgated, in accord with the Marshall Islands Administrative Procedure Act of 1979 (P.L. 1979-23).

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

JACK ADDING,

Petitioner-Appellant,

-v-

**MARSHALL ISLANDS CHIEF ELECTORAL
OFFICER SHIRO RIKLON,**

Respondent-Appellee.

S.CT. CIVIL NO. 88-05
(High Ct. Civil No. 1987-163)

ORDER DISMISSING APPEAL

MARCH 31, 1989

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because Appellant failed to timely file an opening brief.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Timely File Opening Brief*: Appellant’s failure to timely file an opening brief is grounds for dismissal.

[1] It appearing from the record of this appeal that service of certification of the record was made April 18, 1988, on Appellant’s counsel, that Appellant’s brief has not been filed and that no request for an extension of time has been filed, it is

ORDERED, consonant with Rules 6 and 18 of the Appellate Rules of Procedure, that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

LAIBON JEJO,

Plaintiff-Appellant,

-v-

LOBOKE LOBO,

Defendant-Appellee.

S.CT. CIVIL NO. 88-10

(High Ct. Civil No. 1984-024)

ORDER DISMISSING APPEAL

APRIL 6, 1989

ASHFORD, C.J.

SUMMARY:

The appeal was dismissed because Appellant failed to timely file a Notice of Appeal.

DIGEST:

1. **APPEAL AND ERROR – Dismissal, Grounds for – Failure to Timely File Notice:** Rule 4 of the Appellate Rules of Procedure and 6 TTC § 352 require an appeal to be filed within thirty (30) days. Timely filing is jurisdictional.

[1] Appellant has filed his Notice of Appeal on November 4, 1988, appealing from an Order of the High Court dated October 4, 1988. Rule 4 of the Appellate Rules of Procedure and 6 TTC § 352 require an appeal to be filed within thirty (30) days. Timely filing is jurisdictional. *RMI v. Balos, et al.*, 1 MILR (Rev.) 120, 121 (May 4, 1988); *Abrams v. Johnston*, 7 TTR 341 (App. Div., 1975); *Browder v. Director, Illinois Department of Corrections*, 434 U.S. 257, 54 L.Ed. 2d 521 (1978).

This appeal was filed on the thirty-first day and is, therefore, untimely. It is ORDERED that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

LANGINMO JACOB,

Petitioner-Appellant,

-v-

**MARSHALL ISLANDS CHIEF ELECTORAL
OFFICER SHIRO RIKLON,**

Respondent-Appellee.

S.CT. CIVIL NO. 88-07
(High Ct. Civil No. 1987-165)

ORDER DISMISSING APPEAL

APRIL 13, 1989

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because Appellant failed to timely pay costs for production of the transcript of trial court proceedings.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Pay Fees and Costs:* Appellant’s failure to timely pay costs for production of the transcript of trial court proceedings is grounds for dismissal.

[1] Appellant having failed to pay costs as required by Rule 16, notwithstanding granting additional time, it is

ORDERED that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

BILLY PIAMON,

Plaintiff-Appellee,

-v-

JILLO LANITUR-BULELE,

Defendant-Appellant.

S.CT. CIVIL NO. 89-01

(High Ct. Civil No. 1988-146)

ORDER DISMISSING APPEAL

JUNE 9, 1989

ASHFORD, C.J.

SUMMARY:

The trial court order denying Appellant's motion to dismiss or for summary judgment did not terminate the proceedings, permitted them to continue, and was merely interlocutory. This appeal was dismissed because an order must be final to be appealable.

DIGEST:

1. **APPEAL AND ERROR – Decisions Reviewable – Finality of Determination:** Under Article VI, § 2(2) of the Constitution of the Marshall Islands, an appeal may be taken to the Supreme Court only from any final decision of the High Court, as of right, or from any final decision of any court in the discretion of the Supreme Court.

Defendant appealed from an order denying Defendant's Motion to Dismiss or for Summary Judgment of Res Judicata. In response to Plaintiff-Appellee's motion in this Court to dismiss the appeal as being from an interlocutory order, Defendant has argued the evidence on which Defendant's claim of *res judicata* is based.

[1] In the Trust Territory Courts, appeals were allowed only from final orders or judgments. *Trust Territory v. Konou*, 7 TTR 331 (1975). Under the Constitution of the Marshall Islands, an

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appeal may be taken to the Supreme Court only from “any final decision” of the High Court, as of right, or from “any final decision” of any court in the discretion of the Supreme Court.

Republic of the Marshall Islands Constitution, Article VI, § 2(2). This Court has previously held that an order must be final to be appealable. *RMI v. Balos, et al.*, 1 MILR (Rev.) 53, 53 (Jul 25, 1986).

If the trial court had granted the Motion to Dismiss or for Summary Judgment, that order would have terminated the proceedings, been final and appealable. The order denying the motion, however, did not terminate the proceedings, permitted them to continue, and is merely interlocutory. If it was erroneous, the error can be raised on appeal when a final judgment or order has been entered in the lower court.

The appeal is dismissed and the cause remanded to the High Court for further proceedings.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

PREMIER FILM AND EQUIPMENT, INC.,

Plaintiff-Appellee,

-v-

AMOS McQUINN,

Defendant-Appellant.

S.CT. CIVIL NO. 88-09
(High Ct. Civil No. 1983-073)

ORDER DISMISSING APPEAL

JUNE 13, 1989

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because Appellant failed to timely file an opening brief.

DIGEST:

1. **APPEAL AND ERROR – *Dismissal, Grounds for – Failure to File Opening Brief:*** Appellant’s failure to timely file an opening brief is grounds for dismissal.

[1] Notice of certification of the record by the Clerk was given to Appellant’s counsel on November 29, 1988, apparently by mail. Under Rules 18(b) and 6(a) of the Marshall Islands Rules of Appellate Procedure and Rule 6(e) of the Marshall Islands Rules of Civil Procedure, Appellant’s Brief was due January 31, 1989. Neither the brief nor any application for extension of time has ever been filed. Pursuant to Rule 20(a) of the Marshall Islands Rules of Appellate Procedure, it is

ORDERED, that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

MICHAEL KONELIOS,

Petitioner-Appellant,

-v-

**MARSHALL ISLANDS CHIEF ELECTORAL
OFFICER SHIRO RIKLON,**

Respondent-Appellee.

S.CT. CIVIL NO. 88-06
(High Ct. Civil No. 1987-164)

ORDER DISMISSING APPEAL

JULY 10, 1989

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because Appellant failed to timely file an opening brief.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to File Opening Brief:* Appellant’s failure to timely file an opening brief is grounds for dismissal.

[1] Under Order entered April 14, 1989, Appellant’s Brief was due May 22, 1989. Neither the brief nor any application for extension of time has ever been filed. Pursuant to Rule 20(a) of the Marshall Islands Rules of Appellate Procedure, it is

ORDERED, that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

REPUBLIC OF THE MARSHALL

S.CT. CIVIL NO. 86-10
(High Ct. Civil No. 1986-044)

Plaintiff-Appellee,

-v-

LUJANA BALOS, *et al.*,

Defendants,

and

KABUA KABUA,

Proposed Intervenor-
Defendant/Appellee.

STIPULATION FOR DISMISSAL OF APPEAL

It is hereby stipulated and agreed, by and between Plaintiff/Appellee Republic of the Marshall Islands (“Republic”) and Proposed Intervenor-Defendant/Appellant Kabua Kabua, by and through their respective attorneys, that:

1. This appeal be dismissed, each party to bear his or its own costs;
2. Kabua Kabua states, as grounds for dismissal, that: (1) this appeal has been made moot by the expiration of the time period of the condemnation that is the subject of this action; and (2) the purpose of his attempted intervention, which was to prevent a claim by others that he would be estopped from claiming the Iroj Lablab title to the condemned lands if he did not intervene, has been accomplished.
3. The Republic’s agreement that this appeal be dismissed shall not constitute agreement by the Republic to the second ground for dismissal set forth in paragraph 2, above, and that the entry of an order of dismissal by the court shall not constitute an adjudication of the second ground for dismissal set forth in paragraph 2 above.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

MARSHALL ISLANDS DEVELOPMENT CORPORATION AND SAM LEON (dba CRYSTAL AMUSEMENT CENTER),

S.C.T. CIVIL NO. 89-05
(High Ct. Civil No. 1989-348)

Plaintiffs-Appellees,

-v-

MAJURO ATOLL LOCAL GOVERNMENT,

Defendant-Respondent-
Appellant,

and

REPUBLIC OF THE MARSHALL ISLANDS,

Intervenor-Respondent-
Appellant.

ORDER DISMISSING APPEAL

JUNE 29, 1989

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because the Appellant had filed the notice of appeal to the Supreme Court rather than the High Court as required by rule.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Noncompliance with Rules:*

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Appellant filed the notice of appeal before the appellate court rather than the trial court as required by rule.

[1] Rule 4(b) of the Marshall Islands Rules of Appellate Procedure requires the notice of appeal to be filed “with the presiding judge of the court from which the appeal is taken or with the clerk of courts.” The Notice of Appeal in this case, from an order of the High Court, was captioned “In the Supreme Court” and was filed with the clerk of courts, with whom papers for both of those courts are filed. Notices of appeal are customarily filed in the court appealed from, not in the court appealed to, and Rule 4(b) appears to so require. Whether the substantive rights [text missing in original]. *Reedsburg Bank v. Apollo*, 508 F2d 995 (1975), on which Appellant relies, is inapposite because it dealt with an order denying intervention.

The appeal is dismissed and the cause remanded to the High Court for further proceedings.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**ATAJI BALOS, JULIAN RIKLON,
and LAJI TAFT,**

S.CT. CIVIL NO. 87-05
(High Ct. Civil Nos. 1987-108,
109, and 110)

Petitioners,

-v-

HIGH COURT CHIEF JUSTICE TENNEKONE,

Respondent.

REMOVAL BY THE HIGH COURT

AUGUST 2, 1989

KING, A.J. *pro tem*¹
ASHFORD, C.J., and KOBAYASHI, A.J. *pro tem*²

SUMMARY:

This action stems from a determination by a Commission of Inquiry that petitioners committed the offense of contempt against its authority. The Court dismissed the contempt charges on the following grounds: The 1986 Commissions of Inquiry Act failed to provide any notice or opportunity to be heard and the “conclusive evidence” clause of § 12(3)(b) of the Act was unconstitutional. The Court also dismissed, as moot, the petitioners’ request for a writ of prohibition.

DIGEST:

1. CONSTITUTIONAL LAW – *Due Process – Procedural*: Constitutional due process in

¹Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, by appointment of the Cabinet.

² Honorable Bert T. Kobayashi, Associate Justice Emeritus of the Supreme Court of Hawaii, by appointment of the Cabinet.

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contempt proceedings requires that the defendant be given reasonable notice of the charges and opportunity to be heard.

2. CONTEMPT – *Nature and Elements*: Contempt is civil in nature if sanctions are remedial and conditional upon compliance and is criminal if punitive and unconditional.
3. CONSTITUTIONAL LAW – *Due Process – Presumptions and Burden of Proof*: The “conclusive evidence” clause of § 12(3)(b) of the Commissions of Inquiry Act 1986 runs directly contrary to the guarantees of the Constitution of presumption of innocence and rights against self-incrimination, confrontation of witnesses and compelling attendance of witnesses.
4. CONSTITUTIONAL LAW – *Disqualification of Judge*: Article VI, § 1(6) of the Constitution requires a judge to recuse himself if he previously played a role in the case or he is disabled by any conflict of interest.

OPINION OF THE COURT BY KING, A.J.

I. BACKGROUND

This action stems from contempt proceedings arising from a determination by a Commission of Inquiry (the “Commission”) that petitioners Ataji Balos, Julian Riklon, and Laji Taft (collectively “petitioners”) committed the offense of contempt against its authority.

The Commissions of Inquiry Act 1986, P.L. 1986-29 (“Act”), gives the President the authority to appoint Commissions of Inquiry into the administration of any government department or public authority, conduct of public employees, and matters which are “in the interest of the public safety, national security or welfare.” Act, § 2(1). Pursuant to this authority, on February 19, 1987, the President of the Republic of the Marshall Islands appointed a Commission of Inquiry to investigate the finances of the Kwajalein Atoll Corporation and the status of the Kwajalein Atoll Trust.

Petitioners were summoned by the Commission to produce pertinent records by April 7, 1987. They subsequently appeared personally before the Commission for examination, but produced no records. On August 18, 1987, in its final report, the Commission stated the following “(Petitioners’) failure to respond (to the order for production of document) constitutes

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the offense [of] contempt which has to be dealt with [by] the High Court.”

Petitioners were summoned to appear before the High Court and show cause why they should not be held in contempt. On October 7, 1987, petitioners moved to quash the summons, claiming that the Act was unconstitutional. Prior to the hearing on the order to show cause, petitioners moved to disqualify Chief Justice Tennekone. Petitioners argued that the Chief Justice’s prior role – as legislative counsel – in the drafting and enactment of the Act constitutes a conflict of interest that necessitated the Chief Justice’s recusal. Petitioners’ motion for disqualification was denied on October 22, 1987, by Associate Justice Ralph W. Kondo of the High Court.

On November 13, 1987, Chief Justice Tennekone referred the question of the constitutionality of Section 12(2) and (3) of the Act to the Supreme Court – pursuant to Article VI, § 2(3) of the Constitution. On November 14, 1987, the Supreme Court accepted the referral of the constitutional challenge.

On November 14, 1987, petitioners’ appeal of Justice Kondo’s denial of disqualification was dismissed because this denial was not a final, appealable order. Petitioners then filed a writ of prohibition in this Court, seeking to bar Chief Justice Tennekone from participating in the High Court proceeding on the order to show cause and the related motion to quash. The Supreme Court, consisting of Chief Justice Harold W. Burnett, and, sitting by designation, High Court Associate Justice Ralph W. Kondo, and Judge Robert Hefner of the Commonwealth Court of the Northern Marianas Islands, heard both the petition for a writ and the referral of constitutional questions on February 12, 1988.

However, the following events occurred after the Supreme Court hearing: (1) The Court learned that Judge Hefner had not been appointed by the Cabinet to hear the case; (2) The Cabinet failed to renew Chief Justice Burnett’s contract, so his appointment lapsed on June 15, 1988; (3) On July 11, 1988, the Clerk of the Court received a handwritten opinion signed by Burnett which held that the Act was unconstitutional; (4) The opinion was typed and then signed by both Burnett and Kondo and filed on August 16, 1988, but was “unfiled” on the same day

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pursuant to instructions from the Chief Justice of the High Court.

These events led to the present rehearing of both the issue of constitutionality of the Act's § 12(2) and (3) and the petition for the writ of prohibition. Chief Justice Clinton R. Ashford of the Supreme Court invited the attorney general and the legislative counsel of the Republic to appear at the rehearing. Mr. Douglas Premaratne, Legislative Counsel, filed a written submission as *amicus curiae* in response to this invitation.

II. DISCUSSION

A. Constitutionality of the Act

Section 12 of the Act specifies what actions or omissions constitute contempt against the Commission and provides, in relevant part:

(1) If any person upon whom a summons is served under this Act . . .

c) refuses or fails without cause which in the opinion of the commission is reasonable, to produce to the commission any document or other thing which is in his possession or power and which is in the opinion of the commission necessary for arriving at the truth of the matters to be inquired into . . . such person shall be guilty of the offense of contempt against or in disrespect of the authority of the commission.

The Act provides that the Commission “may cause its secretary to transmit to the High Court a certificate setting out such determination.” Act, § 12(2). Section 12 further provides that:

3) In any proceedings for the punishment of an offense of contempt (before) the High Court . . . any document purporting to be a certificate signed and transmitted to the court under Subsection (2) shall

(a) be received in evidence, and be deemed to be a certificate without further proof unless the contrary is proved; and

(b) be conclusive evidence that the determination set out in the certificate was made by the commission, and of the facts stated in the determination.

Section 10 of the Act provides that every offense of contempt committed against the

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Commission shall be punishable by the High Court as if it were an offense of contempt against the High Court. The offense of contempt against the Commission is therefore a misdemeanor carrying with it a possible prison term of up to six months and a fine up to \$500.00. *See* Judiciary Act § 59.

Article II, § 4(1), of the Constitution of the Marshall Islands (“Constitution”) provides that “(n)o person shall be deprived of life, liberty, or property without due process of law.” While the penalties for the offense of contempt are clearly deprivations of liberty and property, the Act fails to provide for any notice or opportunity to be heard. This failure alone does not render the Act’s contempt provision constitutionally infirm, since these due process guarantees can be read into the Act’s requirement that the Commission refer the matter to the High Court which would then hold a hearing, after giving notice and providing the alleged contemnor an opportunity to be heard. The written submission of Counsel Premaratne for the Republic as *amicus curiae* agrees that the High Court must necessarily observe due process of law once the matter is referred to it. Written Submission, at 9.

[1] In this case, the petitioners were not given prompt notice since the order to show cause came months after their appearance before the Commission. This delay does not comport with the Constitution’s due process guarantees. *See, e.g., Kabua v. Gannett Co., Inc.*, 1 Selected Decisions of the High Court of the Republic of the Marshall Islands 10 (1984) [Constitutional due process requires defendant in a civil case be given reasonable notice of action]. In criminal cases, the requirement of adequate notice is even more imperative. *See, e.g., Cooke v. United States*, 267 U.S. 517, 537 (1925) [Constitutional due process in criminal contempt proceedings requires that the defendant be given reasonable notice of the charges and opportunity to be heard]. Delay which is not due to the person charged may be presumed to be prejudicial.

However, even had the petitioners been given prompt notice with the opportunity to be heard, they would have been faced at the hearing with the Commission’s determination that they had committed contempt. Section 12(3)(b) of the Act provides that this determination and the facts in the Secretary’s certificate constitute “conclusive evidence.” This “conclusive evidence”

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clause is unconstitutional.

[2] First of all, the contempt charges at issue here are for criminal, not civil contempt. The Commission's certificate does not specify whether the contempt is criminal or civil; but since the Commission is no longer in existence, punishment cannot be conditional upon compliance with the Commission's request for the documents. *See, e.g., Hicks v. Feiock*, 108 S.Ct. 1423, 1429-31(1988) [Contempt is civil in nature if sanctions are remedial and conditional upon compliance and is criminal if punitive and unconditional]. In any event, the referral to the High Court did not request coercive remedies.

This view is further supported by the failure of the Commission to refer the matter to the High Court, at the time of the alleged failure to produce the requested document, for civil contempt under Section 60 of the Judiciary Act which would have authorized the High Court to impose imprisonment and/or daily fines until the documents were produced.

[3] Because the petitioners face criminal charges, they are entitled to the procedural safeguards expressly enumerated in Article II, § 4 of the Constitution. Section 4(2) provides that "every person charged with a criminal offense shall be presumed innocent until proven guilty beyond a reasonable doubt." *See Rep. of the Marshall Islands v. Yates*, 1 Selected Decisions of the High Court of the Marshall Islands 75 (1982) [Accused is presumed innocent; burden is upon the prosecutor to prove guilt beyond a reasonable doubt]. Section 4(4) guarantees the accused in all criminal proceedings prior notice of the nature and cause of the accusation, the right against self-incrimination, the right of confrontation, and the right to compel attendance of witnesses. *See also* Criminal Procedure Code of the Marshall Islands, § 37 (enumerated rights of criminal defendants).

The "conclusive evidence" clause runs directly contrary to these safeguards. The accused contemnors are not presumed innocent until proven guilty beyond a reasonable doubt, but instead are faced with "conclusive evidence" that they have committed the offense. The "conclusive evidence" clause also abrogates the rights against self-incrimination, of confrontation, and to compel the attendance of witnesses.

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Finding that the Act's "conclusive evidence" clause is contrary to the Constitution necessitates that the Court find this clause void as a matter of law. The Constitution declares in its opening sections that it is the supreme law of the land and that any law "which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be void." Constitution, Article I, §§ 1 and 2.

So far as this Court is aware, this "conclusive evidence" clause in relation to the contempt powers of tribunals of inquiry is unique to the Marshall Islands and to Ceylon (Sri Lanka). The "conclusive evidence" clause of the Marshall Islands Act mirrors that of the Ceylonese Commissions of Inquiry Act. *See* relevant portions of Ceylonese Act printed and discussed in *Rajah Ratnagopal v. Attorney-General*, [1970] AC 974, [1969] 3 W.L.R. 1056.

In England, the original Tribunals of Inquiry (Evidence) Act 1921 specifically provided that the Court would hold a hearing with witnesses for both the Commission and for the accused before taking any action against the accused. Tribunals of Inquiry (Evidence) Act 1921, § 1(c). The contempt portions of that Act have been superseded by the Contempt of Court Act of 1981. The 1981 Act provides that the Tribunal of Inquiry's certificate, which states that there has been commission of an offense of contempt, "is not binding on the court. The court must itself inquire into the matter afresh to determine if an offense has been committed." Contempt of Court Act, 1981, Criminal Contempt (4), § 49.

Striking the unconstitutional "conclusive evidence" clause of the Commissions of Inquiry Act does not change the procedure for criminal contempt referrals from Commissions of Inquiry to the High Court. Any alleged contempt before the Commission would not have been committed before the High Court itself. Therefore, the High Court would not follow the procedure for summary contempt, but would follow the procedure specified for contempt charges in § 57(4) of the Judiciary Act, which provides that "a charge of the offense of contempt of court shall be laid and dealt with in the same way as other charges of offenses."

The Attorney-General, as "chief legal officer of the Government of the Marshall Islands," is in charge of the supervision of the criminal prosecution for contempt. *See* Part I, § 2(b) of the

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Criminal Procedure Code. The Constitution charges the Attorney-General with the responsibility for “instituting, conducting or discontinuing any proceedings for an offense alleged to have been committed, and for seeing to it that the laws are faithfully executed.” Constitution, Article VII, § 3(1).

The Attorney-General’s constitutional duty to ensure that “the laws are faithfully executed” in his supervision of the criminal contempt proceedings before the High Court provides further assurance that these proceedings would comport with the Constitution’s due process guarantees and with the rights of criminal defendants enumerated in the Criminal Procedure Code.

Upon review of these due process guarantees and rights, the Court finds that the protracted length of these proceedings mandates that the contempt charges against the petitioners be dismissed with prejudice. More than two years have elapsed since the events at issue; the Commission has long since been dissolved; the invalidity of the earlier Supreme Court’s “unfiled” opinion which necessitated the present Court’s rehearing of the issues – all of these factors counsel that the charges be dismissed in the interest of due process and fundamental fairness.

The matter is remanded to the High Court with instructions to dismiss the contempt charges against the petitioners with prejudice.

B. The Writ of Prohibition

Dismissal of the petitioners’ contempt charges renders their motion for a writ of prohibition moot. Nonetheless, the Court deems it desirable to comment upon the standard used by Justice Kondo in denying their motion to disqualify Chief Justice Tennekone.

Article VI, § 1(6) of the Constitution states:

No judge shall take part in the decision of any case in which the judge has previously played a role or with respect to which he is disabled by any conflict of interest.

This language is repeated in Section 67 of the Judiciary Act.

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Justice Kondo's order denying petitioner's motion for disqualification acknowledged Chief Justice Tennekone's role in the drafting of the legislation, but stated that "(s)ection 67 of the Judiciary Act requires that (petitioners) also show that the Chief Justice was in fact biased and prejudiced against them." No authority is cited for this proposition, and the Court has found none for it.

[4] The Court is of the opinion that these provisions in the Constitution and in the Judiciary Act concerning disqualification of a judge are disjunctive. If a judge played a role in a case or if he is disabled by any conflict of interest, he must recuse himself. The Court therefore finds that the standard used by Justice Kondo was incorrect.

The petition for a writ of prohibition is dismissed as moot.

SO ORDERED.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

TOJIO CLANTON,

S.CT. CIVIL NO. 88-03
(High Ct. Civil No. 1987-159)

Petitioner-Appellant

-v-

**MARSHALL ISLANDS CHIEF ELEC-
TORAL OFFICER SHIRO RIKLON,**

Respondent-Appellee,

and

NIEDEL LORAK, et al.,

S.CT. CIVIL NO. 88-02
(High Ct. Civil No. 1987-161)

Petitioners-Appellants,

-v-

**MARSHALL ISLANDS CHIEF ELEC-
TORAL OFFICER SHIRO RIKLON,**

Respondent-Appellee.

APPEAL FROM THE HIGH COURT

AUGUST 2, 1989

ASHFORD, C.J.

KING, A.J. *pro tem*,¹ and Kobayashi, A.J. *pro tem*²

¹The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by Cabinet appointment.

²The Honorable Bert T. Kobayashi, Associate Justice Emeritus of the Supreme Court of Hawaii, sitting by Cabinet appointment.

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SUMMARY:

These appeals were from judgments of the High Court dismissing appeals to the High Court from rejections by the Chief Electoral Officer of recount petitions. The Chief Electoral Officer found petitioners had failed to show a substantial possibility of a different outcome and rejected the petitions for recount. Judgments of the High Court were affirmed.

DIGEST:

1. APPEAL TO THE HIGH COURT – *Decisions of Chief Electoral Officer*: Reviews by the High Court of the decisions of the Chief Electoral Officer pursuant to 2 MIRC Ch. 1, § 81(1) are performed by the High Court in the exercise of its appellate jurisdiction.
2. APPEAL AND ERROR – *Decisions Reviewable – Decisions on Appeal to High Court*: An appeal as of right from any final decision of the High Court in the exercise of its appellate jurisdiction will lie only if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of the Constitution.
3. APPEAL AND ERROR – *Same – Same*: The filing of an appeal in the manner provided by the present Rules of Appellate Procedure sufficiently invokes the power of the Court to determine whether jurisdiction lies under any of the three provisions of Article VI, § 2 of the Constitution to review a decision of the High Court made in the exercise of the High Court’s appellate jurisdiction.
4. APPEAL AND ERROR – *Same – Same*: The Supreme Court’s discretion to grant, or indeed to order up, an appeal pursuant to Article VI, § 2(2)(c) of the Constitution appears to be unfettered, but exercising discretion imports a reasoned, mature, and responsible exercise of judicial authority.
5. APPEAL AND ERROR – *Questions Reviewable – Record and Proceedings Not in Record*: An appeal is on the record. Neither enlargement of the grounds for complaint nor the presentation of additional evidence nor a hearing *de novo* is encompassed within the ordinary meaning of appeal.
6. STATUTES – *Construction and Operation*: Statutes are to be construed according to their plain and obvious meaning, absent some indication of legislative intent to the contrary.
7. ELECTIONS AND VOTING – *Conduct of Elections – Recounts*: The Chief Electoral Officer must be persuaded that there is a substantial possibility that the election result would be affected by a recount, or he must reject a petition for a recount.

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8. APPEAL AND ERROR – *Questions Reviewable – Asserted Below*: An appellate court cannot rule on the merits of a question that was neither presented to, nor decided by, the officer, body or court appealed from.
9. EVIDENCE – *Presumptions*: The presumption always is that officials have done what the law requires.

OPINION OF THE COURT BY ASHFORD, C.J.

These “appeals,” by candidates from Arno and Ujae who failed to be elected to the Nitijela in the 1987 election, were consolidated for briefing and argument. They arose from judgments of the High Court dismissing, on the merits, appeals to the High Court from rejections by the Chief Electoral Officer of recount petitions filed by disappointed candidates following the announcement of the unofficial results of the election. The recount petitions alleged the grounds for recount in statutory language (2 MIRC Ch. 1, § 80(1))³ and were supported by affidavits alleging that ballots were counted that had been cast by voters (five of whom were named in the affidavit concerning Ujae) who were under age or who did not reside or have land rights in the electoral district in which they voted; a ballot box was kept in a private home on Arno for two days and there were more ballots in that box than voters on Arno; and a ballot box was taken to Lukwoj for voters to cast ballots after 7 p.m. and thereafter Arno voters were allowed to cast ballots in that same box.

The Chief Electoral Officer⁴ responded in writing to the petitions for recount. He stated that the registration records showed the named challenged voters to be of age and residents of or holding land rights in the district in which they voted, all registered voters to be of legal age and

³The statute in effect at the time of the election was the Elections and Referenda Act 1980, P.L. 1980-20 as amended by P.L. 1983-25. With renumbering of some sections, it is now incorporated in the Marshall Islands Revised Code as Title 2, Chapter 1, which will be cited for ease of reference.

⁴As used in this opinion, this term shall include the other electoral officials deputized by the Chief Electoral Officer.

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that no comparison with registration records could be made for unnamed voters. He further stated that the ballot box kept in a private home was in safekeeping in the home of an electoral officer and did not contain more votes than registered voters in the voting ward where it was used. Finally, the Chief Electoral Officer explained that the election official did not arrive at Lukwoj until after 7 p.m. and denied that any ballots of Arno voters were cast after 7 p.m. in that box.

Noting that the election records and counting procedures were and would be the same, on any recount, as in the original tabulation, the Chief Electoral Officer found petitioners had failed to show a substantial possibility of a different outcome and rejected the petitions for recount.

Petitioners' appeals to the High Court alleged additional grounds for recounts and sought to present additional evidence, including copies of birth certificates of persons under 18 believed to have been allowed to vote. The High Court considered the facts alleged in support of the appeals and the representations of counsel, in addition to the record made by the recount petitions, affidavits and rejection rulings, but declined to allow additional evidence.

A. Jurisdiction.

[1] A threshold question is whether this Court has jurisdiction to hear these "appeals." When a petition for recount has been rejected, an appeal against the decision may be taken to the High Court. 2 MIRC Ch. 1, § 81(1). That was done by petitioners in these cases. The High Court may uphold the appeal and order a recount or dismiss the appeal. 2 MIRC Ch. 1, § 81(2). No provision for further judicial review is contained in the statute⁵ and the official result of the election is announced on conclusion of the judicial review. 2 MIRC Ch. 1, § 85(2).

Petitioners-Appellants nevertheless proceeded to appeal to this Court on the assumption that the appeal was authorized "as of right" by Article VI, § 2(2)(a) of the Constitution. That jurisdictional grant applies to "any final decision of the High Court in the exercise of its original

⁵Appeals to the High Court, but no further judicial review, are provided in 2 MIRC Ch. 1, for rejection of a voter's application to amend the Electoral Register (§ 29(3)), and for rejection of a voter's application to be entered in the Electoral Register (§ 34(2)).

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jurisdiction.” We are of the opinion, however, that reviews by the High Court of the decisions of the Chief Electoral Officer pursuant to 2 MIRC Ch. 1, § 81(1) are performed by the High Court in the exercise of its appellate jurisdiction. The plain language of that subsection and subsection 81(2) admit of no other conclusion.

[2] But an appeal “as of right” from any final decision of the High Court in the exercise of its appellate jurisdiction will lie “only if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of the Constitution.”

Constitution Article VI, § 2(2)(b). The notice of appeal does not allege that the High Court has so certified, or even that the High Court was requested to do so. Therefore, Petitioners-Appellants do not have an appeal “as of right” to this court.

[3,4] Nevertheless, pursuant to Article VI, § 2(2)(c), an appeal may still lie “at the discretion of the Supreme Court, subject to such conditions as to security for costs or otherwise as the Supreme Court thinks fit, from any final decision of any court.” We note that the Rules of Appellate Procedure do not cover “appeals” directed to this discretionary power. In the absence of specific procedural requirements that track the three jurisdictional provisions of Article VI, § 2, we hold that the filing of an appeal in the manner provided by the present Rules of Appellate Procedure sufficiently invokes the power of this Court to determine whether jurisdiction lies under any of the three provisions of § 2. Accordingly, we interpret the notice of appeal which has been filed as including a request to this court to exercise its discretionary jurisdiction. The Supreme Court’s discretion to grant, or indeed to order up, an appeal pursuant to Article VI, § 2(2)(c) appears to be unfettered. No qualifying words restrict the plain language. However, the word “discretion” itself imports a reasoned, mature, and responsible exercise of judicial authority.

For example, the laws of the Trust Territory of the Pacific Islands granted to the appellate division of the High Court discretion to hear appeals in matters involving the construction or validity of laws, regulations, and enactments, “if the appellate division considers that the public interest will be served thereby.” 5 TTC § 54.

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We are of the opinion that the issues presented in these cases are of great public interest, involving the construction and operation of election statutes which are basic to the legitimacy of the government of this Republic.

We therefore take jurisdiction of these appeals in the exercise of our discretion pursuant to Article VI, § 2(2)(c) of the Constitution.

B. Procedure on appeal to the High Court.

Appellants have complained that the lower court deprived them of the opportunity to issue subpoenas and adduce evidence, citing *Beasa Peter v. Riklon*, High Court Civil Action No. 1983-120 (1984), and the Marshall Islands Rules of Civil Procedure. Neither is persuasive. While the opinion in the *Beasa Peter* case indicates that evidence outside the record may have been considered by the High Court on an appeal from the Chief Electoral Officer's decision not to grant a recount, this Court is not bound by the procedure adopted by the High Court in that case when it believes that procedure to have been in error. Neither are the Marshall Islands Rules of Civil Procedure relevant, because they deal with civil actions which are "commenced by filing a complaint with the court." MIRCivP Rule 3. Each of these cases was commenced by filing a paper in the High Court entitled "Appeal From Rejection of Recount Petition." They were properly so titled, because the statute, 2 MIRC Ch. 1, § 81, speaks unequivocally of an appeal to the High Court, against the decision of the Chief Electoral Officer, and limits the action that may be taken by the High Court in connection with the appeal.

[5,6] As a matter of general law, it is axiomatic that an appeal is on the record. *Osawa v. Ludwig*, 3 TTR 594 (1966); *Witters v. Wash. Dept. of Serv. For the Blind*, 474 U.S. 481, 88 L.Ed. 2d 846, n.3, 106 S.Ct. 748 (1986). Neither enlargement of the grounds for complaint nor the presentation of additional evidence nor a hearing *de novo* is encompassed within the ordinary meaning of appeal. Nothing in 2 MIRC Ch. 1 § 81 suggests that any meaning other than the ordinary meaning of the word was intended. It is well settled that the statutes are to be construed according to their plain and obvious meaning, absent some indication of legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 69 L.Ed. 2d 246, 252, 101 S.Ct. 2524 (1981);

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United States v. James, 478 U.S. 597, 92 L.Ed. 2d 483, 493, 106 S.Ct. 3116 (1986).

C. Rejection of the recount petitions.

Appellants sought recounts of the Arno and Ujae votes under both subsections (a) and (b) of 2 MIRC Ch. 1, § 80(1). Candidate Clanton from Ujae trailed the winning candidate by 2 votes out of a total of 204 votes counted and Candidate Lorak from Arno was 31 votes, out of 2087 votes counted, behind the second-place winner. The results, they claim, were “so close that it would be proper to have the voting figures rechecked.” 2 MIRC Ch. 1 § 80(1)(a). It is apparent that the results could be characterized as “close,” both in terms of percentages of votes cast and numbers of votes; 2 votes, or 1% of those cast, in the case of Ujae and 31 votes, or 1.5% of those cast, in the case of Arno.

[7] Whether or not a petitioner for a recount under 2 MIRC Ch. 1, § 80(1)(a) must aver facts believed to justify a recount, as 2 MIRC Ch. 1, § 80(2) requires for a recount requested under 2 MIRC Ch. 1, § 80(1)(b), the Chief Electoral Officer must be persuaded that there is a “substantial possibility” that the election result would be affected by a recount or he must reject the petition. 2 MIRC Ch. 1, § 80(4). The statute sets forth no criteria to guide the Chief Electoral Officer in the exercise of his discretion, nor did the Appellants furnish information not already known to him which arguably gave rise to a substantial possibility that a recount would establish a different result. In the circumstances, we are not able to find the Chief Electoral Officer abused or erroneously exercised the discretion vested in him by the statute.

The errors urged on this appeal, to justify a recount under 2 MIRC Ch. 1, § 80(1)(b), were that the Chief Electoral Officer did not treat the ballots of voters registered at the polling place on the day of the election as challenged ballots and that there were more ballots in one box than there were people that voted.⁶ These grounds are somewhat different from the grounds on which

⁶The “errors” of keeping the ballot box in a private home and allowing Lukwoj voters to cast ballots after 7 p.m. were not pursued. While the Chief Electoral Officer conceded that ballots from Lukwoj were cast after 7 p.m., presumably those voters had arrived at the polling place, but had been unable to vote before 7 p.m. *See* 2 MIRC Ch. 1, § 70(3).

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the petitions for recount were based. The voters named in an affidavit supporting the Ujae candidate's petition for recount appear to have been voters registered before the election, but the unnamed, allegedly under-age voters complained of in the Arno candidate's affidavit might have been voters registered on election day. The alleged additional ballots were identified in the Arno candidate's affidavit as ballots exceeding the number of voters on Arno, not as ballots exceeding the number of voters who voted.

[8] Taking the latter ground first, we cannot rule, on an "appeal," on the merits of a question that was neither presented to nor decided by the Chief Electoral Officer. Complaint was made to him that more ballots were in a box than there were voters at that place, and he responded that for every voting ward the count showed fewer ballots than there were registered voters. Now it is contended that not so many persons voted as there were ballots in the box. This question presumably could have been raised during the public count of the vote (*see* 2 MIRC Ch. 1, § 78), and in any event, in the petition for recount. It cannot be raised for the first time on appeal.

[9] We turn next to the claim that the Chief Electoral Officer did not treat the ballots of voters registered at the time of voting as challenged ballots. There is no question that 2 MIRC Ch. 1, § 73(3) requires those ballots to be treated as challenged ballots. However, the record is completely devoid of any evidence to support Appellants' claim that the Chief Electoral Officer did not do what the law required him to do. The presumption always is that officials have done what the law requires.

D. Opportunities to challenge ballots.

What has been said above disposes of all points validly raised in this case, except the complaint that the High Court should not have appointed the Legislative Counsel to appear as *amicus curiae*. That is dealt with in the opinion on a companion case.⁷ However, inasmuch as the Elections and Referenda Act, 2 MIRC Ch. 1, is legislation significantly affecting the entire electorate and all candidates, the application of which previously has not been challenged in this

⁷*Clanton, et al. vs. MI Chief Elec. Off.*, 1 MILR (Rev.) 156 (Aug 2, 1989).

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Court, we believe a few additional observations may be in order.

The Act provides that eligible voters may cause their names to be entered in the Electoral Register prior to an election (2 MIRC Ch. 1, § 73 1(1)) or may apply for entry in the register at a polling place during the election. 2 MIRC Ch. 1, § 73(2). In the latter event, the voter must seal his ballot in an envelope provided by an election official (2 MIRC Ch. § 73(4)(a)), which the election official must seal in a second envelope, together with the voter's application for registration, and deposit in the ballot box. 2 MIRC Ch. 1, § 73(4)(b).

After voting at a polling place is completed, the ballot boxes are locked and delivered to the Chief Electoral Officer (2 MIRC Ch. 1, § 75) who, as soon as practicable, causes the boxes to be transmitted to the Counting and Tabulation Committee. 2 MIRC Ch. 1, § 77. The Counting and Tabulation Committee must publicly open the ballot boxes, determine whether any challenged ballot papers are to be accepted or rejected, and count and tally all votes properly cast. 2 MIRC Ch. 1, § 78(1). Candidates and their authorized representative are expressly entitled to be present. 2 MIRC Ch. 1, § 78(3). In order to avoid infringing the secrecy of the ballot (2 MIRC Ch. 1, § 73(5)), it is obvious that challenges to ballots must be determined before they are accepted or rejected and that, if counted, the ballots must be separated from the voter's application for registration and the envelope on which the election official endorsed the particulars of the voter and the grounds of challenge as required by 2 MIRC Ch. 1, § 73(4)(b)(ii).

Voters who apply to register at the polling place and whose qualifications a candidate seeks to challenge, as in this case, can be identified and their qualifications reviewed by the Counting and Tabulation Committee (2 MIRC Ch. 1, § 78(1)(b)) promptly following the opening of the ballot boxes and prior to the counting of their ballots. If a candidate is not satisfied with the determination of the Counting and Tabulation Committee, he has the right to require the Chief Electoral Officer to refer the question to the High Court. 2 MIRC Ch. 1, § 88(2). In this way, the eligibility of the challenged ballot to be counted, or not, can promptly and definitely be determined.

On the other hand, if the new voter's application for entry in the Electoral Register

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appears to be in order, no objection to counting the statutorily challenged ballot is made and the Counting and Tabulation Committee counts the ballot, it is not thereafter possible to identify that ballot. A review of the voter's qualifications thereafter is not only untimely, but also futile. Absent a sufficient number of disqualified voters to justify voiding the election, the results would be unaffected as there is no way of determining for which candidate or candidates the disqualified voters' ballots were cast.

In summary, we note that the Act provides timely, effective remedies for candidates and others to challenge the qualifications of voters, ballots cast, and irregularities in the voting process.

The judgments of the High Court are affirmed.

David Strauss for Appellants

(Dennis J. Reeder with him on the briefs);

Neil Rutledge, Assistant Attorney General, for Appellees

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

TOJIO CLANTON, *et al.*,

Petitioners-Appellants,

-v-

**MARSHALL ISLANDS CHIEF ELEC-
TORAL OFFICER SHIRO RIKLON,**

Respondent-Appellee.

S.CT. CIVIL NO. 88-04
(High Ct. Civil No. 1988-010)

APPEAL FROM THE HIGH COURT

AUGUST 2, 1989

ASHFORD, C.J.

KING, A.J. *pro tem*,¹ and KOBAYASHI, A.J. *pro tem*²

SUMMARY:

The Supreme Court affirmed a ruling of the High Court that challenges voter qualifications under the Elections and Referenda Act 1980, as amended, would not be entertained because the challenged voters were not identified by name.

DIGEST:

1. APPEAL AND ERROR – *Parties – Amicus Curiae*: The function of a friend of the court is to assist in assuring that the court is fully advised. He is expected to and usually does take an adversary position.
2. ELECTIONS AND VOTING – *Voters Eligibility – Challenges*: Failure to obtain a

¹The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by Cabinet appointment.

²The Honorable Bert T. Kobayashi, Associate Justice Emeritus of the Supreme Court of Hawaii, sitting by Cabinet appointment.

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ruling on the qualifications to vote of an absentee voter who votes at a special polling place, prior to that voter's ballot being accepted and tallied, defeats a challenge later made.

3. ELECTIONS AND VOTING – *Same – Same*: Challenge could be made at the special polling place or when the Chief Electoral Officer examines absentee voters' affidavits.

4. ELECTIONS AND VOTING – *Same – Same*: The Chief Electoral Officer is not required to refer to the High Court a challenge to the rights to vote of a class of voters, as distinguished from the right to vote of a single identified individual.

OPINION OF THE COURT BY ASHFORD, C.J.

Petitioners, all of whom were candidates who did not achieve election to the Nitijela in the 1987 election and who had pending appeals from rejections of their petitions for recount, sought a writ of *mandamus*, directed to the Chief Electoral Officer, to refer questions of voter qualifications to the High Court as required by P.L. 1980-20, § 80(2).³ The High Court ruled that the Chief Electoral Officer should have referred those questions and proceeded immediately to hear and consider them as if the writ had issued.

The questions petitioners had asked the Chief Electoral Officer to refer concerned the qualifications to vote of newly registered voters and newly registered absentee voters, whether some voters cast two ballots and whether there were more ballots in a specified ballot box than voters whose votes were placed in that box. The petition for a writ, however, asked only that the questions concerning voter qualifications be referred to the High Court and, on this appeal, only that question and a procedural question concerning the status of an *amicus curiae* appointed by the High Court were raised.⁴

³The statute in effect at the time of the election was the Elections and Referenda Act 1980, P.L. 1980-20 as amended by P.L. 1983-25. With renumbering of some sections, it is now incorporated in the Marshall Islands Revised Code as Title 2, Chapter 1, which will be cited for ease of reference.

⁴The Notice of Appeal preserved Appellants' claim that the High Court erred in denying their motion for discovery to compel the Chief Electoral Officer to produce the names of newly

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Neither the requests directed to the Chief Electoral Officer nor the petition for writ of *mandamus* identified the newly registered voters, who were challenged as a class. It appears, however, that during the hearing twelve persons were named whom petitioners claimed were either under age or did not hold land rights or reside in the electoral districts in which they voted. It also appears from the High Court's ruling that no challenges to voters' rights to vote, individually or as a class, were made prior to the Chief Electoral Officer being requested to refer to the High Court the question of their qualifications to vote.

The High Court ruled that 2 MIRC Ch. 1, § 88(2), under which the requests were made and were deemed to have been referred to the High Court, requires that the challenged voters be identified by name. Inasmuch as they were not named, and all of them apparently had been allowed to vote, the High Court held that petitioners were not entitled to any relief. We agree.

A. Function of an *amicus curiae*.

[1] Before addressing the substantive issue on this appeal we can summarily dispose of the procedural issue. Appellants insist the High Court erred in appointing the Legislative Counsel as *amicus curiae* because, by reason of his employment, he could not be neutral. Appellants misconstrue the role of a friend of the court. His function is to assist in assuring that the court is fully advised. He is expected to and usually does take an adversary position. Rules of appellate procedure universally recognize that an *amicus* will support one or another of the litigants. See, for example, MIRAppP Rule 10. The Senators whose seats were the target of this and the related cases,⁵ although they were not parties to the cases, certainly had an interest in their outcome. Who, better than the Legislative Counsel, could assure that the court was informed concerning their views and positions?

registered voters in five electoral districts. This point was not briefed, however, and the brief in the companion cases cross-referenced (*Clanton, et al. v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146 (Aug 2, 1989)) dealt only with the High Court's refusal to issue subpoenas and allow evidence on the appeals from rejection of petitions for recount.

⁵See footnote 4.

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B. Identification of challenged voters.

[2,3] In the companion cases we have noted that failure to obtain a ruling on the qualifications to vote of a voter registered at the polling place on election day, prior to that voter's ballot being accepted and tallied, defeats a challenge later made. The reason is that the ballot can no longer be identified and its effect, if any, on the election cannot be determined. The same is true of the ballot of an absentee voter who votes at a special polling place pursuant to the provisions of 2 MIRC Ch. 1, §§ 56 to 60. Since absentee voters' ballots are not required to be identified as challenged ballots in the container delivered to the Counting and Tabulation Committee pursuant to 2 MIRC Ch. 1, § 65(2), however [sic], the candidate or his poll watcher would have to challenge the voter and his ballot in order to preserve the identity of that ballot. The challenge could be made at the special polling place or when the Chief Electoral Officer examines absentee voters' affidavits. 2 MIRC Ch. 1, § 65(1). If the challenge is sustained, the voter can demand that the Chief Electoral Officer refer the question to the High Court. 2 MIRC Ch. 1, § 88(1). If denied, the challenger can demand that reference. 2 MIRC Ch. 1, § 88(2).

We turn now to the principal issue by this appeal. That is, whether a candidate who questions the rights to vote of a class of voters is entitled to demand that the Chief Electoral Officer refer the question to the High Court, under either or both of Article IV, § 9 of the Constitution and 2 MIRC Ch. 1, § 88.

The Constitution refers to questions concerning "the right of any person" to vote at an election to the Nitijela. 2 MIRC Ch. 1, § 88 applies not only to elections to the Nitijela, but also to elections by ballot and by consensus under the Local Government Act of 1980 and to referenda under that Act, the Constitution or other law. 2 MIRC Ch. 1, §§ 4 and 93. The statute, as well as the Constitution, refers to individual voters. 2 MIRC Ch. 1, § 88(1) deals with "any person whose claim to a right to vote" has been rejected, and 2 MIRC Ch. 1, § 88(2) deals with questions concerning "the right of a person to vote."

[4] In their plain meaning, "any person" and "a person" both refer to a single individual. One who has been denied the right to vote is, under subsection (1), a single, identified individual.

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The ordinary meanings of “a person,” under subsection (2), and “any person” under Article IV, § 9, whose right to vote has given rise to any question, would also refer to a single, identified person. Neither the language of 2 MIRC Ch. 1, § 88 nor reason suggest that the Nitijela intended an identified person under subsection (1) and unidentified persons, or a class of voters, under subsection (2), nor does the language of Article IV, § 9, which encompasses the situations covered by both subsections (1) and (2), suggest any such differentiation.

We conclude that the High Court was correct in its procedure and interpretation of the law. The judgment is affirmed.

David Strauss for Petitioners-Appellants

(Dennis J. Reeder with him on the briefs)

Neil Rutledge, Assistant Attorney General, for Respondent-Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**RENANDO NAVARRO and LEVI
VELASCO,**

S.CT. CIVIL NO. 88-08
(High Ct. Civil No. 1987-159)

Plaintiffs-Appellants,

-v-

**CHIEF OF POLICE PAUL KIM and
MINISTER OF FOREIGN AFFAIRS
TOM KIJINER,**

Defendants-Appellees.

APPEAL FROM THE HIGH COURT

AUGUST 2, 1989

KOBAYASHI, AJ. *pro tem*¹
ASHFORD, C.J. and KING, A.J. *pro tem*²

SUMMARY:

A petition for Writ of Habeas Corpus was filed with the High Court to declare the detention and deportation proceedings in Section 32 of the Immigration Act unconstitutional. Although the outcome of this appeal has no consequence for Appellants because they have been deported, the Court concluded that the appeal was not moot and retained jurisdiction for the appeal based on “a recurring controversy of substantial public interest” rationale. Since the Court found that Section 32 of the Immigration Act lacked due process safeguards and failed constitutional muster, the High Court’s denial of petition was reversed.

¹The Honorable Bert T. Kobayashi, Associate Justice Emeritus of the Supreme Court of the State of Hawaii, sitting by appointment of the Cabinet.

²The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by appointment of the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

DIGEST:

1. IMMIGRATION AND EMIGRATION – *Removal or Deportation – Due Process Requirements*: Section 4(10) of Article II of the Constitution requires that a person be afforded the protection of procedural due process before he is detained.
2. IMMIGRATION AND EMIGRATION – *Same – Same*: The overwhelming weight of authority holds that an alien, once he has entered a country, is indeed entitled to due process of law before he may be detained and deported.
3. CONSTITUTIONAL LAW – *Due Process – Procedural*: Due process requires, at a minimum, that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing.

OPINION OF THE COURT BY KOBAYASHI, A.J.

This is an appeal from an order of the High Court denying Appellants' application for Writ of Habeas Corpus.

In its opinion the court found the Immigration and Emigration Act 1986 (hereinafter Immigration Act) constitutional – both the detention and the deportation – as provided in § 32 of the Immigration Act.

The Appellants contend that the Immigration Act, especially § 32 thereof, is unconstitutional.

The Appellees contend that the appeal should be dismissed as moot (Appellants having been deported).

STATEMENT OF THE CASE

Appellants were nationals of the Republic of the Philippines who had resided in the Marshall Islands for some length of time. The Minister of Foreign Affairs, Tom Kijiner, signed Deportation Orders 07-88 and 05-88 dated February 19, 1988, against Appellants respectively. These Deportation Orders were made pursuant to § 32 of the Immigration Act.

The Deportation Orders ordered the Marshall Islands Chief of Police to place the

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Appellants in solitary confinement at the Majuro prison until they could be deported.

“Accordingly, they were taken into custody and placed under detention in solitary confinement.”

It is unclear from the record but, by all indications, Appellants had entered the Republic lawfully. Appellees’ counsel, in his arguments before this Court agreed that Appellants’ entry into the Republic had been lawful. In his answering brief Appellees’ counsel states that “it has never been alleged that any crime has been committed.”

On February 24, 1988, Appellants filed an application for a writ of *habeas corpus* alleging illegal and unconstitutional detention. The hearing was held on February 25, 1988, and the application was denied. Appellants remained in solitary confinement in the Majuro prison until they were deported and on March 18, 1988, the High Court filed its written Order.

In determining whether § 32 of the Immigration Act is constitutional or not, we must seek guidance and direction from The Supreme Law of the Republic of the Marshall Islands (Republic hereinafter):

The Constitution of the Marshall Islands (hereinafter Constitution) is a beautifully crafted document!

Article I, § 1(1) states: This constitution shall be the supreme law of the Marshall Islands; and all judges and other public officers shall be bound thereby (emphasis added).

Initially, however, a resolution of the threshold question of mootness must be made.

Though the outcome of this appeal, perhaps, has no consequence for Appellants, we conclude that this appeal is not moot and we shall retain jurisdiction because the appeal involves “a recurring controversy of substantial public interest.” *Roe v. Wade*, 410 U.S. 113, 124-25 (1973).

As stated in *Heine v. Radio Station WSZO and GM*, 1 MILR (Rev.) 122 (Jun 6, 1988):

The State (United States) decisions on this question are unanimous in holding that an appellate court should retain jurisdiction in the face of mootness, when there is involved a recurring controversy of great public interest.

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QUESTION OF THE CONSTITUTIONALITY OF SECTION 32 OF THE IMMIGRATION ACT:

Appellants were not detained pursuant to criminal statutes.

Appellants were detained pursuant to the Immigration Act, under which civil or administrative deportation proceedings are initiated.

The Supreme Law of the Republic governs the instant appeal.

The Constitution in Article II, § 4(1) states:

No person shall be deprived of life, liberty or property without due process of law.

[1] Section 4(10) of Article II of the Constitution specifically pertains to the rights of a person detained outside of the criminal process:

No person shall be preventively detained, involuntarily committed, or otherwise deprived of liberty outside the criminal process, except pursuant to Act, subject to fair procedures, and upon a clear showing that the person's release would gravely endanger his own health or safety or the health, safety, or property of others (emphasis added).

The foregoing constitutional provisions require that the Appellants be afforded the protection of procedural due process before they could be detained.

It is not disputed that no such protection was given. It is clear that the detention was a deprivation of liberty under Article II, § 4(1) and thus the absence of any procedural protections before detention constitutes a violation of said due process clause.

The detention of the Appellants further failed to meet the requirements of said § 4(10) of Article II of the Constitution.

Though the detention met one of three requirements, that is, "pursuant to Act," the detention failed to meet the requirements of "subject to fair procedures" and "upon a clear showing that the person's release would gravely endanger his own health or safety or the health, safety, or property of others."

Thus, § 32 of the Immigration Act, lacking due process safeguards, fails to pass

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constitutional muster.

The High Court clearly erred in concluding that the foregoing constitutional provisions have no application to a detention in a deportation proceeding. The Supreme Law of the Republic makes no such exception.

[2] Furthermore, the High Court's opinion is contrary to the overwhelming weight of authority. *Landon v. Plasencia*, 459 U.S. 21, 32-33 (1982); *Jean v. Nelson* 71 F.2d 1455, 1467 (CCA 11, 1983).

The authorities hold that an alien, once he has entered a country, is indeed entitled to due process of law before he may be detained and be deported. He is entitled to the due process protections afforded by the Constitution.

[3] Due process requires "at a minimum . . . that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

In our opinion, the Immigration Act is constitutionally defective in another respect: Section 32(3) of the Act states:

Any order made by the Minister under this section shall be final and conclusive and shall not be questioned in any court of law in any manner whatsoever.

We hold that the above provision is violative of both the constitutional guarantee that the writ of *habeas corpus* shall not be suspended, Article II, § 7, as well as the supremacy clause, Article I, § 1(1).

We note that the High Court did recognize that an alien threatened with deportation retains the right to petition for a writ of *habeas corpus*. The High Court, however, made no mention of the infirmity in the Immigration Act.

We hold that § 32(3) of the Immigration Act must be considered as stricken from said Act.

Additionally, in the implementation of § 32 of the Immigration Act, the provisions of § 32 must be read to include, for the prospective detainee and deportee, notice and an opportunity

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for a hearing prior to detention and deportation.

The High Court should have granted the application for writ of *habeas corpus*. We reverse the High Court's order denying the application.

David Strauss for Plaintiffs-Appellants

Johnsay Riklon, Assistant Attorney General, for Defendants-Appellees

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

TOJIO CLANTON,

Plaintiff-Appellant

S. CT. CIVIL NO. 89-02
(High Ct. Civil Nos. 1988-084
and 1988-082, consolidated)

-v-

**MARSHALL ISLANDS CHIEF ELEC-
TORAL OFFICER SHIRO RIKLON,**

Defendants-Respondents,

and

NIDEL LORAK and JACK HELKENA,

Plaintiffs-Appellants,

-v-

**MARSHALL ISLANDS CHIEF ELEC-
TORAL OFFICER SHIRO RIKLON, *et al.*,**

Defendants-Respondents.

APPEAL FROM THE HIGH COURT

AUGUST 2, 1989

ASHFORD, C.J.

KING, A.J. *pro tem*,¹ and KOBAYASHI, A.J. *pro tem*²

¹The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by Cabinet appointment.

²The Honorable Bert T. Kobayashi, Associate Justice Emeritus of the Supreme Court of Hawaii, sitting by Cabinet appointment.

MARSHALL ISLANDS, SUPREME COURT

SUMMARY:

The Supreme Court affirmed a judgment of the High Court dismissing two suits asking that 1987 elections to fill Arno and Ujae seats in the Nitijela be set aside and new elections ordered because those suits were between the same parties, asserted same rights based on same facts and sought same relief as in actions earlier filed and still pending.

DIGEST:

1. ABATEMENT OF ACTIONS – *Nature and Grounds*: A second suit will be abated by a first only if there are the same parties, the same rights asserted, and the same relief prayed for, which must be founded on the same facts or essential basis.
2. ABATEMENT OF ACTIONS – *Same*: “Same” as used in stating and applying principles of abatement does not mean “identical” causes of action and relief sought. It means the “essential basis” must be the same.

OPINION OF THE COURT BY ASHFORD, C.J.

These are two more in the series of actions by candidates for Ujae and Arno seats in the Nitijela who failed to be elected in 1987. Prior to the filing of the complaints in these actions, the following had occurred:

In December 1987, these candidates and others filed appeals in the High Court from the Chief Electoral Officer’s denial of their petitions for recounts. While those petitions were pending, these candidates and others petitioned the High Court for a writ of *mandamus* requiring the Chief Electoral Officer to refer questions of voter qualifications to the High Court. In February 1988, the High Court upheld the Chief Electoral Officer’s denial of the petitions for recount and ruled against petitioners on the voters’ qualifications questions. In mid-March 1988, the Appellants and petitioners in those actions filed notices of appeal to this court.³ On March

³The appeals that were not abandoned are dealt with in opinions filed concurrently herewith in *Clanton, et al. v. MI Chief Elec. Off.* (1), 1 MILR (Rev.) 146 (Aug 2, 1989) *Clanton, et al. v. MI Chief Elec. Off.* (2), 1 MILR (Rev.)156 (Aug 2, 1989).

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31, 1988, the three candidates who are Appellants in this case filed these actions in the High Court seeking to have the 1987 election declared null and void and new elections ordered for the Ujae seat and “the” Arno seat (without specifying which one of the two) in the Nitijela. Besides the Chief Electoral Officer, the defendants named in these actions were the successful candidates who had been elected to the Ujae and Arno seats. No relief against the successful candidates was sought.

The Complaints in these actions recited the unsuccessful efforts of Plaintiffs to obtain recounts and to obtain a ruling against the qualifications of certain voters, reiterated the same complaints that had been made to the Chief Electoral Officer and High Court in the earlier cases, contained conclusory allegations that the conduct of the Chief Electoral Officer “fatally compromised the secrecy, security and integrity of the election” and conclusory allegations that plaintiffs would be elected if the irregularities were corrected and improper votes not counted. In addition to provisions of the Elections and Referenda Act 1980,⁴ Plaintiffs relied on Article IV, § 9, of the Constitution⁵ as a basis for relief. The complaint of the Ujae candidate set forth no new factual allegations. The complaint of the Arno candidates did set forth in paragraphs 6(a) through (d) several irregularities not earlier raised.

Defendants moved for dismissal of the complaints on the grounds of abatement, *res judicata* and election of remedies. The High Court sustained the pleas in abatement and dismissed both actions.

⁴The statute in effect at the time of the election was the Elections and Referenda Act 1980, P.L. 1980-20 as amended by P.L. 1983-25. With renumbering of some sections, it is now incorporated in the Marshall Islands Revised Code as Title 2, Chapter 1, which will be cited for ease of reference.

⁵Any question that arises concerning the right of any person to vote at an election of a member or members of the Nitijela, or to be or to remain a member of the Nitijela, or to exercise the rights of a member, or concerning the conduct of any person in relation to any election of a member or members of the Nitijela, shall be referred to and determined by the High Court.”

MARSHALL ISLANDS, SUPREME COURT

Appellants have cited *U.S. v. Oregon State Medical Soc.*, 343 U.S. 326, 96 L.Ed. 978, 72 S.Ct. 690 (1952) for the proposition that if the remedy sought in the second action is concurrent or cumulative the second action does not abate. The case states that an action for injunction to prevent future violations does not prevent concurrent or subsequent remedies for past violations of anti-trust statutes. In these cases, we are concerned with the same series of events, not with successive, earlier and later events of a similar nature. However, this court agrees with the author of the opinion in the cited case that “(i)t will simplify consideration of such cases as this to keep in sight the target at which relief is aimed.” 96 L.Ed. 978 at 984. The targets in the prior actions and in these actions were the Nitijela seats for Ujae and Arno that were filled at the 1987 election.

[1] Appellants have also cited and quoted from *The Haytian Republic*, 154 U.S. 118, 38 L.Ed. 930, 14 5. Ct. 992 (1894), to the effect that a second suit will be abated by a first only if there are the same parties, the same rights asserted and the same relief prayed for, which must be founded on the same facts or essential basis. In that case the court held, not surprisingly, that a libel of a vessel for violations of the Chinese Exclusion Act and for smuggling opium is no bar to a subsequent libel of the same vessel for similar violations committed prior to the filing of the first libel.

[2] “Same,” as used in stating and applying the principles of abatement does not mean “identical” causes of action and relief sought, as contended by counsel at oral argument. It means, as the court stated in the passage quoted by Appellants, the “essential basis” must be the same.

In the case before the court, the parties were the same as in the still pending prior actions, except that the successful candidates were added as defendants. Their presence did not alter the basics of the situation, nor was any relief directly against them asked. The rights asserted and the bases for relief were the same, but for the additional irregularities alleged in the Arno candidates’ complaint. Those were:

- (a) Ballot boxes were not present at polling places (2 MIRC Ch. 1, § 69

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requires “sufficient” ballot boxes at each polling place).

(b) Polling places were not opened at 7 a.m. and closed at 7 p.m. (2 MIRC Ch. 1, § 70 allows earlier and later closing in stated circumstances).

(c) Ballots were accepted at places not designated as polling places pursuant to the statute (the cited section, 2 MIRC Ch. 1, § 68 has to do with staffing, not location, of polling places).

(d) No certification was made that ballots were dealt with according to the statute (2 MIRC Ch. 1, § 75(2)).

To the extent these were indeed irregularities no assertion was made that they occurred at Arno or how they affected, if at all, the votes tallied or omitted from tallying either for the plaintiffs or the winning candidates.

The relief prayed for, in these cases, was that the Ujae and Arno elections be declared void and new elections held. That relief was aimed at the same target at which the relief in the earlier cases was aimed.

The judgment of the High Court is affirmed.

Dennis J. Reeder for Appellants

Dennis M. McPhillips, Assistant Attorney General, for Appellees

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

ADDE MWEDRIKTOK,

Plaintiff-Appellee,

-v-

**LIEJBAD LANGIJOTA,
and INOKKO ABIJA,**

Defendants-Appellants.

S.CT. CIVIL NO. 88-01
(High Ct. Civil No. 1987-012)

APPEAL FROM THE HIGH COURT

AUGUST 15, 1989

ASHFORD, C.J.

KING, A.J. *pro tem*,¹ and KOBAYASHI, A.J. *pro tem*²

SUMMARY:

In a dispute over entitlement to “in lieu of copra” and “land use” payments the Supreme Court held that the High Court’s application of the principle of *res judicata* and division of payments in one-third shares among the irojlaplap, alap and dri jermal were correct.

DIGEST:

1. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Fact*: Findings of fact by the High Court are not to be set aside by the Supreme Court unless found to be clearly erroneous.
2. LAND RIGHTS – *Distribution of Land Use Payments*: Allocating equal thirds of

¹Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, by appointment of the Cabinet.

²Honorable Bert T. Kobayashi, Associate Justice Emeritus of the Supreme Court of Hawaii, by appointment of the Cabinet.

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payments for land use and in lieu of copra to the iroiaplal, alap and dri jeral is consistent with Marshallese practice.

OPINION OF THE COURT BY KING, A.J.

Defendants-Appellants Liejbad Langijota (“Langijota”) and Inokko Abija (“Abija”) appeal from a High Court decision involving the allocation of payments originating from the United States to the displaced residents of Eru island, Kwajalein Atoll.

Appellants claim three points of error: (1) The High Court’s ruling is contrary to Marshallese custom, tradition, and practice, (2) The High Court erred in giving more rights to Plaintiff-Appellee Adde Mwedriktok (“Mwedriktok”) than Mwedriktok had and in finding that Mwedriktok represents seven families, (3) The High Court erred in concluding that the “in lieu of copra” payments are the same as the Kwajalein Atoll Land Use Agreement (“KALUA”) “land use” payments.

In its findings of fact, the High Court found that the parties in the case were the same as or in privity with the parties in an earlier case, *Lijbalang Binni and Tojiro Lomae v. Adde Mwedriktok, Samuel Lemto, Maina Jajo, Maka P. and Daina Mae*, Civil No. 318 (1971) (“*Binni*”). The High Court also found that the issues raised in the case were the same, with two exceptions not relevant here, as those in *Binni*. Based upon these findings, the High Court held that the principles of *res judicata* applied so that the Court was bound by the holding in *Binni*.

The issue in *Binni* was whether Lijbalang Binni, Langijota’s predecessor, or Mwedriktok was the rightful alap of Eru Island. *Binni* held that Binni, Langijota’s predecessor, was the alap of Eru Island and so was entitled to the alap’s share of the payments. The *Binni* court remarked that this title of alap was “an empty honor” so long as the government continued to exclude the people from mid-atoll islands of Kwajalein. The court held, by agreement of the parties, that the government payments to the displaced Eru Island residents were to be divided equally among the eleven families of Eru Island in accordance with the directive of Iroiaplal Albert Loeak. *Binni* also held that Abija’s predecessor represented four families and that Mwedriktok represented the

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remaining seven.

Based upon its finding that *res judicata* applied, the High Court held that Langijota – as Binni’s successor – was the alap of Eru Island. The High Court took judicial notice of the “undisputed and prevailing customary practice among the people of the Marshall Islands” that the interests in land are shared in thirds by the iroiylaplap, alap, and dri jermal. The High Court therefore held that *Binni’s* statement that the alap title was “an empty honor” had to be modified in light of the Marshall Islands’ Constitution (“Constitution”) which mandates that these customary practices not be invalidated, citing Constitution, Article X, § 1(1). The High Court therefore clarified that Langijota as alap is entitled to receive for distribution one-third of all the “in lieu of copra” and “land use” payments. It was only due to the acquiescence of Binni – Langijota’s predecessor – that the alap’s customary one-third share was combined with the other one-third and distributed equally among the eleven families as directed by Iroiylaplap Albert Loeak.

The High Court also held that Abija and Mwedriktok, as dri jermals representing eleven families, were entitled to the remaining third of the government payments – with Abija entitled to 4/11 of the one-third to distribute to the four families whom he represents and Mwedriktok entitled to the remaining 7/11 of the one-third to distribute to the seven families whom he represents. The High Court further held that all of these payments are to be retroactive to 1983, and Langijota and Abija shall pay to Mwedriktok any sums which exceed the amounts that they are entitled to under the High Court’s judgment.

The High Court also found that the “in lieu of copra” payments and the KALUA “land use” payments were both “based on the interest in land held by the recipients of the payments and were and are being made because the people of Eru Island were displaced from their island.”

[1] The High Court’s findings of fact are not to be set aside by this Court unless found to be clearly erroneous. Judiciary Act, § 66(2). Appellants fail to show clear error in the High Court’s findings that the parties in the current action are the same or in privity with the parties in *Binni* and that the issues here are the same as in *Binni*. Therefore, this Court finds no error in the High

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Court's conclusion that *res judicata* applies.

[2] Appellants' first point of error that the High Court's ruling is contrary to Marshallese custom, tradition, and practice is without merit. Allocating equal thirds of the payments to the iroiylaplap, alap, and dri jermal is consistent with Marshallese practice. Appellants fail to provide support for their bold statement that Marshallese practice grants Langijota the discretion as alap to disregard the court's judgment in *Binni* and cut off Mwedriktok's rights altogether.

Appellant's second point of error also fails to acknowledge *Binni* and the principles of *res judicata* which bound the High Court and bind this Court as well. *Binni* held that Mwedriktok was not the alap of Eru Island, and so by necessary deduction that he was a dri jermal, and that he represented seven of the eleven families. Therefore, Appellants argument that the High Court erred in giving Mwedriktok more rights than he had and in finding that he represented seven families is meritless.

Appellants also fail to show that the High Court's finding that the "in lieu of copra" payments and KALUA "land use" payments were based on the displaced Eru Island residents' interest in land was clearly erroneous. Appellants argument that this Court should compare the market value of the land with the market value of the crops produced is disingenuous: accepting Appellants stated values for purposes of this appeal, it is clear that there is a marked difference between the land's market value and the crops' market value. However, Appellants neglect to point out the relevance of this difference to the High Court's finding that both payments are based on the displaced residents' interests in Eru Island.

The judgment of the High Court is AFFIRMED.

SO ORDERED.

Mollie M. Lennarz (Ruben R. Zackhras on the brief) for Defendants-Appellants
Anibar L. Timothy for Plaintiff-Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**LES NORTHUP BOAT REPAIR, QUALITY
REFRIGERATION CO., INC. and
LOS ANGELES MARINE HARDWARE,
INC.,**

S.CT. CIVIL NO. 83-03
(High Ct. Civil Nos. 1982-052,
1982-052A, 1982-056 through
065, and Consolidated Cases)

Plaintiffs-Appellants,

-v-

**0/S HOLLY ELAINE, 0/S JUDE,
et al.,**

Defendants-Appellees,

and

**ORANGE PRODUCTION CREDIT
ASSOCIATION,**

Plaintiff-Appellee,

-v-

**0/S HOLLY ELAINE, 0/S JUDE,
et al.,**

Defendants-Appellees.

APPEAL FROM THE HIGH COURT

OCTOBER 2, 1989

ASHFORD, C.J.
KONDO, A.J., and PHILIPPO, A.J. (sitting by designation)

LES NORTHUP BOAT REPAIR, *et al.*, v. O/S HOLLY ELAINE, *et al.*

SUMMARY:

In appeals by parties claiming liens against U.S. documented ships, the Supreme Court ruled that the substitution of one person for another as mortgagor did not affect the priority of the mortgage lien. The Court also declined to upset the trial court's ruling that one lien was lost by failure to timely enforce it. Lastly, the Court affirmed the trial court's allocation of costs among claimants, except as to one lienor, whose share it ruled should have been charged against proceeds of sale of the ships.

DIGEST:

1. MORTGAGES – *Construction and Operation – Substitution of New Mortgagor*: A substitution of the primary obligor does not invalidate or necessarily subordinate the priority of the lien on the security.
2. APPEAL AND ERROR – *Review – Questions of Fact*: An appellate court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision.
3. MARITIME LIENS – *Enforcement – Laches*: Absence of a vessel from home waters operates to relieve the lienor, to some extent, from laches; but the question in each case against a subsequent owner who acquired in good faith and without notice is whether the high degree of diligence in the enforcement of lien rights has been shown.
4. MARITIME LIENS – *Same – Same*: Whether laches applies in a given case depends upon the circumstances of the case and is primarily addressed to the trial court's discretion.
5. MARITIME LIENS – *Same – Allocation of Costs*: Trial court has discretion to allocate wharfage charges and costs of government custody of vessels among lienor claimants and holders of mortgages as it thinks appropriate, but portion allocable to lienor who established a lien should be charged against proceeds of sale of the vessels.

OPINION OF THE COURT BY ASHFORD, C.J.

Crewmen, artisans, suppliers and mortgagees filed actions *in rem* and *in personam* against four commercial fishing vessels, their owners and other individual and corporate defendants seeking to impose and enforce liens against the vessels and personal judgments against the other defendants. The actions were consolidated for trial of the *in rem* claims in the

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High Court. These appeals were taken by some of the artisans and suppliers, and by a mortgagee, from the Final Judgment of the High Court on the *in rem* claims. They concern only the vessels Jude and Holly Elaine.

The vessels were documented by the United States Coast Guard of the United States Department of Transportation. In January, 1981, the owners executed a Preferred Mortgage on each vessel, which was duly recorded with the United States Collector of Customs at the Port of Los Angeles-Long Beach, California, and noted on the vessel's documentation certificate. The mortgages were in favor of Orange Production Credit Association (OPCA). The owners also executed a Second Preferred Mortgage on the Jude in favor of Claimants-Appellants Russel O. and Margaret Brown (Brown), which was similarly recorded and noted.

Subsequently, artisans and suppliers Les Northup Boat Repair, Quality Refrigeration Co., Inc., and Los Angeles Marine Hardware, Inc. (collectively, Boat Repair), provided service, goods and materials to the vessels.

In April 1981, the vessels sailed for Majuro from San Pedro. Boat Repair was aware of their departure and their destination, but took no steps to impose or enforce maritime liens against the vessels. In December 1981, the vessels were sold to Western Pacific Seiner Management, Inc. (Westpac), whom the trial court found was a bona fide purchaser for value without notice of the Boat Repair claims. In connection with the purchase, Westpac obtained additional financing from OPCA in the amount of approximately \$389,000, a large part of which was used to bring the debt secured by the first Preferred Mortgages to current status. The loan to Westpac was secured by a supplement to the first Preferred Mortgage on each vessel.

Brown's consent was required, and was given, for recordation with the Collector of Customs of the documents transferring title to Westpac. The supplements to the first Preferred Mortgages were duly recorded and noted on the vessels' certificates of documentation.

In January 1982, this litigation was commenced with Boat Repair claiming maritime liens and other relief, on the basis of which the vessels were arrested at Majuro by the Government of the Marshall Islands. Suits by others followed and in August 1982, OPCA filed its complaints to

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foreclose its mortgages. The following month, the cases were consolidated.

A. Effect of the Supplements to the First Preferred Mortgages.

[1] Appellants claim that the actions of the parties and execution of the supplements to the first mortgages constituted a novation, by which the liens of the first mortgages were completely extinguished. Testimony by Brown indicates that the original mortgagors were to be relieved of their liability to OPCA, on the assumption of their obligations by Westpac. Also, the supplemental Loan Agreement signed by Westpac recited payment terms for the notes secured by the first mortgages that differed from those in the notes. However, Appellants have not pointed to any evidence from which it can be concluded that OPCA intended to give up its first mortgage liens on the vessels. A substitution of the primary obligor does not invalidate or necessarily subordinate the priority of the lien on the security, nor has anything been pointed to or found in the Ship Mortgage Act (46 USCA 911 *et seq.*, as it then existed) which would dictate that result. Furthermore, the recitals in and language of the December 17, 1981 Supplement to First Preferred Mortgage, on each of the Jude and Holly Elaine, indicate an intent to make the new loan an additional charge on the first lien. This Court is not called upon to decide the effect of that attempt, both because the proceeds of sale of the vessels were insufficient to satisfy even the first mortgages and because, as to the Jude, the trial court ruled that only the sum secured by the first mortgage had priority over Brown's second mortgage. Neither, in the circumstances, need this Court rule on the contentions that the supplements did not satisfy the requirements of the Ship Mortgage Act.

[2] We find nothing in the record which gives us a basis for setting aside the trial court's finding that when Brown consented to recording of the transfer of title to Westpac, he neither believed nor had reason to believe that OPCA relinquished the priority of its first mortgage. Nor is there any evidence to support a conclusion that the supplements destroyed the lien of the first mortgage on either the Jude or the Holly Elaine. An appellate court must refrain from reweighing the evidence and must make every reasonable presumption in favor of the trial court's decision. *Abner, et al. v. Jibke, et al.*, 1 MILR (Rev.) 3, 5 (Aug 6, 1984). *See also*

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29 MIRC Ch. 1, § 30.

B. Boat Repair's Liens.

[3, 4] The High Court found there was insufficient evidence to establish maritime liens in favor of Quality Refrigeration Company, Inc., and Los Angeles Marine Hardware, Inc., and dismissed them as unproved. Although those two suppliers are Appellants, their appeal is only against the judgment that they, together with Les Northup Boat Repair, were liable to OPCA for reimbursement of a portion of the wharfage fees imposed by the Government while the vessels were under arrest. As to Les Northup Boat Repair, the trial court found that while liens for labor and materials could have been imposed prior to the vessels' departure from San Pedro, that claimant failed to act with due diligence to enforce its liens and was barred by laches from doing so after acquisition of the vessels by Westpac, a bona fide purchaser without notice. As noted in *The Everosa*, 93 F.2d 732 (1937), cited by Boat Repair, absence of a vessel from home waters operates to relieve the lienor, "to some extent," from laches; but the question in each case against a subsequent owner who acquired in good faith and without notice is whether the "high degree of diligence" in the enforcement of lien rights has been shown. 93 F.2d at 735. We have not found anything in the record to cause us to upset the trial court's ruling on the application of laches. Whether laches applies in a given case depends upon the circumstances of the case and is primarily addressed to the trial court's discretion. *Rabauliman v. Matagolai*, 7 TTR 424 (1976).

C. Award of Wharfage Fees as Costs Against Boat Repair.

[5] The trial court ruled against all *in rem* claims of Boat Repair and ordered Boat Repair to pay court costs with respect to those claims. Those costs were wharfage charges and costs of government custody of the vessels, of which \$13,680.74 was charged against Boat Repair and \$4,281.26 was charged against the holders of first mortgages, based on the number of days each party had each vessel under arrest. Boat Repair complains that these preservation expenses should be paid solely from the proceeds of sale of the vessels, and not be assessed against parties who recovered nothing. This ignores the facts that two of the three claimants who caused the vessels to be arrested and to incur the majority of that expense failed to prove their liens and that

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the lien of the third claimant was held barred by laches. The trial court had discretion to allocate those costs among the parties as it thought appropriate. The claimants who did not establish liens were, we believe, properly assessed the costs their unfounded claims caused. *See European-American Banking Corp. v. M/S Rosaria*, 486 F.Supp. 245 (1979) (costs assessed against intervenors who failed to establish claims). On the other hand, Les Northup Boat Repair did establish a lien which was defeated by laches. We believe the trial court should have exercised its discretion to charge that lienor's share of the costs, \$3,648.68, against the proceeds of sale of the vessels, as its action in arresting the vessels, as a legitimate lienor, did redound to the benefit of priority lienors.

The judgment in favor of OPCA and against Les Northup Boat Repair in the amount of \$3,648.68 is reversed; in all other respects the final judgment on the *in rem* claims is affirmed.

Donald R. Hazelwood for Appellants Brown
Lawler, Felix and Hall (Did not appear, but filed a brief for Appellants Boat Repair)

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**REPUBLIC OF THE MARSHALL
ISLANDS,**

S.CT. CRIMINAL NO. 88-01
(High Ct. Crim. No. 1988-034)

Plaintiff-Appellee,

-v-

GEORGE SAKAIO,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

October 18, 1989

ASHFORD, C.J.

TENNEKONE, A.J., and KONDO, A.J. (sitting by designation)

SUMMARY:

The Supreme Court set aside a conviction for possession of marijuana because the trial court failed to inform the defendant of his right to have a lawyer and to assure that he fully understood the consequences of a guilty plea and, also, for denying defendant's request to withdraw that plea and to be represented by counsel.

DIGEST:

1. CONSTITUTIONAL LAW – *Due Process – Accused's Right to Counsel*: Few constitutional protections are as fundamental to ensuring a fair trial for the accused as the right to the assistance of counsel. This right is guaranteed by Article II, § 4(4) of the Constitution.
2. CONSTITUTIONAL LAW – *Construction – Rules of Interpretation*: Article I, § 3(1) mandates that the courts of the Marshall Islands, in interpreting and applying the Constitution, shall look to the decisions of courts of countries having constitutions similar in the relevant respect.
3. CRIMINAL LAW AND PROCEDURE – *Record*: Rules 2b(1) and 17b(1) of the Marshall Islands Rules of Criminal Procedure impose on the trial court the duty to make a record

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which is more than merely a summary of the proceedings.

4. CRIMINAL LAW AND PROCEDURE – *Same*: The duty to make a proper record of the proceedings is not discretionary.

5. CRIMINAL LAW AND PROCEDURE – *Arrests – Duty to Advise of Right to Counsel*: The duty to advise arrested persons of their right to counsel does not obligate the police to persuade an accused that he needs counsel, but simply to advise of his right to the assistance of counsel.

6. CRIMINAL LAW AND PROCEDURE – *Rights of the Accused – Advice of Rights*: The official at a preliminary hearing is under an affirmative duty to advise an accused during such hearing of his right to the assistance of counsel.

7. CRIMINAL LAW AND PROCEDURE – *Pleas*: The accused may not be called upon to plead at a preliminary hearing. 32 MIRC Ch. 1, § 40.

8. CRIMINAL LAW AND PROCEDURE – *Same*: Before a plea of guilty is accepted, the trial court must ascertain from the accused's own statements in court that he is voluntarily making the plea and understands the nature and general effect of the plea.

9. CRIMINAL LAW AND PROCEDURE – *Waivers – Awareness and Competence*: Waiver of the right to counsel must be knowingly and affirmatively made by an accused competent and completely aware of the right being waived and must appear on the record.

10. CRIMINAL LAW AND PROCEDURE – *Pleas – Withdrawal of Guilty Plea*: Withdrawal of a plea of guilty should be allowed when the court cannot conclude that it was given advisedly and without fear or ignorance.

OPINION OF THE COURT BY ASHFORD, C.J.

This is an appeal from a conviction on a plea of guilty to possession of marijuana. The conviction must be set aside for failure of the High Court to advise the Appellant of his right to the assistance of counsel, to assure that his guilty plea was made with a full understanding of his rights and of the consequences of that plea and for summarily rejecting his attempts to withdraw that plea and to be represented by counsel.

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Appellant was charged with possession of marijuana, in violation of Public Law 1987-11. The record below does not reveal whether he was informed of his right to the assistance of counsel by the police or by the High Court prior to or at his arraignment. No transcript of the arraignment and sentencing proceeding exists. However, it is undisputed that at his arraignment, he was not represented by counsel and pleaded guilty to the charge. The court thereupon sentenced him to two years in prison and he immediately requested that his plea of guilty be withdrawn. The court refused to grant the request.

At a subsequent hearing (of which there is a transcript) to assure proper disposition of the marijuana, the High Court declined to let the Public Defender represent the defendant, on the ground that he had already been convicted and sentenced.

[1,2] Few constitutional protections are as fundamental to ensuring a fair trial for the accused as the right to the assistance of counsel. Article II, § 4(1) of the Marshall Islands Constitution commands that “[n]o person shall be deprived of life, liberty, or property without due process of law.” Article I, § 3(1) mandates that “[i]n interpreting and applying this Constitution, a court shall look to the decisions of the courts of other countries having constitutions similar, in the relevant respect, to the Constitution of the Marshall Islands” The provisions in Article II, § 4(4) of the Constitution contain and expand upon the rights guaranteed by the Sixth Amendment to the United States Constitution. Article II, § 4(4) of the Marshall Islands Constitution states:

In all criminal prosecutions, the accused shall enjoy the right . . . to defend himself in person or through legal assistance of his choice and, if he lacks funds to procure such assistance, to receive it free of charge if the interests of justice so require.

The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

Both constitutional provisions provide for the assistance of counsel in criminal prosecutions. Thus, the decisions of the United States Supreme Court in this area are entitled to respect in this

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Republic. Article I, § 3, Marshall Islands Constitution.

In a leading case concerning the right to counsel in the United States, its Supreme Court stated:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not “still be done.” It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer – to the untrained laymen – may appear intricate, complex, and mysterious.

Johnson v. Zerbst, 304 U.S. 458, 462-63, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938).

The United States Supreme Court further explained the importance of the accused’s right to counsel in *Gideon v. Wainwright*, 372 U.S. 335, 344, 9 L.Ed. 2d 799, 83 S.Ct. 792 (1963):

[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indication of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

I. Lack of a record in the High Court.

The only “record” of the proceedings upon the arraignment and sentencing in the High Court is the order entered by the trial judge at the conclusion of those proceedings. The order recited in general terms what occurred during those proceedings and set the amount and terms of bail in the event of an appeal.

Rule 2b(l) of the Marshall Islands Rules of Criminal Procedure imposes on the trial court the duty to make a record:

The judge of any court, including a community court, who presides at any trial, hearing, or other proceeding, shall be responsible for the making of the

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record of that trial, hearing, or proceeding, and may require any other judge hearing the matter, or a reporter, or clerk, to assist him in making the record.

[3,4] Rule 17b(1), Marshall Islands Rules of Criminal Procedure explains that in the High Court the record is more than merely a summary of the proceedings:

A record of every case (other than an appeal) will be taken down in longhand, shorthand, or mechanical means, except that only so much, if any, of oral arguments or oral statements of counsel need be included as the court may direct.

No such record was made in this case, but in view of the disposition of the appeal, we need not rule upon the consequences of that failure. Suffice to say, that the duty to make a proper record of the proceedings is not discretionary. The discussion that follows may indicate the importance of a record complying with the rule.

II. Failure to Inform the Appellant of His Right to the Assistance of Counsel.

A. Duty of Police to Advise.

[5] The courts and the Nitijela have recognized the importance of the right to the assistance of counsel at several stages in the criminal process. 12 TTC § 68(2)(a)-(c) (1980), currently codified as 32 MIRC Ch. 1, § 20(2)(a)-(c), specifically states:

[A]ny person arrested shall be advised as follows:

- (a) that the individual warned has a right to remain silent;
- (b) that the police will, if the individual so requests, endeavor to call counsel to the jail or other place of detention and allow the individual to confer with counsel there before he is questioned further, and allow him to have counsel present while he is questioned by the police, if he so desires; and
- (c) that the services of the Public Defender, when in the vicinity, and of his local representative are available for these purposes without charge.

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The duty to advise arrested persons of their right to counsel does not obligate the police to persuade an accused that he needs counsel. *Trust Territory v. Sokau*, 4 TTR 434 (1969). The police must simply advise the accused of his right to the assistance of counsel.

In this case, there is no showing that the police advised Appellant of his right to counsel. The High Court's order entered after Appellant's arraignment and sentencing demonstrates he was not represented by counsel at those proceedings. Promptly after sentencing, Appellant requested the services of the Public Defender. From these circumstances, this Court concludes that the police did not inform Appellant of his right to counsel.

B. Court's Duty to Advise.

[6] Like police, the official at a preliminary hearing is under an affirmative duty to advise an accused during such hearing of his right to the assistance of counsel. 12 TTC § 202, currently codified as 32 MIRC Ch. 1, § 39(b), provides that the official shall:

(b) inform the arrested person of his right to retain counsel and of his right to be released on bail as provided by law, and allow him reasonable time and opportunity to consult counsel, if desired;

Rule 3b of the Marshall Islands Rules of Criminal Procedure imposes that same duty upon the court, to advise an accused of his constitutional right to the assistance of counsel, if that advice has not earlier been tendered. That Rule requires that the accused be informed of his right to counsel "as soon as practicable after arrest and not later than the time as [sic] which he is informed of the charges and receives a copy thereof." The information should be provided in language easily understood by the average person. The accused should be given the opportunity to make an intelligent and uncoerced choice whether to be represented by counsel.

Further assurance that the accused has been informed of his right to counsel is provided by Rule 9 of the Marshall Islands Rules of Criminal Procedure, which mandates that immediately prior to arraignment:

. . . the court shall require the accused to identify himself by giving his name, age,

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sex, and residence. The court shall then ask the accused if he has counsel. If he has no counsel, the court shall ask him if he desires counsel. If he so desires, he shall be allowed opportunity to procure counsel.

The importance of counsel at a preliminary hearing was first recognized in the United States in *White v. Maryland*, 373 U.S. 59, 10 L.Ed. 2d. 193, 83 S.Ct. 1050 (1963). In that case, during a preliminary hearing at which the accused was not represented by counsel, a plea of guilty was entered by the accused. After the appointment of counsel, the plea was changed to “not guilty” and “not guilty by reason of insanity.” At trial, the plea of guilty made at the preliminary hearing was introduced into evidence against the accused. The United States Supreme Court reversed the conviction, holding that the time at which an accused enters a plea is critical and, therefore, he must earlier be advised of his right to the assistance of counsel.

[7] In this Republic, the accused may not be called on to plead at the preliminary hearing. 12 TTC § 203, currently codified as 32 MIRC Ch. 1, § 40. The rule from *White v. Maryland*, therefore, applies when the accused can be called upon to plead; i.e., during an arraignment.

III. Failure to Assure that Appellant Fully Understood.

[8] Because of the finality of a plea of guilty, courts have required that “the trial court ascertain from the accused’s own statements personally in open court that he is voluntarily making a plea of guilty and understands the nature of the charge and the general effect of the plea, before such a plea is accepted.” *Rodriguez v. Trust Territory*, 3 TTR 179, 181 (1966). The American Bar Association’s Standards For Criminal Justice, which have been extensively cited in United States Courts and have begun to attract international attention, set forth a comprehensive array of subject matters that should be covered by the court, with the defendant, to assure that he fully understands the meaning and consequences of a guilty plea.³

³Standard 14-1.4, entitled “Defendant to be advised,” states:

“(a) The court should not accept a plea of guilty or *nolo contendere* from a defendant without first addressing the defendant personally in open court and determining that the defendant understands:

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While the Standards state aspirations that perhaps cannot be expected to be attained except in quite sophisticated courts with well trained and experienced judges, prosecutors and defense counsel, they demonstrate the variety of concerns a court should address to assure that a

(i) the nature and elements of the offense to which the plea is offered;

(ii) the maximum possible sentence on the charge, including that possible from consecutive sentences, and the mandatory minimum sentence, if any, on the charge, or of any special circumstances affecting probation or release from incarceration:

(iii) that, if the defendant has been previously convicted of an offense and the offense to which the defendant has offered to plead is one for which a different or additional punishment is authorized by reason of the previous conviction or other factors, the fact of the previous conviction or other factors may be established after the plea, thereby subjecting the defendant to such different or additional punishment;

(iv) that by pleading guilty the defendant waives the right to a speedy and public trial, including the right to trial by jury; the right to insist at a trial that the prosecution establish guilt beyond a reasonable doubt; the right to testify at a trial and the right not to testify at a trial; the right at a trial to be confronted by the witnesses against the defendant, to present witnesses in the defendant's behalf, and to have compulsory process in securing their attendance; and

(v) that by pleading guilty the defendant waives the right to object to the sufficiency of the charging papers to state an offense and to evidence allegedly obtained in violation of constitutional rights, except to the extent that motions concerning such matters may already have been made and ruled upon, or unless the right of appeal on such issues is reserved.

(b) If the court is in doubt about whether the defendant comprehends his or her rights and the other matters of which notice is required to be supplied in accordance with this standard, the defendant should be asked to repeat to the court in his or her own words the information about such rights and the other matters, or the court should take such other steps as may be necessary to assure itself that the guilty plea is entered with complete understanding of the consequences.

(c) If the defendant is represented by a lawyer, the court should not accept the plea where it appears the defendant has not had the effective assistance of counsel.”

American Bar Association Standards For Criminal Justice (2d ed., 1986)

MARSHALL ISLANDS, SUPREME COURT

plea of guilty is knowingly made and is based on an adequate understanding of the rights and consequences involved.

[9] Because counsel can provide valuable assistance to a defendant in achieving the necessary levels of knowledge and understanding the court must also assure that any waiver of the right to counsel is knowingly and affirmatively made. That waiver must appear on the record; it cannot be assumed from a silent record. *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969).

For a waiver to be effective, the prosecution must show that the accused was competent to make such a waiver and that the accused was completely aware of the right being waived. In *Johnson v. Zerbst*, *supra*, the United States Supreme Court observed that “[t]he determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Johnson v. Zerbst*, 304 U.S. at 464. Absent a clear indication on the record of his awareness of a waiver, an accused will not be found to have waived his right to the assistance of counsel. The order entered by the trial judge contains no mention of any discussion, much less a waiver, of the Appellant’s right to counsel.

IV. Failure to Properly Consider Appellant’s Request To Withdraw His Guilty Plea and Denial of the Assistance of Counsel.

In *Benemang v. Trust Territory*, 5 TTR 22, 27 (1970) the court said:

It is a familiar general rule that when a defendant has pled guilty in a criminal case, it is within the discretion of the trial court to permit the plea to be withdrawn. Application of the rule to a given situation depends upon the time the motion to withdraw is made and the circumstances pertaining to the reason for the withdrawal. (citations omitted)

The *Benemang* court quoted *Friedman v. U.S.*, 200 F.2d 690 at 696 (8th Cir. 1953), concerning the circumstances the trial court must consider when it decides whether to allow an accused to withdraw his guilty plea.

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The issue for determination is whether the plea of guilty was voluntary, advisedly, intentionally and understandingly entered or whether it was at the time of entry, attributable to force, fraud, fear, ignorance, inadvertence or mistake such as would justify the court in concluding that it ought not to be permitted to stand.

Benemang v. Trust Territory, 5 TTR at 27.

[10] In both *Rodriguez, supra*, and *Benemang* the accused had counsel at the time of entering his guilty plea. In the present case, Appellant was not represented by counsel when he pleaded guilty and was sentenced, nor does it appear that he ever was advised of the opportunity to be provided with the services of counsel. Clearly, the concerns expressed by the courts in *Rodriguez* and *Benemang* are present in this case. In the circumstances, this Court cannot conclude that Appellant's plea was given advisedly and without fear or ignorance.

The post-sentencing hearing was held five days after denial of the Appellant's request to withdraw his guilty plea. Appellant, meantime, had requested the assistance of the Public Defender, who appeared at the second hearing and attempted to represent Appellant. The transcript reveals he was not permitted to do so and the order entered by the judge on conclusion of the hearing stated "the Court disallowed his application (to appear as counsel) as the defendant was no longer an accused as he had pleaded 'guilty' to the charge and had been sentenced."

The Constitution guarantees the right to counsel to persons accused of criminal wrongdoing. This constitutional right must not be treated lightly by the police or the courts, for the right to the assistance of counsel ensures accused persons of a fair trial and ultimately, due process of law.

The United States Supreme Court has held that a conviction obtained from a proceeding in which the constitutional right to counsel has been denied is void. *Gideon v. Wainright, supra*. In this case the denial of the right appears to have occurred not merely once, but twice.

The judgment is reversed and the cause is remanded to the High Court for further action consistent with this opinion.

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Submitted on the brief, without oral argument.

David M. Strauss, Public Defender, for Plaintiff-Appellant

The Attorney General declined to file a brief on behalf of Defendant-Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**MARSHALL ISLANDS NATIONAL
DEVELOPMENT BANK, INC.,**

S.CT. CIVIL NO. 89-04
(High Ct. Civil No. 1987-032)

Plaintiff-Appellee,

-v-

HELENA AND JIMA ALIK,

Defendants-Appellants.

APPEAL FROM THE HIGH COURT

DECEMBER 12, 1989

ASHFORD, C.J.

TENNEKONE, A.J., and PHILIPPO, A.J. (sitting by designation)

SUMMARY:

The High Court entered judgment on the complaint, answer, motions and discussions with counsel for the parties without taking testimony or admitting exhibits. The Supreme Court found the record insufficient to support the judgment and remanded the case to the High Court for proceedings as necessary to enter a judgment on the merits, consent decree, confirmation of settlement, dismissal or other appropriate disposition as the evidence or agreement of the parties might dictate.

DIGEST:

1. JUDGMENTS – *In General*: Judgment may be entered only upon a record sufficient to support it.
2. JUDGMENTS – *Same*: Absent a stipulation that an agreement is valid, the High Court must, before rendering judgment on an agreement, find that it is valid under contract law and has not been superseded by any subsequent agreement.

MARSHALL ISLANDS, SUPREME COURT

OPINION OF THE COURT BY ASHFORD, C.J.

This is an appeal from a judgment in favor of Plaintiff-Appellee Marshall Islands National Development Bank, Inc. (“Bank”) in an action against Jima and Helena Alik (“Alik”) for default on a loan.

I.

On March 2, 1987, Bank filed a complaint against Alik, alleging that Alik had executed a promissory note evidencing a loan from Bank in the amount of \$107,879.56. Bank also alleged that Alik defaulted on this loan and that at the time of default the outstanding balance, including interest, was \$175,740.48. Bank alleged that the terms of the note included a provision for acceleration of balance due upon default. Bank also alleged that Alik had executed and delivered to Bank two real property mortgages as security for the loan.

Bank prayed for judgment in its favor against Alik in the sum of \$175,740.48 with interest thereon at the rate of 6 per cent per annum from date of judgment; attorneys’ fees in the sum of \$20,375.00 in addition to court costs “incurred herein”; foreclosure of all security agreements and mortgages to pay sums owed Bank; and such other and further relief as the court may deem just and proper.

Alik filed an answer admitting that the High Court had jurisdiction over the dispute and denying all other allegations of the complaint.

On October 28, 1987, Alik moved to dismiss the case. Apparently this motion was never ruled upon. The motion alleged that Bank had prevented Alik from handling the loan fund and had itself mismanaged the fund and made unnecessary expenditures. Alik also alleged that they requested copies of Bank’s records concerning the management of the fund but never received any such documentation. Alik further alleged they had no responsibility for Bank’s attorneys’ fees because a settlement had already been made between Bank and Alik. Alik indicated a document was attached to the motion supporting the existence of a settlement but no such document is contained in the record.

Bank then filed a motion for an order restraining Alik from collecting any rental money

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due from four rental units and an order requiring that all such rental money collected be placed in an escrow account until all the issues in the action were fully adjudicated. Alik received notice that a hearing was scheduled for March 11, 1988, and that they were to appear. There is no record of a hearing taking place on this motion. March 11, 1988, is the date of the agreement on which the High Court based its judgment.

The written agreement between the parties dated March 11, 1988, stipulated that the outstanding balance of the account on January 31, 1988, stood at \$127,078.35 and provided that tenants would pay rent directly to Bank. The agreement also stipulated that Bank would pay any insurance premiums, taxes and maintenance expenses relating to the four apartments and that Alik would not pay any legal expenses or fees in connection with the present lawsuit.

On January 16, 1989, Bank filed a motion for entry of judgment based on the March 11, 1988, agreement. Bank referred to the agreement as a “settlement agreement” and attached a copy of it to the motion.

On February 13, 1989, the High Court ordered judgment in favor of Bank in the amount of \$127,078.35 with post-judgment interest accruing at a rate of 9%, and denied Bank’s claim for legal expenses and fees. The Court also ordered that all other terms in the March 11, 1988, agreement be incorporated by reference and made a part of the judgment.

II.

[1] The question presented on appeal is whether it was proper for the High Court to enter judgment as it did on the basis of the record before it. For the reasons set out below this Court finds that the record is insufficient to support the judgment and remands the case to the High Court for action consistent with this opinion.

III.

A. The Record

The High Court had before it the complaint, the answer, a motion to dismiss, a motion for injunction, and a motion for entry of judgment, each with accompanying exhibits including a copy of the March 11, 1988, agreement. The High Court did not take testimony or admit exhibits

MARSHALL ISLANDS, SUPREME COURT

at the hearing on the motion for entry of judgment, but only heard argument by Bank's counsel and Alik and representations by Alik. The following excerpt from the transcript is indicative of that argument:

Mr. Alik: We agreed with what we signed here.

....

Mrs. Alik: During that time we made that settlement it was with another Counsel. And the Counsel informed us that he was going to drop this case.

....

Mr. Michelsen
[Bank's
Counsel]

... the fact of the matter is, the matter wasn't dropped obviously. What did Dennis [Bank's counsel at the time of the agreement] want is the matter to be dismissed and not be brought back and not pay.

....

Mrs. Alik: We were all present with Mr. [Dennis] Reeder, at that time in his office while Mr. Reeder, himself called the Courthouse and informed that the settlement has been made and the case be dropped.

....

Court: Well, I don't know why that one wasn't included in that agreement, and normally that was – but in any case, it doesn't mean that you don't have to pay anything. They did file a suit against you based on his notes, do you understand?

....

Court: ... Are you saying that this agreement is not good?

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....

Court: The question is, you did sign these documents you agreed that you owed the money.

....

Mr. & Mrs.: Yes

....

Mr. Michelsen: I can't imagine Mr. Reeder had been presented in his way to make this settlement in his office. I can't imagine Mr. Reeder called in Court and informed that Court that there is going to be a trial concerning this settlement. But I would not be sure that Mrs. Alik would be able to specifically remember or if she ever heard Mr. Reeder talking over the phone exactly what he said to Court in English a year later.

....

Mrs. Alik: Mr. [Dennis] Reeder informed us that nobody will have to show up in Court because of the case has already been dismissed.

....

Court: Mr. Michelsen, this matter has not been brought to the attention of this Court after this agreement was signed on March 11, there is inference that this matter was – this case was settled, will you agree? Which means that the inference or intent was to dismiss the case, but if you have an option to bring the new case again based on this agreement.

....

Mr. Michelsen: Your Honor, I don't know what has been dropped because there was following up paper work was done at that time, the point is that this agreement is the resolution of the underlying issues in this case.

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In addition, during the hearing Plaintiffs counsel refers to an “August agreement” and Jima Alik refers to an agreement entered into “last summer” but the only agreement before the court is the one dated March 11. It is not clear from the High Court’s order what evidence its judgment is based upon or whether the court intended a judgment on the merits or something else.

B. Judgment on the Merits

[2] Aside from the fact that the March 11, 1988 agreement was subsequent to and not mentioned in the complaint and answer, unless the parties have stipulated that the agreement is valid, the High Court must before rendering judgment on the agreement find that the agreement is valid under contract law and that it has not been superseded by any subsequent agreement. There does not appear to have been any stipulation nor was any evidence taken as to whether there was a valid contract. For example, was dismissal of the lawsuit, allegedly relied upon by Alik, a condition precedent to or consideration for the contract?

C. Alternative to Judgment on the Merits

If the agreement did not amount to a resolution of all the issues in dispute, it may nevertheless end the lawsuit if that is the intention of the parties. It was made on the same day a hearing was scheduled on a motion to enjoin Alik from receiving rent from tenants and to have the rent paid directly to Bank. The fact that the agreement provided for this result, but did not establish a rate of interest or schedule for repayment, suggests that it was intended to obviate the motion for injunction and not the entire lawsuit. To the contrary are the facts that Bank has urged judgment and Aliks have urged dismissal on the basis of the agreement. If there was an intent to end the suit, that intent may have been to end it by dismissal through settlement or novation, to have a settlement approved or confirmed by the court, or to have the court enter a consent decree.

D. What is the Nature of the Judgment?

Not only is it impossible for this Court to determine from the record what the parties intended, but also the record leaves this Court in doubt as to what the High Court intended.

In order to determine whether the judgment was proper, this Court must know whether

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the High Court's judgment was a consent decree, an approval or confirmation, an order to enforce a settlement, or something else entirely. A review of the transcript of the hearing indicates that the High Court may even have viewed its judgment as a dismissal:

Court: Mr. Michelsen, I think I agree with you. I think what they're asking for is that because this agreement which you entered into we'll make upon the record so that the case can be dismissed.

....

Court: The reason why Mr. Michelsen is here, is to have these agreements entered on the record and the case will be dismissed, and the Court so Ordered. The Court Orders these agreements entered into voluntarily liable of which you agreed – which you admitted made upon of the record and make an Entry of Judgment is Ordered based upon the agreement of March 11, 1988[.]

The Court did not take evidence for an adjudication on the merits nor did the admissions in argument provide an adequate basis for that adjudication.

The judgment entered by the High Court is reversed and the cause is remanded for such proceedings as are necessary to render a judgment on the merits or consent decree, confirmation of settlement, dismissal or other appropriate final order as the evidence or the mutual agreement of the parties may dictate.

Decided on the record and briefs submitted by:
Jima J. Alik for Defendants-Appellants
R. Barrie Michelsen for Plaintiff-Appellee.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

LIWEWE JEJA,

Plaintiff-Appellant,

S.CT. CIVIL NO. 86-05
(High Ct. Civil No. 1983-075)

-v-

**HESLI LAJIKAM, LIMET
MOJILONG, LOTON ANTIBAS,
RINA BATLOK, TIKOS LEON,
and LIMELON JAWIN,**

Defendants-Appellees.

APPEAL FROM THE HIGH COURT

MARCH 7, 1990

ASHFORD, C.J.

KONDO, A.J., and PHILIPPO, A.J. (sitting by designation)

SUMMARY:

Plaintiff claimed the iroj edrik title to certain wetos on islands in Arno Atoll. With the advice of the Traditional Rights Court, the High Court found that Plaintiff's claims were not established either under Marshallese custom or earlier court judgments concerning the wetos. The Supreme Court affirmed, finding that the earlier judgments relied upon had involved different legal issues. The Court also declined to hear an additional basis for the claim of title that had not been asserted in the trial court.

DIGEST:

1. **COURTS** – *Traditional Rights Court – Qualification of Judges*: After issues referred to the Traditional Rights Court have been tried and decided, it is too late to object to the qualifications of the judges.
2. **RES JUDICATA** – *Requirements*: Application of the doctrine of *res judicata* requires both identity of parties and identity of issues in the earlier and subsequent actions.

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3. APPEAL AND ERROR – *Questions Reviewable – Asserted Below*: The Supreme Court cannot decide on appeal a question or claim not raised or asserted in the court below.

OPINION OF THE COURT BY ASHFORD, C.J.

Plaintiff brought this action against the Iroijiplap of certain wetos on Longar Island and the alaps of wetos on Longar Island and Tinak Island, Arno Atoll, praying that the court order the Defendants to recognize Plaintiff as the Iroij edrik over the wetos. Trial was held before the Traditional Rights Court and the High Court, sitting together. Answering specific questions referred to it by the High Court, the Traditional Rights Court stated it could not find from the evidence how Plaintiff obtained the Iroij edrik title. The High Court concurred, finding that neither Marshallese custom nor earlier judgments concerning the wetos operated to convey the title of Iroij edrik to Plaintiff. Plaintiff appealed. For the reasons set forth below, this Court affirms the judgment of the High Court.

A. Composition of the Traditional Rights Court.

This case was tried before the Traditional Rights Court and the High Court in January 1986, after enactment of the Traditional Rights Court (Composition and Appointments) Act 1985, P.L. 1986-1, 27 MIRC Ch. 3. That statute provides that the Traditional Rights Court shall consist of a permanent panel of three judges appointed by the Judicial Service Commission and such other members or panels as may be constituted from time to time in the event of disability, disqualification or other expedient reason. 27 MIRC Ch. 3, §§ 2, 3 and 4. Section 5 of the statute requires the Judicial Service Commission to prescribe qualifications of the judges in accordance with Article VI, § 4(1) of the Constitution of the Marshall Islands. That constitutional provision requires the judges to be selected so as to include a fair representation of all classes of land rights and on a geographical basis calculated to ensure fair and knowledgeable exercise of the court's powers.

[1] The permanent panel appointed by the Judicial Service Commission includes an Iroijiplap (from whom, as the Traditional Rights Court found in this case, Iroij edrik rights are

MARSHALL ISLANDS, SUPREME COURT

derived), an alap and a dri jerbal. Plaintiff complained on appeal that the three judges of the Traditional Rights Court were all from the Ralik Chain of the Marshall Islands, which does not have an “iroij edrik system.” Plaintiff asserts that had there been members on the court from the Ratak Chain, which has that system, the answers to the questions submitted by the High Court to the Traditional Rights Court would have been different. Absent evidence to that effect, this Court cannot assume that the mere fact that all members of the Traditional Rights Court were from the same island chain would offend the constitutional requirement of geographical representation ensuring fair and knowledgeable exercise of the court’s jurisdiction. Furthermore, it is too late to raise, for the first time on appeal, an objection that was not asserted in the court below. *See, e.g., Newark Morning Ledger Co. v. United States*, 539 F.2d 929 (1976). The composition of the Traditional Rights Court became known to Plaintiff not later than the opening day of trial. The record discloses no objection by Plaintiff to the composition of the Traditional Rights Court, nor any request by the Plaintiff to either the presiding judge or the Chief Justice of the High Court to appoint a suitable person from the Ratak Chain to act as a temporary member of the Traditional Rights Court for the case. *See* 27 MIRC Ch. 3, § 4(1)(c). After the issues referred to the Traditional Rights Court have been tried and decided, it is too late to object to the qualifications of the judges. *See, Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir. 1982), *cert. den.* 459 U.S. 839, 74 L.Ed. 2d 81, which, while applying 28 U.S.C.A. § 455(a), contains a useful discussion of the reasons underlying the need for timeliness in challenging the trial judge’s qualification or raising the issue of disqualification.

B. The judgments in Civil Action Nos. 44 and 187 did not establish Plaintiff’s right to succeed to the iroij edrik title.

Plaintiff asserted in the court below and in this Court that the doctrine of *res judicata* barred Defendants from refusing to recognize Plaintiff as successor to the iroij edrik title on the subject wetos. Plaintiff relied on judgments in Civil Action No. 44 (1957) and Civil Action No. 187 (1965) in the trial division of the High Court of the Trust Territory.

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The doctrine of *res judicata*, literally translated as “the matter has been adjudged” means quite simply that the court will not permit parties or those in privity with them to relitigate issues which have already been determined by a court of competent jurisdiction. *Joseph v. Ludwig*, 4 TTR 354, 356 (1969)

[2] It is clear that application of the doctrine requires both identity of parties and identity of issues in the earlier and subsequent actions. *Wong v. Sungiyama*, 3 TTR 367 (1967). Without examining the question of identity of parties, it is apparent that there is no identity of issues between those earlier cases and the case at bar. Civil Action Nos. 44 and 187 involved the efficacy of Wills of Lujim to pass her iroij edrik title to Lijobar and Mwejina. The Court in Civil Action No. 187 found that the 1929 Kalimur (“Will”) of Lujim, approved by the Japanese authorities on Jaluit when the Kalimur was made, to be effective to transfer Lujim’s iroij edrik title. Modifying the judgment entered in Civil Action No. 44, the Court in Civil Action No. 187 ruled that paragraph 1(c) of the earlier judgment should be corrected to read:

“As between the parties and all persons claiming under them, Litarjidrik, acting with the consent and approval of Lijobar, is entitled to act as iroij edrik on the wetos between Lotoen and Lolimen on Lonar Island, Arno Atoll.”

In this case, Plaintiff claims the iroij edrik title as successor in interest to Litarjidrik. The issues are whether Litarjidrik succeeded to that title (note that the judgment specifically stated she was acting with the consent and approval of Lijobar) and, if so, whether Plaintiff succeeded Litarjidrik as owner of that title.

C. The dichotomy of title and right.

Plaintiffs Amended Complaint was based on a claim of title; that is, ownership of rights in land.¹ The Amended Complaint alleged that Defendants “have refused to recognize and to give Plaintiff the iroij edrik’s share of the copra produced” from the wetos in question and sought

¹As used in this opinion “title” refers to ownership of rights in land as distinguished from an appellation given to a person as a sign of privilege or distinction.

MARSHALL ISLANDS, SUPREME COURT

a judgment requiring the Defendant to “recognize Plaintiff as the iroij edrik” and “the Alaps to pay their respective amounts owing to Plaintiff.” Similarly, Plaintiff’s opening statement at the trial reflected his claim of title and the rights flowing therefrom. The six questions referred by the High Court to the Traditional Rights Court in a referral order dated January 13, 1986, all concern the title of the iroij edrik. No objection to the language of those questions appears in the record. The evidence of both Plaintiff and Defendants was consistent with the claim of title by Plaintiff and the defense that Plaintiff had not succeeded to the iroij edrik title. The questions by the Traditional Rights Court to the witnesses and that court’s answers to the reserved [sic – referred?] questions demonstrate that the Traditional Rights Court understood the action to be a dispute over the iroij edrik title.

Plaintiff and the single witness called by him did not testify that Plaintiff had royal blood; nor was there any claim that any predecessor iroij edrik made a Kalimur in his favor. There was undisputed and un rebutted testimony by several witnesses that Plaintiff had no royal blood and no Kalimur named him as iroij edrik.

In answering the reversed [sic – referred?] questions, the Traditional Rights Court stated in several of its answers that royal blood, or iroijiaplap blood, is necessary to succeed to the iroij edrik title. It should be noted, however, that the Traditional Rights Court did not specifically consider whether a person without royal blood could succeed to that title under a valid Kalimur. This Court expressly refrains from expressing any opinion on that subject since it is not necessary to determination of this case.

Plaintiff changed his theory on appeal. He now asserts that he has the rights of the iroij edrik, arising independently of the title, if not the title itself. *Maddison v. Tarkwon and others*, Civil Action No. 48 (1956) in the trial division of the High Court of the Trust Territory is cited in support of his position. The judgment in that case held that the plaintiff Maddison “holds the iroij edrik land rights in the following lands on Majuro Atoll, Marshall Islands, but is not entitled to the title or to the ceremonial rights of an iroij edrik.” It may well be that the “title” referred to in the *Maddison* judgment is the rank or privilege of iroij edrik, as distinguished from his

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ownership of land rights; but, if not, then *Maddison* does give credence to the claim that title and the rights flowing therefrom can be separated. However, it does not appear from the judgment, as claimed by Plaintiff, that Maddison had no royal blood.

[3] Even assuming that land rights associated with the title of iroij edrik can be separated from that title (but without deciding that they can be separated) this Court cannot decide on appeal a question or claim not raised or asserted in the court below. *Jatios v. Levi*, 1 TTR 578, 585 (1954).

The judgment of the High Court is affirmed.

By order, submitted on the briefs without oral argument:

Hemos A. Jack for Plaintiff-Appellant

Linda Wingenbach, Micronesian Legal Service Corp., for Defendants-Appellees

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

WALTER LANWI, *et al.*,

Plaintiffs-Appellees,

-v-

LANUWA KINTIRO,

Defendant-Appellant.

S.CT. CIVIL NO. 90-04
(High Ct. Civil No. 1984-010)

ORDER DISMISSING APPEAL

JULY 11, 1990

ASHFORD, C.J.

Plaintiffs-Appellees moved to dismiss this appeal, citing deficiencies and irregularities of both form and substance in the prosecution of the appeal. Defendants-Appellants have neither responded nor opposed the motion. Accordingly, it is

ORDERED that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff-Appellant,

-v-

LOLA LANG,

Defendant-Appellee.

S.CT. CRIMINAL NO. 89-01
(High Ct. Crim. No. 1989-005)

ORDER DISMISSING APPEAL

JULY 18, 1990

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because Appellant failed to timely file an opening brief.

DIGEST:

1. **APPEAL AND ERROR – *Dismissal, Grounds for – Failure to File Opening Brief:***
Appellant's failure to timely file an opening brief is grounds for dismissal.

[1] The Republic, as Appellant in the above case, having failed to file an Opening Brief and to request an extension of time therefor, the Court deems this appeal to have been abandoned.

Therefore, it is

ORDERED that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**REPUBLIC OF THE MARSHALL
ISLANDS,**

S.CT. CRIMINAL NO. 90-01
(High Ct. Crim. No. 1990-003)

Plaintiff-Appellant,

-v-

KITON LAIBWIJ,

Defendant-Appellee.

ORDER DISMISSING APPEAL

JULY 25, 1990

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because Appellant failed to timely file to designate the record.

DIGEST:

1. **APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Designate Record:***
Appellant’s failure to designate the record is grounds for dismissal.

[1] The Republic, as Appellant in the above cause, having failed to designate the record on appeal and to request any extension of time therefor, the Court deems this appeal to have been abandoned. Therefore, it is

ORDERED that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**MARSHALL ISLANDS DEVELOP-
MENT CORPORATION AND SAM
LEON (dba CRYSTAL AMUSEMENT
CENTER),**

S.CT. CIVIL NO. 89-07
(High Ct. Civil No. 1989-348)

Plaintiffs-Appellees,

-v-

MAJURO ATOLL LOCAL GOVERNMENT,

Defendant-Appellant,

and

**REPUBLIC OF THE MARSHALL
ISLANDS,**

Intervenor-Appellant.

APPEAL FROM THE HIGH COURT

SEPTEMBER 10, 1990

ASHFORD, C.J.

BIRD, A.J., and PHILIPPO, A.J. (sitting by designation)

SUMMARY:

An amusement center challenged a local ordinance outlawing the use and possession of poker machines, asserting that the Republic's Gambling Devices Act and Import Duties Act permitted the machines to be imported and used. The Supreme Court ruled that the Acts relied on by the amusement center had been repealed, so they could not defeat the ordinance.

DIGEST:

1. APPEAL AND ERROR – *Questions Reviewable – Cross Appeal*: In the absence of a

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timely filed cross appeal, the Supreme Court will not rule upon a claimed error of the High Court raised in the brief of the Appellee.

2. STATUTES – *Repeal – Incorporated Statute*: Repeal of a statute that re-enacted, through incorporation by reference, a repealed statute, effects a repeal of the statute incorporated by reference.

OPINION OF THE COURT BY ASHFORD, C.J.

These are appeals from a summary judgment granted by the High Court in favor of Plaintiffs-Appellees. We reverse.

Plaintiffs-Appellees Marshall Islands Development Corporation and Sam Leon (hereinafter, collectively, “MIDC”) filed a declaratory judgment action against Defendant-Appellant Majuro Atoll Local Government (hereinafter “MalGov”) seeking a judicial determination that MalGov’s Ordinance No. 1989-1, entitled “Gambling Device Ordinance 1989” (a) is unconstitutional, as applied to poker machines, because it is inconsistent with the national Gambling Devices Act, 31 MIRC Ch. 2, or (b), in the alternative, that the regulation of gambling was pre-empted by the Gambling Devices Act, leaving no opportunity for regulation by the local government. Intervenor-Appellant Republic of the Marshall Islands (hereinafter “Republic”) intervened in the case to assist in defending the legality of the ordinance. MalGov filed a motion for summary judgment, but all parties agreed and informed the court that the motion should be treated as a motion for judgment on the pleadings by MalGov. The High Court, without explanation, treated it as a motion for summary judgment and gave judgment for MIDC, the nonmoving party. The High Court ruled that the Gambling Devices Act, as interpreted by the Nitijela, permitted the use and possession of poker machines. Based on that conclusion, the High Court found the Gambling Devices Ordinance to be inconsistent with the Gambling Devices Act and, therefore, unconstitutional. *See* Article IX, § 2(1) of the Constitution. The High Court did not reach MIDC’s pre-emption claim.

[1] The appeals present both procedural and substantive issues. We will deal, first, with the procedural issues. One of these is MIDC’s complaint that the trial court erred in allowing the

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Republic to intervene. We will not rule on this point, inasmuch as no cross-appeal from the final judgment was filed by MIDC. The other is the complaint by MalGov and the Republic that the High Court erred in treating the motion as one for summary judgment when the parties had agreed that it should be treated as a motion for judgment on the pleadings. The court is not necessarily bound by the parties' characterization of a pleading, but we have elected to treat the motion in the manner to which the parties agreed.

We now proceed to examination of the substantive issues.

In its summary judgment, the High Court correctly noted that the Gambling Devices Act, 31 MIRC Ch. 2, was repealed by the Import Duties Act 1984 (P.L. 1984-3) and re-enacted by the Import Duties (Amendment) Act 1984 (P.L. 1984-28). The repealing act, P.L. 1984-3, imposed an import tax of 25% on "(a)musement machines, including video, pinball, pachinko, and gambling devices." *See* 11 MIRC Ch. 5, Schedule, item 27. The High Court reasoned that if the National Government taxed the importation of amusement machines, including gambling devices, it could not have intended that use and possession of them be illegal and, therefore, the ordinance's prohibition against possession and use of poker machines for gambling was inconsistent and unconstitutional.

The flaw in the summary judgment was its failure to recognize changes in the national law that became effective prior to the May 29, 1989 effective date of the local ordinance. In 1989, the Nitijela repealed the Import Duties Act 1984 and replaced it with the Import Duties Act 1989, effective May 1, 1989. P.L. 1989-49, §§ 20 and 21. In the 1989 statute, no import duty is imposed on gambling devices and the Gambling Devices Act is not mentioned.

[2] These events require us to determine whether the Gambling Devices Act, upon which MIDC relies, did or did not survive the repeal of the Import Duties Act 1984. Because the revival of the Gambling Devices Act was by an amendment to the Import Duties Act 1984, incorporating the Gambling Devices Act within that statute by reference, we conclude that the repeal of the Import Duties Act 1984 in its entirety effected a repeal, also, of the statute it had incorporated by reference. This conclusion is consistent with accepted rules of statutory construction announced by case law and the leading United States treatise on that subject.

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Several venerable United States Supreme Court cases have announced principles of law applicable to incorporating and incorporated statutes that have stood the test of time. It often happens that a legislative body, for simplicity and convenience, will incorporate by reference the provisions of an earlier statute into a later statute. The cases referred to establish that the repeal or amendment of the incorporated statute has no effect upon the incorporating statute, which continues in force the incorporated statute with the same meaning and effect that it had at the time of its adoption by the incorporating statute. *Kendall v. United States*, 12 Pet. 522, 9 L. Ed 1181 (1838, U.S.); *In Re Heath*, 144 U.S. 92, 36 L.Ed. 358, 12 S.Ct. 615 (1892); *Hassett v. Welch*, 303 U.S. 303, 82 L.Ed. 858, 58 S.Ct. 559 (1938). It follows from this that if the statute incorporated by reference owes its efficacy solely to the incorporating statute, repeal of the latter effects a repeal of the former.

The fact that the Gambling Devices Act was revived by amendment to the Import Duties Act 1984 does not require a different result. When an act (here, the Import Duties Act 1989) repeals a statute as amended (here, the Import Duties Act 1984), both the original act and the amendment are repealed unless a legislative intention to the contrary is clearly indicated. Sutherland, *Statutory Construction* (4th Ed., 1985 Rev.) § 22.38. The repealing language of the Import Duties Act 1989 is simple, direct and admits of no intent to preserve any part of the repealed Act.

Where an express repeal is clearly stated, identifying the affected act with reasonable certainty, the court has no responsibility or authority but to apply the legislative will as expressed. Sutherland, *Statutory Construction* (4th Ed., 1985 Rev.) § 23.07.

Upon the effective date of the MalGov Gambling Device Ordinance 1989, the Gambling Devices Act having been repealed (for the second time), there was neither an inconsistency with nor a pre-emption by national law to render that ordinance ineffective.

The judgment of the High Court is reversed and the case is remanded with instructions to enter judgment on the pleadings in favor of MalGov.

MIDC and Leon v. MALGOV and RMI (2)

R. Barrie Michelsen for

Defendant-Appellant Majuro Atoll Local Government

Dennis McPhillips, Assistant Attorney General, for

Intervenor-Appellant Republic of the Marshall Islands

David M. Strauss for

Plaintiffs-Appellees Marshall Islands Development Corporation and Sam Leon

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**ROBIN RANG and
NETIN ZACKAIAS,**

S.CT. CIVIL NO. 90-05
(High Ct. Civil No. 1986-160)

Plaintiff s-Appellees,

-v-

LANUWA LAJWA,

Defendant-Appellant.

ORDER GRANTING MOTION TO DISMISS APPEAL

NOVEMBER 23, 1990

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal on the grounds that the notice of appeal failed to include a concise statement of the questions presented.

DIGEST:

1. **APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Identify Errors:*** Failure to include in the notice of appeal a concise statement of the questions presented is grounds for dismissal.

Defendant-Appellant’s Notice of Appeal states, as its grounds:

(F)irst, the Findings of Fact by the Traditional Rights Court and the Trial Judge and their application and interpretation of Marshallese culture and land laws are erroneous; and secondly, the Trial Judge’s conclusion of law was in error as well.

[1] Rule 3 of the Marshall Islands Appellate Rules of Procedure requires the notice of appeal to “contain a concise statement of the questions presented by the appeal” and warn that the Court

RANG, *et al.*, v. LAJWA

will not consider any questions not set forth in the notice or fairly comprised therein. Counsel for Appellees correctly contends there is no notice at all concerning the alleged errors and questions to be raised on appeal. The notice alleges bare conclusions of error without specifying the basis of those conclusions.

The notice is so defective as to warrant dismissal of the appeal as provided for in Rule 20(a). *Mereb v. Orrenge*, 8 TTR 123 (App. Div., Palau District, 1980); *Korok v. Lok, et al.*, 1 MILR (Rev.) 93, 95 (Feb 25, 1988).

ORDERED: The motion is granted. This appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

EJBAD LANGIJOTA,

S.CT. CIVIL NO. 89-03
(High Ct. Civil No. 1986-145)

Plaintiff-Appellee,

-v-

BETHSHIBA ALEX,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

DECEMBER 3, 1990

ASHFORD, C.J.

BIRD, A.J., and PHILIPPO, A.J. (sitting by designation)

SUMMARY:

This suit involved a dispute over ownership of alap rights in Enebon and Boked Islands, Kwajalein Atoll. The trial court, citing Secretarial Order 2969, ruled that the unappealed 1959 ownership determination by a Land Title Officer must be given *res judicata* effect. The Supreme Court noted that Order 2969 had been revoked by Order 3076 and remanded the case to the trial court to determine whether the parties' predecessors in interest were parties to the Land Title Officer's proceedings. If not, the trial court must determine whether Defendant-Appellant is barred by laches from challenging that determination as to Enebon; and if not, which of them owns the alap interest in that island.

DIGEST:

1. TRUST TERRITORY COURTS DECISIONS – *Stare Decisis*: Decisions of Trust Territory courts do not have *stare decisis*, as distinguished from *res judicata*, effect in courts of the Marshall Islands.
2. TRUST TERRITORY COURTS DECISIONS – *Precedential Value*: In some circumstances, the value of Trust Territory court decisions as precedent will exceed the

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precedential value of cases from non-Pacific Islands jurisdictions.

3. RES JUDICATA– *Determinations by Land Title Officers*: Trust Territory Office of Land Management Regulation No. 1 provided sufficient procedural safeguards to hold administrative determinations thereunder to be *res judicata* as to persons who participated in the proceedings and those in privity with them.
4. PUBLIC OFFICERS – *Presumptions – Duties Performed*: Absent evidence to the contrary, a court can presume that Trust Territory officials did their duty; that is, did the things a Regulation required them to do.
5. LACHES – *Discretionary*: Whether laches bars an action depends upon the facts and circumstances; the decision to apply laches is primarily left to the discretion of the trial court.
6. LACHES – *Requirements*: To apply laches, the court must find (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense.

OPINION OF THE COURT BY ASHFORD, C.J.

This is a dispute over entitlement to the alap title, and rights stemming therefrom, to Enebon and Boked Islands, Kwajalein Atoll.

Both plaintiff and defendant claimed title under custom, the one asserting the land was bwij land and the other asserting it was imon aje land. Plaintiff also claimed under the 1959 determination made by a Land Title Officer pursuant to Trust Territory Office of Land Management Regulation No. 1. But, while that determination declared the alap title to Enebon to be in plaintiff's predecessor in title, it declared the alap title to Boked to be in defendant's predecessor in title.

The trial judge did not rule on the conflicting claims based on custom. He believed he was bound by the precedent established by *Jablotok v. Ebot*, 8 TTR 506 (App. Div., Marshall Islands District, 1985), which held that determinations by Land Title Officers are *res judicata*.¹

¹It should be noted that *Jablotok* involved different parties, different land and a different title (senior dri-gerbal rights in Leolen weto, Uliga Island, Majuro), so the case has, at the most,

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There being no dispute that the alaps determined by that officer for Enebon and Boked Islands were, respectively, the predecessors in interest of plaintiff and defendant, the High Court ruled that plaintiff was alap of Enebon and defendant was alap of Boked.

In *Jablotok*, the Appellate Division of the High Court of the Trust Territory relied exclusively on a provision in Order 2969 of the U.S. Secretary of the Interior as the basis for its ruling that unappealed final decisions of Land Title Officers must be given *res judicata* effect. “Clearly, Secretarial Order 2969 is a valid law in the Trust Territory and cannot be ignored by any governmental entity” *Id.*, 510. Counsel for Appellant, however, has invited this Court’s attention to the fact that Order 2969 was revoked by Order 3076, dated February 16, 1982, prior to the Appellate Division’s ruling. This fact, undoubtedly, was not known to that court. The *ratio decidendi* of *Jablotok* being fatally defective, we decline to follow it.

[1,2] Further, for the guidance of counsel we are obliged to announce that decisions of the Trust Territory courts do not have *stare decisis*, as distinguished from *res judicata*, effect in the courts of the Republic. The Republic is a jurisdiction separate and distinct from the former Marshall Islands District of the Trust Territory. We do not deny, however, that in some circumstances the value of Trust Territory court decisions as precedent will exceed the precedential value of cases from non-Pacific Islands jurisdictions.

This leaves us in the position where we must examine anew the current effect of a determination by a Land Title Officer made more than thirty years ago.

Office of Land Management Regulation No. 1 provided that persons claiming any right in government-used land may file a claim for damages or rental. The Land Title Officers appointed to conduct hearings on these claims were given powers of an administrative judge, including power to summon and swear witnesses, order production of documents and punish for contempt. A notice of hearing describing the land and identifying all claimants, among other things, was required to be given by posting at a public place in the District Administration Headquarters, in

merely precedential, and not *res judicata*, effect on this case.

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the Municipality in which the land was located and, where practicable, on the land, as well as by delivery to the residences of the owners of record (if any) and claimants. Hearings were required to be public and all persons claiming any interest in the land were to be given an opportunity to be heard. The Determination by the Land Title Officer was to be in a prescribed format, describing the land in such a manner as to permit accurate identification of it, was to be filed with the Clerk of Courts for the District and the executed original and copies were to be given to the owner, District Land Office, Land and Claims Administrator and a copy was to be posted at a public place at District Administration Headquarters or at the Headquarters of the Municipality in which the land was located. Provision was made for appeal by any person claiming an interest in the land to the High Court, to be taken within one year from the date the Determination was filed with the Clerk of Courts.

[3] The foregoing provisions, we believe, provide sufficient procedural safeguards, as to notice, opportunity to be heard and appeal, to hold this administrative determination to be *res judicata* as to persons who participated in the proceedings and those in privity with them. *But see Ngerdelolek Village v. Ngerchol Village*, 2 TTR 398 (Trial Div., Palau District, 1963), and *Blas v. Blas*, 3 TTR 99 (Trial Div., Mariana Islands District, 1966).

Ngerdelolek Village held the Land Title Officer's Determination binding only on those who were parties to that proceeding and rendered judgment in favor of a claimant who was not a party, contrary to the result reached by The Land Title Officer. The Court opined that Land Management Regulation No. 1 apparently was intended only to make Determinations as between the Trust Territory government and private parties filing claims against it, and not Determinations good against the world.

This view of the intent of the Regulation is certainly borne out by the Declarations of Purposes in Section 1 of the Regulation. The purposes were (1) to provide procedures for determining ownership of lands used, occupied or controlled by government, (2) to effect return of lands no longer needed to the owners and (3) to provide for settlement of claims resulting from government use or occupation. Section 2 of the Regulation authorized determinations only with

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respect to lands so used, occupied or controlled.

Blas v. Blas ruled that the Title Determination itself is not a bar to a party's claim to the property in question when she was not a party to the proceedings in which it was made and her rights as against another were not in issue in those proceedings.

Excepting only *Blas* and *Ngerdelolek Village, supra*, Trust Territory courts sitting in Districts other than the Marshall Islands have held that Determinations by a Land Title Officer not timely appealed from are binding.² This has been true even in cases where a party to the litigation had not been a party to the Determination proceedings.³

The results in Marshall Islands cases have not been consistent. The Appellate Division has given the Land Title Officer's Determination *res judicata* effect,⁴ but also affirmed a trial court decision that relied, in part, on an unappealed Determination and, in part, on other evidence

²*Santos v. Trust Territory*, 7 TTR 615 (App. Div., Mariana Islands District, 1978).

Cepeda Crisostimo v. Trust Territory, (Trial Div., Mariana Islands District, 1974), affirmed 7 TTR 375 (App. Div. 1976)

Otto v. Konang, 5 TTR 76 (Trial Div., Truk District, 1970)

Rivera v. Trust Territory, 4 TTR 140 (Trial Div., Palau District, 1968)

In Re DeCastro, 3 TTR 446 (Trial Div., Mariana Islands District, 1968)

³*Rudimich v. Chin*, 3 TTR 323 (Trial Division, Palau District, 1967)

Gibbons v. Owang Lineage, 5 TTR 103 (App. Div., Palau District, 1970), modifying *Owang Lineage v. Ngiraikelau*, 3 TTR 560 (Trial Div., Palau District, 1968)

⁴*Lujana v. Clanry*, 8 TTR 441 (App. Div., Marshall Islands District, 1984) *Jablotok v. Ebot*, 8 TTR 506 (App. Div., Marshall Islands District, 1985)

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it found consistent with that Determination.⁵ The Marshall Islands Supreme Court⁶ and Trust Territory trial courts sitting in the Marshall Islands have ruled that Land Title Officer Determinations are not binding on courts.⁷

[4] The record before us is not sufficiently specific to enable us to determine whether the predecessors in interest of the parties were parties to the same or different Determination proceedings before the Land Title Officer. Plaintiff's Exhibit 2 is not a Determination of Ownership containing the certifications as to notice and hearing in the form, or even substantially the form, required by Regulation No. 1, Section 10. Rather, it appears to be a compilation of "official" ownership findings concerning land at Kwajalein Atoll derived, among other sources, from "the land title hearings held from time to time by the Land Title Officer at Ebeye." Nonetheless, absent evidence to the contrary, we can presume that the Land Title Officer did his duty;⁸ that is, that he did the things the Regulation required him to do, so his Determinations are not now open to question. This still does not settle the issue, however, concerning who is bound by the Determination and under what legal theory. If the predecessors of Plaintiff and Defendant were both parties to the proceedings in which the alap titles to Enebon and Boked were determined, we would have no hesitancy in declaring them bound by those Determinations under

⁵*Jitiam v. Konou*, 8 TTR 541 (App. Div., Marshall Islands District, 1986)

⁶*Ebot v. Jablotok*, 1 MILR (Rev.) 8 (Aug 6, 1984), rev. 8 TTR 506 (App. Div., Marshall Islands District, 1985)

⁷*Tikoj v. Liwaikam*, 5 TTR 483 (Trial Div., Marshall Islands District, 1971)

Liwaika v. Bilimon, 4 TTR 123 (Trial Div., Marshall Islands District, 1968)

⁸"In the absence of evidence to the contrary, there is a very strong presumption . . . that public officers have properly discharged the duties of their office." 29 Am Jur 2d, Evidence § 171, citing *United States v. Chemical Foundation*, 272 U.S. 1, 71 L.Ed. 131 (1926); see also *Madrainglui v. School of the Pacific*, 7 TTR 107, 110 (Trial Div., Palau District): "The presumption of regularity and legality of official acts, 29 Am Jur 2d, Evidence § 171 *et seq.*, has not been overcome by the plaintiff."

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either or both of the bar and collateral estoppel aspects of the doctrine of *res judicata*, notwithstanding the ultimate purpose of the Determination proceedings was to determine the liability of government to pay rent or damages.

Assuming they were not parties to the same proceeding or proceedings, the same conclusion may nevertheless be reached. Exhibit 2 shows that Kabua was the iroij of both islands and Soap was the dri jermal of both islands. We may take judicial notice of the geography of Kwajalein Atoll, including the fact that Enebon and Boked are situated less than one-half mile from each other in the northern part of the Atoll. Given these circumstances, it is highly unlikely that the predecessors in interest of the Plaintiff and Defendant were not aware of the Land Title Officer's Determinations with respect to these islands, even if those Determinations were not made in proceedings to which they were both parties. It is probable, also, that the passage of thirty years since the Determinations were made has increased the difficulty and expense of proving title to the alap interests in these islands. If these assumptions are correct, then the doctrine of laches would prevent both parties from now challenging the Determinations.

[5,6] The question whether laches bars an action depends upon the facts and circumstances of the particular case. The decision to apply laches is primarily left to the discretion of the trial court, but that discretion is confined by recognized standards. The court must find (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense. *Coalition for Canyon Preservation v. Bowers*, 632 F.2d 774 (9th Cir., 1980).

The bare fact of a delay creates a rebuttable presumption of prejudice. *Boone v. Mechanical Specialties Co.*, 609 F.2d 956 (9th Cir., 1979).

This case is remanded to the High Court to determine (a) whether Plaintiff and Defendant's predecessors in interest were parties to the same proceeding or proceedings wherein the Land Title Officer determined ownership of the alap interest in Enebon and Boked Islands; if so, the Land Title Officer's Determination is *res judicata*; and if they were not, (b) whether Defendant-Appellant is barred by laches from challenging the Determination of the Land Title

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Officer as to Enebon and, if not, (c) which of Plaintiff-Appellee and Defendant-Appellant is the owner of the alap interest in that Island; and to enter judgment in accordance with its findings and this opinion.

Roy T. Chikamoto (John R. Heine with him on the brief)
for Defendant-Appellant Bethshiba Alex
David M. Strauss for Plaintiff-Appellee Ejbada Langijota

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

LOBOKKE LOBO,

S.CT. CIVIL NO. 89-08
(High Ct. Civil No. 1984-024)

Plaintiff-Appellant,

-v-

LAIBON JEJO,

Defendant-Appellee.

APPEAL FROM THE HIGH COURT

JANUARY 2, 1991

ASHFORD, C.J.

BIRD, A.J., and PHILIPPO, A.J. (sitting by designation)

SUMMARY:

The Traditional Rights Court and the High Court ruled that, according to custom, the alap has discretion to determine how much of his share of land rental payments is to be distributed to the various members of his bwij. The Supreme Court agreed.

DIGEST:

1. APPEAL AND ERROR – *Review – Questions of Law*: Matters of law are reviewed *de novo*.
2. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Facts*: Findings of fact are reviewed to determine if they are clearly erroneous.
3. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Fact – Clearly Erroneous*: A finding of fact is clearly erroneous when the entire record produces a definite and firm conviction that the trial court made a mistake.
4. CUSTOM – *Factual Inquiry*: Every inquiry into custom involves two factual determinations: first, is there a custom with respect to the subject matter of the inquiry; and, if so,

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second, what is it?

5. LAND RIGHTS – *Alap – Powers and Obligations*: The amounts and timing of distributions of the alap’s share among the members of his bwij entitled thereto is in the discretion of the alap.

OPINION OF THE COURT BY ASHFORD, C.J.

Plaintiff-Appellant claimed entitlement to one-half of the alap’s share of rental payments for the use of a weto at Kwajalein Atoll “because he is next in line to be Alap” (Complaint, paragraph 3). The record in the case indicates that, later, Plaintiff-Appellant was not consistent with respect to either the percentage of the alap share claimed or the theory under which it was claimed. In this Court, Plaintiff-Appellant asked that he be awarded a “fair and reasonable share” of the land rental “in accordance with Marshallese custom” (Opening Brief, final paragraph).

Defendant-Appellee is the alap. There is no dispute that he distributed both cash and equipment to Plaintiff-Appellant, as one of the more than one hundred people for whom Defendant-Appellee, as alap, is responsible.

The case has been before the Traditional Rights Court twice: the first time on referred questions from the High Court and the second time in a joint trial with the High Court wherein the Traditional Rights Court was asked specific questions. In both instances, the Traditional Rights Court advised the High Court that while Plaintiff-Appellant had a right to share in the rental proceeds, the amount and timing of distributions, according to custom, should be left to the alap to decide. In the judgment appealed from, the High Court concurred with and adopted the advice of the Traditional Rights Court.

[1-3] Initially, we are faced with the question as to what standard of review to apply in this case. If the alleged error is one of law, we review the matter *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 101 L.Ed. 2d 490 (1988); *Pwalendin v. Ehmel*, 8 TTR 548 (App. Div., Pohnpei District, 1986). If the alleged error is in, or based upon, factual findings, we will reverse or

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modify only if the findings are clearly erroneous. 27 MIRC Ch. 2, § 66(2). *Compare* 6 TTC § 355(2). A finding of fact is clearly erroneous when the entire record produces a definite and firm conviction that the court below made a mistake. *Anderson v. Bessemer City*, 470 U.S. 564, 84 L.Ed. 2d 518 (1985); *Naishon v. Litiria*, 8 TTR 357 (App. Div., Marshall Islands District, 1983); *Pwalendin v. Ehmel, supra*; *State of Truk v. Aten*, 8 TTR 631 (App. Div., Truk Terr. Div., 1988).

[4] Plaintiff-Appellant's Notice of Appeal and Opening Brief had the theme that the High Court failed to interpret Marshallese custom properly and erred in according the alap "absolute" discretion in the distribution of the rental proceeds. We are disposed to the view that the error urged is in, or based upon, factual findings as to custom. Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense.

[5] Our review of the transcript of testimony in the trial before the High Court and Traditional Rights Court, sitting together, has satisfied us not only that there was abundant evidence to sustain the factual findings, but also that there is no basis for us to upset those findings.

Further, neither the written opinion of the Traditional Rights Court nor the judgment of the High Court appealed from has the scope attributed to them by Plaintiff-Appellant. Those documents do not purport to bestow upon the alap the "absolute" discretion of which Plaintiff-Appellant complains. The High Court ruled, with respect to the alap share, that the alap "may distribute it in his own discretion among the members of his own bwij." That judgment must be read in the light of the Traditional Rights Court opinion on which it was based. That opinion recognized that plaintiff had a right to share in the distribution, but "as to how much, here the Traditional Rights Court will adhere to the custom and let Alab Laibon Jejo decide." We do not view that statement, or the acknowledgment of the Traditional Rights Court that the alap has "sole control of the money in order to care for all his people and lands," as an adjudication that

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the alap may exercise his discretion free of the considerations and restraints that typically guide that exercise of discretion.

Plaintiff-Appellant also urged that the High Court erred in failing to exercise its equitable powers to ascertain and award a sum certain, from the land rentals, to Plaintiff-Appellant. Having found no error in the High Court's acceptance and endorsement of the opinion of the Traditional Rights Court, we need not address this extraordinary request to substitute the discretion of the court for that of the alap.

The judgment of the High Court is affirmed.

Roy T. Chikamoto (John R. Heine with him on the brief) for Plaintiff-Appellant.
John M. Silk for Defendant-Appellee.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**KOJJAN ZAION, JEKDRON
MACK, BETONG KANEL, and
LOKORU ISHIGURO,**

S.CT. CIVIL NO. 89-06
(High Ct. Civil No. 1983-041)

Plaintiffs-Appellees,

JILAS ZAION,

Added Plaintiff-
Appellee,

-v-

NOMAI S. PETER,

Defendant-Appellant,

and

TEBRO NERI NENAM,

Intervenor-Appellee.

APPEAL FROM THE HIGH COURT

JANUARY 24, 1991

BIRD, TEMPORARY C.J.¹
RUTLEDGE, A.J., and KOBAYASHI, A.J.² (sitting by designation)

¹Ashford, C.J., disqualified.

²The Honorable Bert T. Kobayashi, Associate Justice Emeritus of the Supreme Court of the State of Hawaii, sitting by appointment of the Cabinet.

ZAION, *et al.* v. PETER and NENAM

SUMMARY:

This suit involved a dispute over entitlement to certain traditional Marshallese land rights in four wetos located on Uliga Island, Majuro Atoll. At issue were the senior dri jermal rights in the four wetos, as well as the alap rights in one of the four. The matter was tried at a joint trial before the High Court and the Traditional Rights Court. The Traditional Rights Court rendered its opinion first and concluded that the individual plaintiffs and the intervenor were entitled to the various traditional land rights in dispute. The High Court subsequently rendered its judgment wherein it agreed that the individual plaintiffs and the intervenor were the proper holders of the disputed traditional land rights. The Supreme Court affirmed.

DIGEST:

1. CUSTOM – *Factual Inquiry*: Every inquiry into custom involves two factual determinations: first, is there a custom with respect to the subject matter of the inquiry; and, if so, second, what is it?
2. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Fact*: Findings of fact are reviewed to determine if they are clearly erroneous.
3. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Fact – Clearly Erroneous*: A finding of fact is clearly erroneous when review of the entire record produces a definite and firm conviction that the court below made a mistake.
4. RES JUDICATA – *Effect*: The doctrine of *res judicata* bars a second action between the same parties on the same subject matter directly involved in the prior action.
5. COLLATERAL ESTOPPEL – *Distinguished from Res Judicata*: The doctrine of collateral estoppel is different from the doctrine of *res judicata* in that, instead of preventing a second assertion of the same claim or cause of action, the doctrine of collateral estoppel prevents a second litigation of issues between the same parties or their privies even in connection with a different claim or cause of action.
6. COLLATERAL ESTOPPEL – *Timeliness*: The affirmative defense of collateral estoppel may not be raised for the first time on appeal.

OPINION OF THE COURT BY BIRD, TEMPORARY C.J.

This is a dispute regarding entitlement to certain traditional Marshallese land rights in

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four wetos located in the primary commercial center of Uliga Island, Majuro Atoll. At issue are the senior dri jermal rights in Barkan, Lotodrik, Lejolimen and Toeak wetos, as well as the alap rights in Toeak weto.

Plaintiffs and intervenor (Appellees) each claim entitlement to the senior dri jermal rights in one or more of the four wetos; defendant (Appellant) claims senior dri jermal status for all four. Intervenor also claims alap rights in Toeak weto. For literary ease, the parties will be referred to herein by their trial court designations.

It is apparently undisputed that the alap and dri jermal interests were once held by a common ancestress of all the parties. At trial, plaintiffs and intervenor maintained, and the Traditional Rights and the High Courts both held, that the alap and dri jermal rights in these four wetos were divided among the daughters of that common ancestress. Plaintiffs, and with one possible exception, the intervenor, contended, and the Traditional Rights and High Courts both held, that there were subsequent transfers or divisions. Defendant disputes whether the divisions or transfers took place, and contends that even if they did occur, they were contrary to Marshallese custom and traditional practice.

This case was heard jointly by the High Court and a panel of the Traditional Rights Court at a trial that lasted over seven weeks. After taking evidence, and hearing the presentations and argument of counsel, the appropriate questions were certified and the matter was referred to the Traditional Rights Court for its deliberations. Subsequently, the Traditional Rights Court rendered its “Opinion in Answer” to those questions. After considering that opinion, the trial court then let issue its own lengthy judgment. In that judgment, the trial court expressed its “respectful agreement with the entirety of that [O]pinion [in Answer].” Judgment, page 40. In summary, the individual plaintiffs and the intervenor were adjudged to be entitled to various traditional land rights in dispute.

Before addressing the specifics of this appeal, a few observations appear to be in order. First, we note that, at the conclusion of the trial, had the parties requested findings of fact and conclusions of law (*see* Rule 41, Marshall Islands Rules of Civil Procedure), the tasks of all

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concerned, including this Court, would have been greatly simplified.³

Further, this Court was hampered in its consideration of this appeal by the manner in which it was presented. From an opening brief which contains sweeping, but generally unsupported, statements or references regarding testimony and other evidence, to a reply brief that ineffectually attempts to correct the deficiencies in the opening brief, to Appellant's repeated attempts to inappropriately shift the burden to the opposing parties, and to intervenor's counsel who consistently ignored questions put to him by this Court at oral argument, this appeal has lacked the focus, support, candor and brevity that are essential to the appellate process in matters of this complexity. This case could never properly serve as an example of how the appellate process should be employed.

In any event, by her opening brief, defendant alleges seven assignments of error. For the most part, her "questions on appeal" characterize issues of Marshallese custom and traditional practice as issues of law. Her obvious purpose in such an approach is to seek *de novo* review of questions which were presented to, and decided by, the Traditional Rights and High Courts as questions of fact. This Court will not allow defendant, through the use of such a stratagem, to re-litigate those factual issues on appeal.

[1] It will be noted that this Court has recently opined:

"Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense." *Lobo v. Jejo*, 1 MILR (Rev.) 224, 226 (Jan 2, 1991).

³Also worthy of note is the fact that the notice of appeal filed by defendant in this matter is of little assistance in discerning just what she perceives as error by the court below. Her conclusory statements in the notice did little to enlighten this Court, or the Appellees, as to the grounds upon which she seeks review. Although the notice was purportedly filed by the defendant "*in pro per*," it obviously was prepared for her by someone with training or experience in the law. The author of that notice no doubt remains anonymous because there can be no pride of authorship in a notice of appeal which is so obviously deficient.

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It is axiomatic that a party relying on a rule of custom has the burden of proving its existence and substance at trial (*see, e.g., Bulale v. Loeak*, 4 TTR 5 (1968)). When a party fails to meet its evidentiary burden at trial, it will not be permitted to remedy its failure by recasting a matter of custom as an issue of law, and then seek to re-litigate it as such on appeal. To permit otherwise would be to unfairly reward a party who was negligent at trial, and to penalize the party who was diligent. To that end, we subscribe to the caution that “[j]udicial restraint is as essential in land matters as insistence upon adhering to laws of land custom.” *Bina v. Laloun*, 5 TTR 366, 372 (1971).

It is also noteworthy that the organic document that embodies the fundamental law of this Republic makes provision for a Traditional Rights Court which shall have the limited jurisdiction to determine questions:

. . . relating to titles or to land rights or to other legal interests depending wholly or partly on customary law and traditional practice in the Marshall Islands.

Constitution, Article VI, § 4(3).

The evident purpose for creating such a tribunal was to provide a forum where the judges are conditioned in Marshallese culture, and they thereby bring specialized knowledge of custom and traditional practice to the dispute resolution process. In recognition of that special role, this Court will afford proper deference to decisions of that court in matters of custom and tradition.⁴

⁴Although they did have “assessors” to assist them in this regard, the Trust Territory Courts that promulgated much of the case law relating to matters of custom and practice did not have the benefit of the deliberations of such a specialized tribunal.

Also, at oral argument, counsel for defendant suggested that the work of a prominent cultural anthropologist on the subject of land tenure in the Marshall Islands should be raised to a status akin to that of a codification of custom. This Court will decline to do so; the primary responsibility for the codification of custom is vested in the Nitijela. (*See* Constitution, Article X, § 2(2)). This Court will not diminish the authority given to the Nitijela by granting that status

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As to the seven alleged assignments of error, the first and second question whether the trial court erred in concluding that “valid” transfers or divisions of certain land rights were made (Appellant’s Opening Brief (hereafter “O.B.”) at page 1). Obviously, by framing the questions such that the inquiry is whether the transfers were “valid,” defendant hopes to transform issues considered at trial as questions of fact into issues of law on appeal.

It will be noted that these questions were presented to the courts at the joint hearing as issues of fact. For example, in his closing argument, then-counsel for defendant argued that the question of division was “an issue of fact that will have to be determined by the court. . . .” Trial Transcript (hereafter “T.T. “), Vol. X, page 1822. Thus, the issues were perceived by defendant, and we are convinced were considered, and determined, by the High and Traditional Rights Courts, as questions of fact. (*See, e.g.*, [Traditional Rights Court’s] Opinion in Answer, pages 3, 5 and [High Court] Judgment pages 5, 6, 8, 9 etc.).

[2,3] Hence, the proper standard of review to apply is whether the High Court’s factual findings are “clearly erroneous” (27 MIRC Ch. 2, § 66(2)). “A finding of fact is clearly erroneous when the entire record produces a definite and firm conviction that the court below made a mistake. (citations omitted)” *Lobo v. Jejo, supra*, at p. 226.

A review of the entire record regarding those findings does not produce “a definite and firm conviction that the court below made a mistake.” We find no “error or defect” of such a magnitude that the trial court’s judgment would be “inconsistent with substantial justice.” 29 MIRC Ch. 1, § 30. Accordingly, we decline to set aside the judgment on the basis of either of these alleged errors.

Regarding the third purported assignment of error (*see* O.B., page 1), by such alleged error defendant creates a “straw man” and then proceeds to knock it down. The alleged “non-error” relates to the *res judicata* effect of land title officer determinations. No cross-appeal was

to the works of an anthropologist, no matter how informed or learned they may be. Accordingly, except in the rare case where judicial notice thereof may appropriately be taken on appeal, anthropological works, like other expert opinion, must be properly introduced at trial.

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taken on this issue by plaintiffs or intervenor, consequently we need not consider it further. (*Cf. MIDC and Leon v. MALGOV, et al.*, 1 MILR (Rev.) 209, 210-211 (Sep 10, 1990).⁵ As to the fourth claimed error, defendant again attempts to create a “straw man” and then knock it down. For the reasons stated immediately above, we need not consider the fourth claimed error any further.

With regard to the fifth and seventh alleged errors, again these supposed errors were presented by the defendant at trial, and considered by the two courts, as questions of fact. For example, at closing argument, then counsel for defendant asserted that as to questions of law “[t]hose are for Your Honor [i.e., the presiding High Court judge], but (indiscernible) under the custom who is correct senior dri jermal for these wetos. Absolutely your Honor, the Traditional Rights Court has to consider it.” T.T., Vol. X, page 1843.

Again, since the questions were presented and considered as issues of fact, we will apply the appropriate test on appeal (i.e., the “clearly erroneous” test). After considering the record in its entirety, we do not reach a definite and firm conviction that the court below made a mistake with regard to either matter. Therefore, we are not inclined to set the judgment aside on the basis of either of these claimed errors.

[4] In her remaining alleged assignment of error (designated as the sixth in the O.B.) defendant maintains that “the trial court erred as a matter of law in failing to give *res judicata* effect to the Trust Territory High Court Judgment in Civil No. 10-77.” O.B., page 30. It will be noted that Trust Territory High Court Civil [Action] No. 10-77 was an action to determine entitlement to the Micronesia War Claims Commission awards relating to war damage to Lejolimen weto. Thus, the subject matter of that action differed in kind from that of the case at bar.

“It is sometimes declared that the doctrine of *res judicata* bars a second action

⁵See *Langijota v. Alex*, 1 MILR (Rev.) 216, 219-20 (Dec 3, 1990), regarding the *res judicata* effect of administrative determinations by land title officers.

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between the same parties on the same subject matter directly involved in the prior action. Indeed, in order for two actions to be regarded as based on the same cause of action so that a judgment in one is a bar to the maintenance of the other action, the two actions must relate to the same subject matter; where the subject matter is essentially different, there is no identity of causes of action.” (Emphasis added). 46 Am Jur 2d, Judgments § 407.

Accordingly, even if it is assumed that all of the other elements thereof were met (and we do not suggest that they were), the affirmative defense of *res judicata* would not be available to defendant in the instant case.

[5] In any event, defendant seeks to utilize the judgment in Civil Action No. 10-77 to somehow prevent plaintiff Kojjan Zaion (or his son, plaintiff Jilas) from asserting senior dri jermal rights in Lejolimen wetu. The defense that defendant apparently seeks to interpose, however, is not *res judicata*, but a derivative thereof, collateral estoppel. It will be noted that:

“The doctrine of collateral estoppel is different from the doctrine of *res judicata* in that, instead of preventing a second assertion of the same claim or cause of action, the doctrine of collateral estoppel prevents a second litigation of issues between the same parties or their privies even in connection with a different claim or cause of action.” (Emphasis supplied). 46 Am Jur 2d, Judgments, Cumulative Supplement § 415, note 15.

It seems apparent that in her argument on appeal defendant has purposely tried to blur the distinction between the two defenses because she is aware that the defense of collateral estoppel does not appear to ever have been raised. Certainly it was not raised as an affirmative defense in her “First Amended Answer and Counterclaim” as required by the Marshall Islands Rules of Civil Procedure (*see* Rules 8(c) and 12(b)); nor are we aware of any other pre-trial indication that the defense would be asserted. If the defense of collateral estoppel was raised at trial, the manifestation thereof has not been brought to our attention.

The only guidance that defendant has provided in support of her contention that indeed the defense of *res judicata* was raised, is her assertion (Appellant’s Reply Brief, at page 10) that “the transcript clearly shows, at Vol. X, pages 1834, 1835, [defendant’s] . . . then-counsel did

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specifically ask the trial court to treat the decision as *res judicata*.”

We note that if the disjointed colloquy between the trial court and defendant’s then-counsel can reasonably be said to show anything, it is that counsel wanted the court to do something with the judgment. He just wasn’t quite sure what. Moreover, that colloquy is devoid of anything that can accurately be described as an attempt to invoke the doctrine of collateral estoppel.

[6] In any case, nothing provided to this Court by defendant can conceivably be said to manifest her intent to invoke the doctrine of issue preclusion (collateral estoppel) at trial. Accordingly, we decline to permit defendant to raise the issue for the first time on appeal. Moreover, even if we were to otherwise permit the invocation of that defense on appeal, defendant has not demonstrated that she has supplied all the elements thereof.

In light of the above, the judgment of the High Court is affirmed.

Alan B. Burdick for Defendant-Appellant.

Davor Z. Pevec for Plaintiffs-Appellees.

David M. Strauss for Intervenor-Appellee.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

MARTIN J. NEYLON,

Plaintiff-Appellee,

-v-

LITI JEIK, et al.,

Defendants-Appellants.

S.CT. CIVIL No. 90-02

(High Ct. Civil No. 1986-036)

ORDER DISMISSING APPEAL

APRIL 19, 1991

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because Appellant failed to timely file an opening brief.

DIGEST:

1. **APPEAL AND ERROR – Dismissal, Grounds for – Failure to File Opening Brief:** Appellant's failure to timely file an opening brief is grounds for dismissal.

[1] The most recent Order Extending Time To File Opening Brief in this appeal unequivocally required that brief to be filed not later than February 15, 1991. It has not been filed. Plaintiff-Appellee's Motion For Dismissal of Appeal is granted. It is

ORDERED that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

ROMAR MAJUWI,

S.CT. CIVIL NO. 90-01
(High Ct. Civil No. 1987-021)

Plaintiff-Appellant,

-v-

LOMORE JORAUT, *et al.*,

Defendants-Appellees.

ORDER DISMISSING APPEAL

APRIL 30, 1991

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because Appellant failed to timely file an opening brief.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to File Opening Brief:* Appellant’s failure to timely file an opening brief is grounds for dismissal.

[1] There have been numerous delays in this case caused by Plaintiff-Appellant’s failure to timely prosecute the appeal. By Order filed February 19, 1991, this court reluctantly granted Appellant “one last extension of time” to file his opening brief. The brief has not been filed. Accordingly, Defendants-Appellees’ Motion to Dismiss Appeal is granted and it is ORDERED that the appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

GUSHI BROTHERS COMPANY,

Petitioner-Appellee,

S.CT. CIVIL NO. 89-09
(High Ct. Civil No. 1989-414)

-v-

HAWAIIAN FLOUR MILLS, et al.,

Respondents-Appellants.

APPEAL FROM THE HIGH COURT

JUNE 28, 1991

ASHFORD, C.J.

PHILIPPO, A.J., and RUTLEDGE, A.J. (sitting by designation)

SUMMARY:

A creditor who had not been properly served with process was not bound by the High Court's injunction against actions to collect sums owing by a debtor even though the creditor took part in the debtor's receivership proceeding.

DIGEST:

1. **APPEARANCE** – *Distinction Between General and Special Abolished*: The provision of Rule 12(b) of the Marshall Islands Rules of Civil Procedure, that defenses or objections are not waived by joinder with other defenses or objections, abolished the distinction between general and special appearances.
2. **JURISDICTION** – *Challenges*: It is unnecessary for a defendant to abstain from asserting other defenses while at the same time attacking jurisdiction over his person.
3. **JURISDICTION** – *Same – Waiver of Objection*: If it is clear that the objection has been preserved, neither going to trial after a challenge to jurisdiction has been overruled nor going to trial after it has been upheld, but proper service has not yet been effected, constitutes a waiver of the objection.

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OPINION OF THE COURT BY ASHFORD, C.J.

Gushi Brothers Company (the “Company”), a sole proprietorship, filed a complaint in the High Court praying that the Court appoint the son of the proprietor as receiver for the Company, enjoin creditors’ execution on assets of the Company, approve a payment schedule to retire the Company’s debts and grant other relief as appropriate. The complaint did not name any defendants nor list the creditors of the Company, but it did identify, by case number and parties, four lawsuits in the Marshall Islands and one in Hawaii brought against the Company by “vendors and suppliers.” In two of those lawsuits, Appellant Hawaiian Flour Mills was named as plaintiff. While the captions on the complaint and summons identified the Company, the summons was not directed to any identified persons or firms. “Service” was made by certified mail on Appellant and other creditors.

Appellant and three other creditors, all represented by the same attorney (“creditors’ counsel”), filed substantially similar answers, including affirmative defenses, and prayed for dismissal of the complaint. The affirmative defenses asserted, among other grounds, that the Court lacked jurisdiction over the creditors “by reason of insufficient process and service of process.” Another creditor moved to dismiss on essentially the same grounds pleaded as affirmative defenses by creditors’ counsel. Following a hearing on the motion to dismiss, at which creditors’ counsel also urged dismissal based upon the affirmative defenses and other grounds asserted in the answers, and consideration of written memoranda filed by counsel, the High Court declined to dismiss the complaint. However, the High Court did agree that there had not been proper service of process on the respondents and ordered petitioner to “re-serve process strictly in accordance with the relevant Rules of Civil Procedure.” *See* Order on Motion To Dismiss Complaint, filed October 30, 1989. Rule 4 of the Marshall Islands Rules of Civil Procedure requires process to be served by the police, or someone specially appointed by the court, and requires personal service upon the defendant or someone as agent for him. *See*, also, 29 MIRC Ch. 1, §§ 2 and 4. Those Rules contain no provision for service by certified mail or

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other substituted service. Rule 63 states that if there is no procedure specified with respect to any matter, the court may proceed in a manner which will promote justice, consistent with law and the Rules. 29 MIRC Ch. 1, §§ 8 and 9 provide for substituted service in certain cases under the direction and control of the court. The record does not contain any return of service on Appellant showing compliance with the High Court's October 30 Order.

Ten days after entry of the Order on the Motion To Dismiss, the High Court conducted a hearing on the merits of the complaint. At that hearing, creditors' counsel appeared for the four creditors on whose behalf he had previously filed answers and, also, "for the purposes of this hearing only" for the creditor who had filed the Motion to Dismiss. Creditors' counsel did not note his appearance as a special rather than a general appearance, nor did he again raise the matter of insufficiency of process and service of process. The court heard the testimony of two witnesses and, the following day, entered its order on the complaint. The order placed the Company in receivership under the jurisdiction of the court, appointed the owner's son as receiver and general manager of the Company, gave him instructions concerning the filing of financial statements and review of Company assets, approved a payment schedule to retire past-due accounts and stayed all proceedings for collection of sums owed by the Company to its creditors.

Appellant Hawaiian Flour Mills was the only one of the several clients of creditors' counsel to appeal. Various grounds of error were alleged, including reassertion of the claim that the High Court did not acquire jurisdiction over Appellant because of insufficiency of process and service of process. Because that claim is well taken, we need not deal with the other grounds urged for reversal.

[1,2] The first question we must deal with is whether the failure of creditors' counsel to appear specially only, until resolution of the claim that the High Court had acquired no jurisdiction over Appellant was resolved, effected a waiver of the jurisdictional defect. We rule that it did not. Rule 12(b) of the Marshall Islands Rules of Civil Procedure states in pertinent part that "(n)o defense or objection is waived by being joined with one or more other defenses or objections in a

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responsive pleading or motion.” The exact same language appears in Rule 12(b) of the United States Federal Rules of Civil Procedure, on which the Marshall Islands Rules are based. The quoted provision has been held to abolish the distinction between general and special appearances, making it unnecessary for a defendant to abstain from asserting other defenses while at the same time attacking jurisdiction over his person. *Investors Royalty Co. v. Market Trend Survey*, 206 F.2d 108 (1953), *cert. den.* 346 U.S. 909, 98 L.Ed. 406, *reh. den.* 346 U.S. 940, 98 L.Ed. 427 (1954).

[3] The next question is whether going to trial on the merits constituted a waiver by Appellant of its objection to the Court’s lack of jurisdiction over it. It has been held that going to trial does not waive the objection, when a motion to set aside service of process has been denied, so long as defendant makes it clear that the objection is preserved. *Hassler v. Shaw*, 271 U.S. 195, 70 L.Ed. 900 (1926). *Cf. Cline v. Kaplan*, 323 U.S. 97, 89 L.Ed. 97 (1944). *See, also*, annotation at 62 A.L.R.2d 937, 941 asserting that a “substantial majority of courts” have held that answering or going to trial on the merits, after an objection to *in personam* jurisdiction has been overruled, does not waive the objection.

The record does not reveal whether any of counsel or the Chief Justice of the High Court knew that service on Appellant had not been effected, prior to trial, as ordered. In any event, if going to trial after a jurisdictional challenge has been denied is not a waiver, it would be anomalous to hold that going to trial when the challenge has been upheld and proper service has been ordered effects a waiver of the objection to jurisdiction. We rule that it did not. Neither, in the circumstances, was it necessary for creditors’ counsel to reiterate the jurisdictional challenge, already upheld, at the opening of the trial.

The cause is remanded to the High Court with instructions to vacate paragraph 4 of its Order of November 10, 1989, enjoining further collection proceedings against the Company, insofar as that Order purports to bind Appellant.

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DISSENTING OPINION BY RUTLEDGE, A.J.

I.

This appeal stems from receivership proceedings in the High Court instituted by a financially troubled company. As a statutory scheme to protect beleaguered businesses has yet to be developed in this young Republic, the court was asked to use its equitable powers to enjoin the company's creditors, appoint a receiver and approve a repayment schedule. Unfortunately, the gnarled handling of the procedural aspects of this action by court and counsel convoluted that process and has now diverted the majority's straightforward consideration of the merits on this appeal. I dissent.

II.

Following the filing of the complaint initiating these receivership proceedings, petitioner Gushi Brothers (the Company) improperly tried to effect service of process on its creditors by mail. Several creditors acquiesced to this action. Counsel for Appellant Hawaiian Flour Mills, however, who also represented three other creditors, filed Answers opposing the action and asserted as an affirmative defense lack of personal jurisdiction by reason of insufficient process and service of process. Another creditor, National Telecommunication Authority (NTA), rather than filing an Answer, moved to dismiss under Rule 12(b) of the Marshall Islands Rules of Civil Procedure, also citing inadequate service of process.

A hearing on NTA's motion was held on October 14, 1989, with only the attorney representing Appellant and NTA's counsel in attendance. The Company's lawyer did not attend but filed a written brief in opposition. Following oral argument by NTA, Appellant's counsel "agreed" with NTA's position.

On October 30, 1989, the High Court issued its written Order On Motion To Dismiss Complaint. In its discussion of the grounds for this motion, the court referred to service of process only as it related to NTA. Without mentioning any other creditors by name, the court then concluded that there had been no proper service of process on the "respondents" and ordered petitioner to re-serve "strictly in accordance with the relevant rules of Civil Procedure."

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Considering counsel for the Company was not present at the hearing, it is not too surprising that only NTA was re-served by the Company. What is surprising is that NTA was re-served on November 14, 1989, five days after the hearing on the merits, although NTA had previously filed its Answer on November 1, 1989. Except for NTA, neither Appellant nor any other creditor was ever re-served.

Despite issuing its order to re-serve process on October 30, 1989, the court waited only 10 days before conducting its final hearing on the merits, on November 9, 1989. At that hearing, only the Company's lawyer and the attorney for Appellant were present. Appellant's attorney also represented NTA "for purposes of this hearing only." Evidence was presented and witnesses were examined, with counsel for Appellant having the opportunity to cross examine and fully participate in the proceedings. At no time did he ever indicate that service had not yet been effectuated or object to the proceedings in any way. Following the hearing, the court enjoined the company's creditors, appointed a receiver and approved a repayment schedule. Of all the creditors, Appellant alone appealed, claiming, among other errors, that service of process was never made.

III.

There can be no question that the service of process by mail on Appellant was improper. Unless the court specifically orders otherwise, Rule 4 of the Marshall Islands Rules of Civil Procedure requires personal service upon the defendant or his agent by the police or some other person specially appointed by the Court.

The purpose of service of process is to notify a party of the claim against him so that he may properly prepare and be given the opportunity to respond, be heard and defend. 62B Am Jur 2d, Process § 3 (1990). Due process under the Constitution of the Marshall Islands would also require reasonable notice of a lawsuit and the opportunity to defend. Constitution, Article II, § 4.

It is clear, however, that objection to service of process may be waived. The defense of insufficiency of service of process is waived, for instance, if not included in the first responsive pleading or motion. Rule 12(h)(1), MIRCivP. It is also waived, pursuant to statute and court

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rule, if a party voluntarily appears. 27 MIRC Ch. 2, § 64(1); Rule 4(d), MIRCivP.

Appellant validly preserved its objection to sufficiency of service of process by including it as an affirmative defense in its Answer. The High Court, in ruling on this issue by its order of October 30, 1989, upheld Appellant's objection and ordered re-service on "respondents" according to the Rules of Civil Procedure. The effect of this decision was to agree with Appellant that the rules had been violated as they relate to service and that strict compliance with the rules was necessary. The court ordered the Company to do nothing more than what it was already required to do under the rules. Following this ruling, then, Appellant stood in the same shoes as a party who had not been served. Proper service of process was necessary unless waived by Appellant.

After issuing its order requiring re-service, the High Court curiously went forward with its trial hearing 10 days later. Appellant was prepared for the trial, participated in it, cross examined witnesses and made arguments to the court. Never once did Appellant object to the proceedings by stating it still had not been served. Never once did Appellant complain that it was not properly before the court. Its behavior and participation was inconsistent with Appellant's claim that the court did not have personal jurisdiction over it due to insufficient service. *See*, 5 Am Jur 2d, Appearance § 5 (1962). This voluntary appearance, without objection, to substantively and actively try the case on the merits, acts as a waiver to defects and irregularities in the service of process and gave the trial court personal jurisdiction over Appellant. 27 MIRC Ch. 2, § 64(1); Rule 4, MIRCivP.

Going to trial after an adverse ruling on a sufficiency of service challenge does not effect a waiver, it is true; it is preserved for appeal. That Appellant here won its jurisdictional challenge, however, merely put it in a position of one who was not served; it did not forever relieve Appellant from its duty to re-assert its objection in the event process was not re-served. The fact that the trial took place only 10 days after re-service was ordered was a peculiar eventuality. Had the trial taken place 10 months later without re-service, could the Appellant have fully participated and not waived its objection? I think not.

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By allowing Appellant to go to trial on the merits and fully litigate the issues without effecting a waiver creates an anomaly. It puts the Appellant in a position where it cannot lose: either it wins at the trial level or it wins its appeal. Waiver must apply to prevent two bites at the apple and to promote judicial economy.

It has been said that this is not only decided law, but good sense. A court having jurisdiction of the subject matter would be open to serious charges if it permitted a party to try a cause on its merits without in any way raising a question as to the party's being rightfully before it, and then allowed the party, after a decision adverse to him, to question the service of process.

5 Am Jur 2d, Appearance § 7 (1962) (footnote omitted).

I would hold that Appellant waived its objection to sufficiency of service of process and address this appeal on its merits.

Determined on briefs submitted by:

Dennis J. Reeder, Esq., attorney for Respondent-Appellant

Douglas F. Cushnie, Esq., attorney for Petitioner-Appellee.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

KABUA KABUA,

Petitioner,

-v-

S.CT. CIVIL NO. 91-03

(Original action concerning
High Ct. Civil No. 1984-098 &
High Ct. Civil No. 1984-102,
Consolidated)

AMATA KABUA, et al.,

Respondents.

JUDGMENT IN ORIGINAL ACTION

DECEMBER 20, 1991

ASHFORD, C.J.

SUMMARY:

A petition for a Writ of Mandamus was filed with the Supreme Court to compel the Judicial Service Commission to recommend, and the Cabinet to appoint, a High Court justice qualified to hear the Petitioner's cases. Although the Constitution grants the Supreme Court original jurisdiction to issue writs in appropriate cases, the petition was denied because Petitioner failed to establish that demand had been made on the officials in question to perform a mandatory duty and that they had refused or unreasonably delayed in performing that duty.

DIGEST:

1. JUDGES – *Disqualification to Act*: Article VI, § 1(6) of the Constitution and § 67 of the Judiciary Act 1983 prohibit a judge from taking part in a decision of any case in which he is disabled by any conflict of interest.
2. JUDGES – *Same*: At common law a judge was not disqualified merely by reason of relationship to an attorney in the cause before him.
3. CONSTITUTIONAL LAW – *Construction – Rules of Interpretation*: In the event that the constitutions of other countries are not sufficiently similar in relevant respect to provide guidance, the court may consider provisions of constitutions of states that are part of a federation that has adopted common law, if those constitutional provisions are similar in relevant respect to

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the Constitution of the Republic of the Marshall Islands.

4. WRITS, EXTRAORDINARY – *Power to Issue*: The constitutional grant of power to each court to issue all writs, in Article VI, § 1(2), confers original jurisdiction on the Supreme Court to issue writs in appropriate cases.
5. WRITS, EXTRAORDINARY – *Same*: The constitutional grant of appellate jurisdiction carries with it all the common law writs necessary to the proper exercise of appellate jurisdiction and does not require an additional grant of power to issue all writs.
6. WRITS, EXTRAORDINARY – *Same*: Section 63 of the Judiciary Act of 1983, 27 MIRC Ch. 2, underscores the Supreme Court’s constitutional power to issue writs in the first instance.
7. WRITS, EXTRAORDINARY – *Requirements – In General*: For a writ of *mandamus* to issue there must be a clear showing of the existence of a nondiscretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed, and a lack of any other sufficient remedy.

OPINION OF THE COURT BY ASHFORD, C.J.

This is an original action filed in the Supreme Court seeking a writ of *mandamus* to compel the Judicial Service Commission to recommend to the Cabinet a candidate for appointment to the vacant position of Associate Justice of the High Court and to compel the Cabinet to act upon the recommendation, both within specified periods. In the alternative, the Petitioner requests this Court to appoint a temporary Justice of the High Court to hear Petitioner’s pending lawsuits, alleging that both sitting Justices of the High Court are disqualified from hearing them. The individual defendants, the Members of the Cabinet and the Members of the Judicial Service Commission, all of whom are also defendants, filed motions to dismiss on grounds, among others, that this Court lacks jurisdiction to entertain an original action.

Disqualification.

[1] At the outset, the Court must disclose that this Judge’s son is employed as an associate in the Honolulu office of the law firm with which two of the individual defendants’ attorneys are also affiliated. One of those two is a partner, the other is an associate and both are in the Kona

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office of the law firm. Article VI, § 1(6) of the Constitution of the Republic and the Judiciary Act 1983, 27 MIRC Ch. 2, § 67, prohibit a judge from taking part in a decision of any case in which he is “disabled by any conflict of interest.” Although not required by the Constitution or statute, this Judge is of the view that he should disqualify himself, also, from any proceeding in which his impartiality might reasonably be questioned. It is appropriate to make these disclosures even though I have concluded I am not disqualified to participate in the case now before the Court.

[2] At common law a judge was not disqualified merely by reason of relationship to an attorney in the cause before him. *See* cases cited in annotation in 50 ALR 2d 143, at 147. I have no concern that my son’s status in the law firm of which he is an employee will be affected by the rulings I may make in this case. I am aware that he is an employee who does not participate in the profits or losses of the firm, but I have no other knowledge of his compensation arrangements. I have never discussed this case or the related litigation with him and, in fact, don’t know if he has knowledge even of the existence of that litigation. In the circumstances, I have concluded there is neither any conflict of interest nor grounds upon which my impartiality might reasonably be questioned.

Original jurisdiction.

At a time when this Court enjoyed the services of both a Chief Justice and an Associate Justice, it entertained three original actions instituted by petitions for extraordinary writs. All of those cases were disposed of on the merits. Two of them involved the same cases with which the petition in this matter is concerned. The first of the two was *Kabua v. High Court, et al. (1)*, 1 MILR (Rev.) 27 (Jan 23, 1986) in which petitioner requested writs of *mandamus* or prohibition to prevent Justices Doi and Soll of the High Court from sitting as judges in those cases. A brief order denied the relief requested, indicating the Court believed it had jurisdiction; otherwise, the petition would have been dismissed.

The second was *Kabua v. High Court, et al. (2)*, 1 MILR (Rev.) 27 (Mar 17, 1986) in which writs of *mandamus* or prohibition were sought directing the High Court to vacate an order

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disqualifying petitioner's attorney from continuing to represent him in those cases. The Court identified its writ jurisdiction sources as Article VI, § 1(2) of the Constitution and § 63 of P.L. 1983-18, the Judiciary Act of 1983 (now 27 MIRC Ch. 2), and stated:

“The power of the Supreme Court to issue writs is, therefore, not unlimited or without boundaries, but is limited to cases where they are necessary to aid in its appellate (Art. VI, § 2, RepMar Const.) or other (Art. VI, § 2(c) and (3), RepMar Const.) jurisdiction or to enforce the Constitution.”

The standard suggested by the Court, against which the relief sought should be measured, was:

“The party seeking these writs must show that there is no other means of obtaining the relief he desires and generally must bear the burden of showing that his right to issuance of the writ is ‘clear and indisputable’ (citations omitted).”

The Court deemed the application to be, in effect, a substitute for an interlocutory appeal and denied the petition.

The third writ case in which this Court exercised original jurisdiction was *Kabua, et al. v. H.Ct. Chief Justice, et al.*, 1 MILR (Rev.) 27 (Mar 20, 1986). Petitioners sought a writ of prohibition directing judges of the High Court and the Kwajalein Community Court not to proceed with trespass, interference with a public officer and assault and battery cases pending before them. The Court denied the petition, noting it would assume the trial courts would act properly and, if not, appeals would provide an adequate remedy.

Ordinarily, precedent of this nature should be sufficient to establish the authority of this Court to exercise original jurisdiction in the case of prerogative writs. However, in view of the fact that all defendants, including the Attorney General as attorney for the Cabinet and the Judicial Service commission, have taken the position that this Court does not have that jurisdiction, and since it is the Attorney General who most commonly would seek such writs from this Court, the Court has reexamined the question.

Article VI, § 2 of the Constitution expressly confers jurisdiction upon this Court to hear

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appeals and cases removed here by the High Court. Article VI, § 1(1) of the Constitution allows the Nitijela to confer additional jurisdiction and it has done so. *See* Nitijela Dissolution (Determination of Date) Act 1981, P.L. 1981-7 (declaratory judgment) and Marshall Islands Nuclear Claims Tribunal (Amendment) Act of 1989, P.L. 1989-57, § 4 (appeals from Nuclear Claims Tribunal and Special Tribunal). The question is whether Article VI, § 1(2) of the Constitution confers original jurisdiction on this Court to issue writs, or merely the power to issue writs in cases in which it has acquired jurisdiction under some other constitutional provision or statute. That section reads:

“Each court of the Marshall Islands shall have power to issue all writs and other processes, make rules and orders and promulgate all procedural regulations, not inconsistent with law, as may be required for the due administration of justice and the enforcement of this Constitution.”

Unfortunately, whatever record exists (if any) of the proceedings of the 1979 Constitutional Convention has yet to be found. We must look, therefore, “to the decisions of the courts of other countries having constitutions similar, in the relevant respect, to the Constitution of the Marshall Islands” (Constitution, Article I, § 3(1)) and to analysis and reason.

[3] The Court’s attention has not been invited to, and its own extensive research has not uncovered, any Pacific common law jurisdiction having a constitution which might have served as the model for the provisions with which we are here concerned. The U.S. Constitution, too, is markedly different. The constitutions of several of the states of that federation, however, have somewhat similar provisions and the court decisions of those states, considering the question of original jurisdiction to issue writs, are instructive.

The constitution of the State of Wisconsin, in Article 7, § 3, provided:

“The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of *habeas corpus*, *mandamus*, *injunction*, *quo warranto*, *certiorari*, and other original and remedial writs, and to hear and

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determine the same.” (Italics in the original, underlining supplied).

In *The Attorney General v. Blossom and others*, 1 Wis. 277 (1853), the Supreme Court of Wisconsin examined the question whether its power to issue writs was “auxiliary” to its appellate and superintending jurisdictions or was a “distinct power.” *Id.*, at 284. The court concluded, both from the language quoted and the nature of the writs themselves, that it had jurisdiction to issue the writs in the first instance.

The constitutions of Colorado (Article 6, §§ 2 and 3) and North Dakota (§§ 86 and 87) contained language nearly identical to that in the Wisconsin Constitution concerning the jurisdiction of the supreme courts of those states, including the limitation to appellate jurisdiction only and the enumeration of the named writs. The supreme courts of those states reached the same conclusion as that reached by the Supreme Court of Wisconsin, agreeing that their constitutions granted original jurisdiction to issue the writs named. *Wheeler v. Northern Colorado Irrigation Co.*, 9 Colo. 248, 11 Pac 103 (1886); *State v. Archibald*, 5 N.D. 359, 66 NW 234 (1896).

[4,5] We do not think the fact that specific writs are not enumerated in the Marshall Islands Constitution renders the cited cases distinguishable. The Constitution, in Article VI, § 1(2), refers to “all” writs, which would necessarily include those named in the Wisconsin, Colorado and North Dakota Constitutions. Further, as noted in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146-147, 2 L.Ed. 60, 63 (1803), the constitutional grant of appellate jurisdiction carries with it all the common law writs necessary to the proper exercise of appellate jurisdiction, so an additional grant of all writs power, limited to appellate jurisdiction, would be superfluous. We conclude that Article VI, § 1(2) confers original jurisdiction on this Court to issue writs in appropriate cases.

[6] This interpretation is borne out by the Judiciary Act 1983, 27 MIRC Ch. 2. Notwithstanding § 7 of that statute does not mention § 1(2) of Article VI of the Constitution in describing the sources of jurisdiction of the Supreme Court, § 63 of the statute states that all courts are empowered “to issue writs and other process” as necessary for the due administration

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of justice and enforcement of the Constitution.

Relief Requested.

[7] For a court to issue a writ of *mandamus* commanding a government official to perform a duty, the following requirements must be met: (1) the official must be required by law to perform the duty sought and the duty must be non-discretionary (*Nix v. Ehmes*, 1 F.S.M. Intrm. 114, 118 (Pohn. 1982); *Cruz v. Johnston*, 6 TTR 354, 359 (1973); *Switz v. Township of Middletown*, 122 A. 2d 649, 656 (1956); *Basset v. Atwater*, 65 Conn 355, 32 A. 937, 937-938 (1895)); (2) the official must have neglected or refused to perform the duty (*New Mexico ex rel Caledonian Coal Co. v. Baker*, 196 U.S. 432, 440, 49 L.Ed. 540, 546 (1905); *Switz v. Township of Middletown*, *supra*, at 657 (1956); *People v. Bowen Industries*, 64 N.E. 2d 213, 214 (1945); *Schmidt v. Humphreys*, 13 Haw. 332 (1901)); (3) the party applying for the writ must have a clear legal right to have the duty performed and there must be no other sufficient remedy (*Kabua Kabua v. High Court et al.* (2), *supra*; *State of Missouri ex rel. v. Hawkins*, 337 S.W. 2d 441, 443-444 (1960); *Basset v. Atwater*, *supra*, at 938).

The petition fails to make a case for granting the relief requested. Not only does it fail to positively allege that the Judicial Service Commission and the Cabinet have neglected or refused to take action to fill the vacancy on the High Court bench, it fails to establish that the Petitioner has requested either, much less both, of those bodies to take action on an urgent basis, with supporting documentation to justify the requests, and that they have refused or unreasonably delayed in taking action. Also, there is an additional route to relief. The Court will take judicial notice of the facts that both High Court Chief Justice Neil Rutledge and High Court Associate Justice Witten Philippo are constitutionally disqualified to hear the cases with which the petition is concerned because they were assistant attorneys general during the pendency of those cases, in which the Republic is a defendant. No other High Court Justice being available to hear the cases, the Cabinet has authority to appoint a person to serve as judge on the cases. 27 MIRC Ch. 2, § 10(3).

The motions to dismiss and the petition are denied.

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Douglas F. Cushnie and Alan B. Burdick for Petitioner

David Lowe for the individual Respondents

Dennis McPhillips, Attorney General, for the members of the Judicial Service
Commission and the Cabinet

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**RONGELAP ATOLL LOCAL
GOVERNMENT COUNCIL, *et al.*,**

S.CT. CIVIL NO. 91-04

Appellants,

-v-

**THE NUCLEAR CLAIMS TRIBUNAL of
the MARSHALL ISLANDS,**

Appellee.

ORDER DECLINING TO ENTERTAIN APPEAL

MAY 7, 1992

ASHFORD, C.J.

The Notice of Appeal filed herein presents the issues whether the Decision of the Nuclear Claims Tribunal to award, as of the end of the first five years under the Compact Section 177 Agreement only 25% (less than one-third) of the total award value, less prior compensation, violates Section 23 of the Nuclear Claims Tribunal Act and is in excess of the Tribunal's authority. Another issue initially raised by the Notice of Appeal has been abandoned by Appellants (Appellants' Rebuttal Memorandum, page 9). Appellee has urged this Court not to entertain the appeal because, among other reasons, the challenged decision was not a "final determination" within the meaning of Section 6(3) of the Marshall Islands Nuclear Claims Tribunal Act 1987, as amended by the Marshall Islands Nuclear Claims Tribunal (Amendment) Act of 1989, which empowers this Court to review, at its discretion, orders concerning injunctions and final determinations of the Nuclear claims Tribunal.

The court finds that the challenged action of the Tribunal was a final determination. To hold otherwise with respect to annual payment orders might preclude recipients from challenging such orders until the conclusion of the 15 years of Tribunal payments and thus render

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meaningless the right of appeal given by the statute.

The appeal is premised on the assumption that the language “(t)he awarding of compensation to individual claimants *pro rata* over a number of years” in section 23(12) of the Marshall Islands Nuclear Claims Tribunal Act 1987 means “equally over a number of years.” No legislative history supporting this contention is cited nor has the Court found any. Reference dictionaries do not establish Appellants’ assumption.

Except in mathematics, *pro rata* does not necessarily mean equally. Black’s Law Dictionary (4th ed., 1951) defines *pro rata* as “(p)roportionately; according to a certain rate, percentage, or proportion.” Webster’s New Twentieth Century Dictionary, Unabridged (Second Ed, 1983) defines *pro rata* as “in proportion; proportionately.” The noun proportion is variously defined as a relationship of parts to the whole and the word symmetry is given as a synonym. The primary definition of symmetry in the same dictionary is “similarity of form or arrangement on either side of a dividing line or plane; correspondence of opposite parts in size, shape, and position; condition of being symmetrical: an attribute of the whole or the parts of which it is composed.” Webster’s Encyclopedic Unabridged Dictionary of the English Language (1989) has definitions similar to those in the Webster’s just quoted. It should be noted, also, that some of the language in the Section 177 Agreement suggests that *pro rata*, rather than referring to the span of years over which payments are made, refers to the funds available in a given year. Article II, Section 7(b).

It is apparent from the briefs filed by the parties that the Nuclear Claims Tribunal is confronted with a multitude of problems arising from limitations on the amount of money available to be awarded to claimants, earnings on those funds, the number of possible claimants and other variables.

This Court believes that the Nuclear Claims Tribunal is entitled to reasonable time and latitude in determining how to cut what currently appears to be a Gordian knot. Accordingly, the Court declines to entertain the appeal.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**MAJURO STEVEDORING &
TERMINAL CO., INC.,**

S.CT. CIVIL NO. 91-01
(High Ct. Civil No. 1990-124)

Appellants,

-v-

JIMA and HELENA ALIK,

Appellees.

ORDER DISMISSING APPEAL

MAY 8, 1992

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because the notice of appeal and opening brief were based on matters not of record.

DIGEST:

1. APPEAL AND ERROR – *Questions Reviewable – Record and Proceedings Not in Record*: Facts outside that record, unless subject to judicial notice, will not be considered.

The Notice of Appeal and Appellants' Opening Brief in this matter reveal that Appellants are primarily relying upon (a) invalidity or lack of service of the Summons, Complaint, Motion to Enter Default and Entry of Default in this matter, alleging facts not in the record before the Court, (b) a Settlement Agreement not in the record, and (c) allegations of fact, also not in the record, concerning the dispute which apparently gave rise to this lawsuit.

[1] A principle of appellate jurisdiction so basic as not to require the citation of authority is

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that appeals are on the record. Facts outside that record, unless subject to judicial notice, will not be considered. Appellants' remedy, if any, for the matters complained of in the Notice of Appeal and Opening Brief is in the High Court by a motion for relief from judgment or other appropriate proceeding.

The appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**SAMUEL BULALE and
ALBATTAR JAMORE,**

S.CT. CIVIL NO. 89-10
(High Ct. Civil No. 1987-034)

Plaintiffs-Appellees,

-v-

**ROBERT REIMERS and OVERTON
CLARENCE,**

Defendants-Appellants.

APPEAL FROM THE HIGH COURT

MAY 8, 1992

ASHFORD, C.J.

RUTLEDGE, A.J., and PHILIPPO, A.J. (sitting by designation)

SUMMARY:

Plaintiff failed to establish that a kitre of the alap and dri jermal rights in two wetos either had not been made or had been revoked. The kitre land rights passed to the bwij of the recipient.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Identify Errors*: The Court may decline to hear an appeal where it cannot be determined from the notice of appeal what the alleged error was.
2. EVIDENCE – *Hearsay – Exceptions – Statements by Persons Incapable of Testifying*: Section 31, Evidence Act 1986, sets forth circumstances in which statements by persons incapable of testifying may be received in evidence.
3. APPEAL AND ERROR – *Review – Harmless Error*: Improper admission of evidence is not grounds for reversal if it appears there is sufficient evidence to justify the decision, independently of the evidence to which objection was made.

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4. LAND RIGHTS – *Kitre (gift land) – Conditions of Gift*: The husband who makes the kitre can attach conditions to it.
5. LAND RIGHTS – *Same – Succession to Rights*: It is proper and normal for kitre land to pass to the bwij of the recipient.

OPINION OF THE COURT BY ASHFORD, C.J.

This appeal is from that part of a Judgment rendered by the High Court that Plaintiff-Appellee Bulale and not Defendant-Appellant Reimers, who claims under Defendant-Appellant Clarence, is the owner of the alap and dri jermal rights in Aibwij and Lowio wetos, Kejbwe Island, Arno Atoll.¹

[1] Preliminarily, the Court is constrained to note that the notice of appeal stated two questions in such general terms as to make it impossible to identify, prior to the filing of the Opening Brief, the errors allegedly committed by the trial court. Rule 3 of the Marshall Islands Rules of Appellate Procedure requires that the notice of appeal “contain a concise statement of the questions presented by the appeal. . . . Only questions set forth in the notice of appeal or fairly comprised therein will be considered by the Court.” This Court has declined to hear appeals where it cannot be determined from the notice of appeal what the alleged error was. *See, e.g., Korok v. Lok, et al.* 1 MILR (Rev.) 93, 95 (Feb 25, 1988). However, because land rights are of particular importance in this jurisdiction, the Court has undertaken to give full consideration to this appeal, notwithstanding the deficiencies in the notice. Counsel are cautioned that the Court may not be so leniently disposed in future cases.

This title dispute is not new. It was the subject of litigation between Bulale and Clarence filed in the trial division of the High Court of the Trust Territory, Marshall Islands District, in 1973 as Civil No. 443. Then, as now, Bulale claimed his interest through customary succession

¹Spellings of Marshallese names and words are those used in Defendants-Appellants’ Opening Brief.

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from his mother's sister Liwije, who had received the alap and dri jermal interests as kitre² from her husband, Irojlablab Wijlan. Then, as now, Clarence (then known as Kaboj) asserted that the kitre had been terminated by Wijlan and that he, Clarence, had succeeded to the alap and dri jermal rights. The case did not go to judgment and was still pending when the court's existence was terminated.

The instant case was triggered by a sale of the same property interests by Clarence to Reimers in 1985. In its judgment, the High Court stated that it was satisfied from the testimony that the kitre had been made and that Clarence's testimony that the kitre had been abrogated by divorce was suspect, unsubstantiated and contradicted by a statement in his own last will and testament executed in 1968. The High Court went on to find that those lands became kabijukinen or bwij lands after the death of Liwije and that Bulale inherited the lands through his mother, Likojmal, the older sister of Liwije. It based this holding on what the court found to be customary practice of inheritance of land rights.

The initial questions raised by the appeal relate to the kitre by Wijlan to Liwije. Appellant asserts that it was established only by inadmissible hearsay testimony, to which he timely objected, that the testimony related only to one of the two wetos and that the Court erred in considering a statement against interest in an unauthenticated document.

[2] Appellant argues that since none of the witnesses had personal knowledge of the kitre, it having been made (if at all) before their time, and since their testimony did not fit within any of the exceptions to the hearsay rule, the court erred in considering that testimony. We disagree. Section 31 of the Evidence Act 1986 (28 MIRC Ch. 1)³ sets forth the situations in which statements by persons incapable of testifying (because of death, disability, distance and so forth) may be admitted in evidence. Subpart (h) of that section allows admission of statements by a number of persons (not merely a single individual) expressing feelings or impressions with

²A gift by a man to a woman, made before or after he marries her.

³Repealed and replaced by the Evidence Act of 1989, P.L. 1989-71, subsequent to trial.

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respect to the matter in question. Subpart (d) of that section allows a statement giving the opinion of a person as to the existence of any matter of general or public interest⁴ made before controversy over the matter has arisen, of which, if it existed, the declarer would likely have been aware. The testimony of Bulale's witnesses Latdrik, Lajkam, Jetnil and Joram fit within these exceptions and was more than sufficient to establish the fact that the kitre had been made. Even Clarence, in claiming it had been abrogated, conceded that it had been made.

Bulale testified that the iroj had combined Lowio and Aibwij wetos by way of Iio and that after the kitre, the two wetos were treated as one. This was confirmed by the testimony of Latdrik and Lajkam, each of whom testified that Lowio was a subpart of Aibwij weto. This testimony provided sufficient basis for the trial court to hold that the kitre covered both lands.

[3] The quotation from Clarence's last will and testament in the judgment of the High Court indicates that the trial judge may have been influenced by that document in finding that the kitre had been made in 1912. If the will was not properly proved, we view it as harmless error because the other evidence, mentioned above, was more than adequate to sustain the finding that the kitre had been made. For the then current definition of harmless error in the receipt or rejection of evidence, *see* § 170 of the Evidence Act 1986, 28 MIRC Ch. 1.

[4,5] Clarence testified that the kitre was not enforced because Liwije and Wijlan were divorced. The kitre having been established, he had the burden of proving its revocation. 28 MIRC Ch. 1, §§ 106 and 108. Lajkam testified that Wijlan lived all his life with Liwije and that she went to Jaluit, where she died, only after his death. The trial court's conclusion is supported by the evidence.

Appellant Clarence's final contention is that to make a determination of the devolution of the kitre land, the court had to have evidence of the conditions of the kitre, that it had none and, therefore, the court erred in concluding that Bulale is the successor to rights in that land. The contention is without merit. Admittedly, the husband who makes the kitre can attach conditions

⁴Lajkam testified that "when a piece of land is given as a gift it is a news to the community." Tr. Part 1, v.3, p. 260.

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to it, including specification of who is to succeed the wife. *Ishoda v. Jejon*, 5 TTR 497, 500 (Marshalls Dist., Tr. Div., 1971). Similarly, the husband and wife together could decide the devolution of the title. *Beklur v. Lijablur*, 2 TTR 556, 558 (Marshalls Dist., Tr. Div., 1964). But it is proper for the kitre land to pass to the bwij of the recipient, *Wena v. Maddison*, 4 TTR 194, 198 (Marshalls Dist., Tr. Div., 1968), and normal for it to do so, *Ishoda v. Jejon, supra*. The trial court was correct in concluding, absent evidence to the contrary, that the kitre land would pass to the bwij of the recipient.

The judgment is affirmed.

Dennis J. Reeder for Defendants-Appellants, and submitted on the briefs.
Hemos Jack on the brief for Plaintiffs-Appellees

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

E. COOPER BROWN,

Appellant,

S.CT. CIVIL NO. 91-06

(NCT No. 23-2110)

-v-

**THE NUCLEAR CLAIMS TRIBUNAL
OF THE MARSHALL ISLANDS,**

Appellee.

APPEAL FROM THE HIGH COURT

AUGUST 13, 1992

ASHFORD, C.J.

KING, A.J. *pro tem*,¹ and LIBKUMAN, A.J. *pro tem*²

SUMMARY:

An attorney representing claimants before the Nuclear Claims Tribunal was ordered by the Tribunal, pending review of the Tribunal's referral of the attorney to the Standing Committee on Professional Conduct of the Marshall Islands, not to appear before the Tribunal without local, licensed co-counsel. The Supreme Court found that the Order violated the attorney's due process rights to notice and an opportunity to be heard and reversed the order.

DIGEST:

1. **ATTORNEYS – *Suspension and Disbarment – Complaints:*** An order of the Nuclear Claims Tribunal referring an attorney to the Marshall Islands Standing Committee on Professional Conduct is not appealable.

¹Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, by appointment of the Cabinet.

²Ronald D. Libkuman, Esq. of the Hawaii State Bar, by appointment of the Cabinet.

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2. **ATTORNEYS – Privileges, Disabilities, and Liabilities – Requirement to Associate Local, Licensed Co-counsel:** Absent a duly adopted universal rule to that effect, conditioning an attorney’s right to appear before the Nuclear Claims Tribunal upon his associating local, licensed co-counsel, requires that the attorney be accorded due process.
3. **CONSTITUTIONAL LAW – Due Process – Procedural:** The minimum elements of due process guaranteed by Article II, § 4(1) of the Constitution are notice and the opportunity to be heard.

OPINION OF THE COURT BY ASHFORD, C.J.

This is an appeal by E. Cooper Brown (hereafter “Brown”) from orders “against him” in a Decision and Order dated December 2, 1991, of the Nuclear Claims Tribunal, Republic of the Marshall Islands (hereafter the “Tribunal”) in proceeding No. 23-2110 before the Nuclear Claims Tribunal. Brown is an attorney representing numerous complainants in that proceeding. Notwithstanding that the Complaint filed by Brown was dismissed by the Tribunal without prejudice to complainants, we have been assured by counsel that the complainants’ substantive rights have not been prejudiced by the dismissal. We have re-captioned this case to identify the real parties in interest on this appeal.

The purpose of the Nuclear Claims Tribunal Act, 42 MIRC Ch. 1 (hereafter, the “Act”) is to compensate residents of the Marshall Islands who sustained injuries or property damage as a result of the United States’ nuclear testing program in the mid-1946 to mid-1958 period. The Act provides for a Defender of the Fund who represents the fund, and a Public Advocate who represents claimants, and provides for payment of these counsel. Claimants may also retain independent attorneys. 42 MIRC Ch: 1, §§ 18 and 17.

Brown is a lawyer who is licensed to practice law in the Marshall Islands, but whose principal office is in Takoma Park, Maryland. Claim forms were filed with the Tribunal in 1989 in which he was named as the attorney for 52 claimants. Apparently in September, 1991 Brown became aware that the Defender of the Fund had written several letters to his clients advising them that their claims for certain types of injuries had been admitted or rejected. On October 2nd

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and 3rd Brown wrote two letters to C. Sebastian Aloom (hereafter “Aloom”), chairman of the Tribunal, questioning these decisions and the manner in which they were made. Brown wrote a third letter to Aloom on October 3 advising Aloom that he had been denied permission to see medical records of his clients and requested that the Tribunal authorize the doctors in control of the records to allow Brown to review the records. Brown wrote a fourth letter to the Clerk of the Nuclear Claims Tribunal on October 3 with the same request. Our attention has not been invited to any response to these letters. On October 28 Brown filed the “Complaint” with the Tribunal, on behalf of his clients, against the Defender of the Fund. The Complaint purported both to challenge decisions by the Defender of the Fund and to appeal those decisions to the Special Tribunal, that is, to one member of the Tribunal. *See* 42 MIRC Ch. 1, § 11.

Earlier, the Defender of the Fund and the Public Advocate had agreed upon an extension of the time within which appeals from decisions of the Defender of the Fund had to be filed. Brown, apparently, was unaware of the extension and filed the Complaint to protect the appeal rights of his clients. However, had it not been for the extension, the time for appeal would have expired on 45 of Browns’ 52 clients. On October 29, without a hearing and on its own motion, the Tribunal dismissed three of the five Counts in the Complaint (Counts II, III and IV) because they did “not even remotely relate to actions of the Defender of the Fund” and were thus “frivolous.” Two Counts (I and V) were allowed to stand because they challenged the determinations of the Defender of the Fund as to complainants’ claims and were thus “validly drawn.”

Brown’s motion for reconsideration of the October 29 order was denied by a November 12 Decision and Order of the Tribunal, which also required Brown to file an affidavit within one week stating which of his clients he or his agents had attempted to contact, the date of each attempt, the means employed, whether the person was contacted and the response. On November 19 Brown filed an Affidavit and Memorandum attempting to verify his attorney-client relationship with complainants, but not complying with the Tribunal’s November 12th Decision and Order. On the same date, he also wrote to the Defender of the Fund, naming his clients, and

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asking for information regarding each client's claim. Brown's legal assistant, Fitzpatrick, also filed an affidavit on November 25 to explain why he could not comply immediately with the Tribunal's November 12 Decision and Order.

The Tribunal then issued its Decision and Order dated December 2, 1991, that ordered: (1) the Clerk of the Tribunal to transmit copies of the Decision and Order and record to the Standing Committee on Professional Conduct of the Marshall Islands Judiciary with the Tribunal's recommendation that disciplinary action and sanctions be imposed against Brown consistent with the findings therein and such other findings as the Committee might make; (2) that during the pendency of the review by the Standing Committee, Brown not be permitted to appear before the Tribunal on any matter without local co-counsel who is authorized to practice law in the Marshall Islands or before the Tribunal; (3) that the Clerk transmit copies of the Decision and Order and related portions of the record to the Disciplinary Committees of the State Bars of Hawaii, Maryland and the District of Columbia; (4) that Brown within ten days file a list of all jurisdictions in which he is licensed, along with licensing information; and (5) that dismissed "this proceeding" without prejudice to the named complainants.

The statement of questions presented, in Brown's notice of appeal, and the arguments in his briefs make it clear that paragraph (5) of the Order was not appealed and that Brown's primary concern was with paragraph (2), requiring him to associate local counsel. Since other aspects of the Order can be construed as action "against him," however, we are constrained to comment upon them.

As noted above, the purpose of the Act is to provide compensation for personal injury and property damage caused by the United States' nuclear testing program in the northern Marshall Islands. The interests of the complainants, who have waited many years for compensation, is paramount. The conduct of the attorneys and the Tribunal itself must always be directed towards the goal of expeditiously and fairly adjudicating the complainants' claims. Attorneys must have access to information necessary to properly represent their clients; and proceedings by the Tribunal must be conducted in a fair and unbiased manner, giving parties a right to be heard

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when appropriate. Attorneys must represent their clients to the best of their abilities, and must not undertake the representation of clients unless they can provide proper representation.

[1] The Tribunal has the same right as a natural person to report an attorney to the Standing Committee on Professional Conduct. This is not a matter for appellate review by this Court. Brown's rights have been in no way impaired by the report, even though the manner of reporting may be unusual.

Similarly, the order of the Tribunal to send the Decision and Order of December 2, 1991 to other jurisdictions is not an appealable order. Brown, presumably, will be accorded due process in whatever disciplinary proceedings are held.

Pending review of the referral to the Standing Committee, the December 2, 1991 Decision and Order also requires that Brown associate with local, licensed co-counsel in all appearances before the Tribunal. This Court interprets that Order to mean that Brown must have associated local, licensed co-counsel before representing any claimants in any way before the Tribunal, whether personally or by the filing of pleadings. The Tribunal's decision in this regard was expressly based on concerns expressed by the Tribunal regarding Brown's failure to communicate with his clients, his conduct in response to Tribunal inquiries and the adequacy of Brown's representation of the complainants.

Brown asserts that the requirement of associating co-counsel is a sanction that has been imposed upon him by the Tribunal, without notice of the transgression of which he was accused or of the possibility that he might be sanctioned and without any opportunity to be heard. The Defender of the Fund, on the other hand, asserts that the requirement to appear only with co-counsel was not a disciplinary sanction, but was merely a condition imposed upon Mr. Brown because of the Tribunal's concern for the proper representation of his clients.

[2,3] However the requirement of associating co-counsel is characterized, it is clear that it was a condition imposed upon Brown's right to practice before the Tribunal without any notice to him that he was at risk of having that condition imposed, without any specification of why he was at risk and without any opportunity for him to be heard. Without meeting the minimum

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elements of due process guaranteed by Article II, § 4(1) of the Constitution, the condition resulted in his being deprived of the right to independently appear before the Tribunal. Those minimum elements are notice and the opportunity to be heard. *Navarro and Velasco v. Chief of Police*, 1 MILR (Rev.) 161 (Aug 2, 1989); *Balos, et al., v. H.Ct. Chief Justice*, 1 MILR (Rev.) 137 (Aug 2, 1989).

Section 6(4)(a) of the Act bestows upon the Tribunal, among other powers, the power of “making rules and promulgating procedural regulations.” Section 10(11) of the Act requires that the Tribunal publish and make available to the public in printed form all rules and regulations promulgated and states that promulgation shall be subject to the Administrative Procedures Act of 1979 (6 MIRC Ch. 1).

The Administrative Procedures Act, in § 3(1)(b), requires each agency to “adopt rules of practice setting forth the formal and informal procedures available.” It also requires, except for emergency rules, that advance notice of proposed rules be given in various ways. 6 MIRC Ch. 1, § 4(a).

The Tribunal, upon reflection or inquiry or both, may well conclude that claimants’ attorneys who have their principal places of business outside of the Marshall Islands, who do not maintain an office in or regularly visit the Marshall Islands in the course of their law practices, who do not speak Marshallese, or who lack what the Tribunal reasonably believes to be qualifications in other respects, should be required to associate with local, licensed co-counsel. If so, it can exercise its rule-making power in the prescribed manner to promulgate a rule of universal application to all who are within its scope.

Paragraph number 2 at page 14 of the December 2, 1991 Decision and Order is reversed.

Jon M. Van Dyke, Esq. for Appellant

Trial Assistant John M. Silk for Appellee (Joshua Berger, Esq. on the briefs)

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**REPUBLIC OF THE MARSHALL
ISLANDS,**

S.CT. CRIMINAL NO. 90-03
(High Ct. Crim. No. 1990-005)

Plaintiff-Appellee,

-v-

ANIBAR TIMOTHY,

Defendant-Appellant.

APPEAL FROM THE HIGH COURT

AUGUST 13, 1992

LIBKUMAN, A.J. *pro tem*¹
ASHFORD, C.J. and KING, A.J. *pro tem*²

SUMMARY:

This is an appeal by Defendant-Appellant Timothy from a conviction involving a violation of 31 MIRC Ch. 1, §§ 5 and 38, which statutes involve obtaining money under false pretenses with intent to defraud. The appeal was based primarily on claims that the Criminal Information was insufficient and thus Timothy's due process rights were violated because the statutes in question did not establish a standard of conduct which would constitute a crime; that there was insufficient evidence to support the conviction; that certain exhibits were erroneously admitted at trial; and that the trial court erred in failing to grant Timothy's "Motion for Judgment of Acquittal." Affirmed.

DIGEST:

1. **CRIMINAL LAW AND PROCEDURE – Statutes – Construction:** 31 MIRC Ch. 1, §§ 5
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¹Ronald D. Libkuman, Esq. of the Hawaii State Bar, by appointment of the Cabinet.

²Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, by appointment of the Cabinet.

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and 38 are clear in their intent and purpose in describing criminal conduct and thus said statutes, and the Information based on said statutes, met the “due process” test of Article II, § 4(4) of the Marshall Islands Constitution.

2. EVIDENCE – *Weight and Sufficiency*: Judgment of the trial court will not be reversed for paucity of evidence unless said judgment is “clearly erroneous.”

3. CRIMINAL LAW AND PROCEDURE– *Statutes – Construction*: MIRC Ch. 1, § 70 does not deprive the Supreme Court of jurisdiction in an appeal of a criminal conviction merely because the sentence is vacated pursuant to the terms of the statute prior to the conclusion of the appeal.

OPINION OF THE COURT BY LIBKUMAN, A.J.

This is an appeal from a Judgment and Judgment of Sentence dated August 28th, 1990 and October 26th, 1990, respectively, which found defendant Anibar Timothy (hereafter “Timothy”) guilty of violating 31 MIRC Ch. 1, §§ 5 and 38. The Judgment of Sentence imposed a suspended sentence and probation on Timothy for all four counts of the Information. Timothy did not violate his probation, and pursuant to 31 MIRC Ch. 1, §§ 70(4) and (5) Timothy is entitled to be discharged by the Court and to have the Judgment vacated. Also, there is a disciplinary proceeding pending against Timothy (Disciplinary Proceeding 1990-1) in which the discipline imposed was founded mainly upon the criminal conviction. Thus, if the criminal conviction were reversed, the decision in the Disciplinary Proceeding against Timothy would necessarily have to be reconsidered. For these reasons, we have considered this appeal.

Facts: Timothy, a Trial Assistant, received a fee advance of \$900.00 from the Lanitulok family to change the names of Mr. and Mrs. Lanitulok and their three children. Timothy’s usual fee was \$350.00 per person but he charged Mr. and Mrs. Lanitulok \$300.00 each and the children \$100.00 each with the understanding that he would submit a claim to the government legal aid fund in the amount of \$350.00 for each child and if that amount were recovered he would reimburse the Lanitulok’s in the amount of \$100.00 per child and retain the balance of \$250.00 per child. Timothy also represented Lenjo Anchor in a probate case and fees of approximately

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\$1300.00 were advanced by Mr. Anchor's son or stepson [Grant Labuan] with the understanding that Timothy would again apply to the government legal aid fund for reimbursement of the fees and would reimburse Mr. Labuan to the extent of the fees recovered.

Timothy wrote to the Minister of Justice on September 18, 1989, requesting "\$350.00 for retainer fee" for each of the cases from the legal aid fund. This request was made pursuant to 37 MIRC Ch. 1, § 1, *et seq.*, which is the legal aid enactment and provides for payment of legal aid funds for Marshallese citizens who cannot afford legal services. By this letter Mr. Timothy impliedly represented that his clients were "unable to afford legal services."

In a trial of this action Judge Philip T. Bird found that Timothy attempted to obtain government funds (i.e., "the . . . money of another") by "false pretenses thus violating 31 MIRC Chapter 1, Section 5 and 38" (*see* Judgment of August 28, 1990). Judgment and Judgment of Sentence were entered and Timothy filed a timely appeal to this Court.

Decision of the Court: The Judgment and Judgment of Sentence of the High Court are affirmed. The arguments raised by the parties are considered below.

[1] 1. Due Process Argument: Timothy claims his due process rights were violated because the Information is insufficient in that the statutes fail to establish a standard of conduct the violation of which would constitute a crime. Timothy was charged under 31 MIRC Ch. 1, §§ 5 and 38. 31 MIRC Ch. 1, § 38 provides that a person who shall unlawfully obtain the property of another by false pretenses, knowing those pretenses to be false, and with the intent to permanently defraud the owner thereof, shall be guilty of cheating. 31 MIRC Ch. 1, § 5 provides that a person who attempts to commit any crime which falls short of actual commission, shall be guilty of attempt to commit said crime. These statutes are sufficiently clear in their intent and purpose to establish the standard of conduct which was violated in this case. Thus the statutes withstand the "due process" tests of the cases cited in Timothy's Opening Brief, including *Evans v. U.S.*, 153 U.S. 608, 14 S.Ct. 939 (1894) and *Russell v. U.S.*, 369 U.S. 749, 82 S.Ct. 1038 (1962) and do not violate Article II, § 4(4) of the Marshall Islands Constitution or Rule 6(e) of the Marshall Islands Rules of Criminal Procedure.

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Much of Timothy's due process argument relates to 37 MIRC Ch. 1, § 5(a), which is a part of the legal aid provisions and provides in essence that the Republic of the Marshall Islands legal aid office should provide certain legal aid services to citizens who cannot afford such services. Timothy argues that this statute contains no standards or procedures for private practitioners to be reimbursed for legal services from the legal aid fund, and thus he could not be guilty of violating 31 MIRC Ch. 1, §§ 5 and 38 because there were no standards or procedures for him to follow or to violate. However, the essence of the Information is that Timothy violated 31 MIRC Ch. 1, §§ 5 and 38 which are sufficiently clear in their intent. The lack of standards or procedures in 37 MIRC Ch. 1, § 5(a) did not allow Timothy to obtain money from the legal aid fund under false pretenses, of which he was found guilty by the High Court.

[2] 2. Sufficiency of the Evidence: A review of the High Court's "Judgment" and the other records and transcripts in this case indicates that there was ample evidence to support the "Judgment" of the High Court and that the "Judgment" is not "clearly erroneous." The High Court found that Timothy had been admitted to practice before the Courts of the Republic on February 19, 1983 as a Trial Assistant, and that he was familiar with the "legal aid enactment" and process through which legal aid funds were obtained. The High Court also found that Timothy, through his submission of his claim, represented to the Government that each of his clients was unable to afford legal services and that this was a false representation because, in fact, the legal fees had already been paid and the services already performed. The Judgment of the High Court is based on substantial evidence and is not clearly erroneous. *Abner, et al. v. Jibke, et al.*, 1 MILR (Rev.) 3, 5 (Aug 4, 1984); *United States v. McCaleb*, 552 F.2d 717 (6th Cir. 1977); *United States v. Lemon*, 550 F.2d 467 (9th Cir. 1977); *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied* 423 U.S. 1088 (1976); *United States v. Boston*, 508 F.2d 1171 (2nd Cir. 1974), *cert. denied* 421 U.S. 1001(1975).

3. Admissibility of Exhibits: Timothy complains that Exhibits 5, 6, 7 and 7A were improperly admitted. Exhibits 5 and 6 were checks of \$500 and \$800, respectively, written on

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G & L Enterprise signed by Grant Labaun payable to Anibar Timothy. Exhibit 7 was the contract between Timothy and Mr. Anchor and Exhibit 7A the translation of the contract. Exhibit 5 is dated with the same date as Exhibit 7. The High Court admitted all of these exhibits and we find no error in this regard. The checks and contract were relevant to the issues and had been authenticated by Mr. Grant Labaun and were thus properly admitted.

4. High Court's denial of Timothy's Motion for Judgment of Acquittal. Timothy argues that the High Court erred in failing to grant his Motion for Acquittal filed at the conclusion of the prosecution's case. For the reasons stated above we find the High Court did not err in failing to grant Timothy's Motion for Acquittal.

[3] 5. Jurisdiction of Supreme Court to hear this appeal. The Republic of the Marshall Islands, in its brief, raises a jurisdictional question. The Republic argues that Timothy was given "straight probation" under 31 MIRC Ch. 1, § 70, that under this section the defendant is placed on probation without a sentence being ordered by the Court and the conviction is vacated and defendant discharged when he does not violate his probation. Thus there is no final decision from which to appeal. We hold that we have jurisdiction to hear this case for two reasons. First, the outcome of the disciplinary proceeding against Timothy (H. Ct. D.P. 1990-1) depended upon this criminal proceeding. Second, the criminal conviction, even though vacated pursuant to 31 MIRC Ch. 1, § 70, could carry other disabilities, such as affecting Timothy's right to practice in other jurisdictions. Therefore, the Supreme Court has jurisdiction to hear this appeal.

Conclusion: The High Court's Judgment of August 28, 1990 and Judgment of Sentence of October 26, 1990 are affirmed.

Douglas F. Cushnie for Defendant-Appellant
Deputy Attorneys General Allen Lolly and Dennis McPhillips for Plaintiff-Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**IN RE: THE MATTER OF
ANIBAR L. TIMOTHY,**

DISCIP. PROC. NO. 1990-01

Practitioner.

REVIEW OF THE HIGH COURT'S
ACTION ON A DISCIPLINARY MATTER

AUGUST 13, 1992

LIBKUMAN, A.J. *pro tem*¹
ASHFORD, C.J., and KING, A.J. *pro tem*²

SUMMARY:

Timothy, a trial assistant, was suspended from practice by the High Court, which held that Timothy's criminal conviction of violation of 31 MIRC Ch. 1, §§ 5 and 38, involved actions of sufficient moral turpitude as to violate Rule 6 of the "Order Creating Standing Committee on Professional Conduct." Timothy appeals to this Court, claiming the criminal conviction has now been vacated pursuant to 31 MIRC Ch. 1, §§ 70(4) and (5) and thus his disciplinary sanctions should be set aside. He also alleges there was insufficient evidence of any violation of Rule 6. Affirmed.

DIGEST:

1. TRIAL ASSISTANTS – *Suspension and Disbarment*: Criminal conviction of violation of 31 MIRC Ch. 1, §§ 5 and 38 involves actions of sufficient moral turpitude as to clearly violate Rule 6 of the "Order Creating Standing Committee on Professional Conduct."
2. TRIAL ASSISTANTS – *Same*: The findings and recommendations of a trial court in a disciplinary proceeding will be set aside only when "clearly erroneous."
3. TRIAL ASSISTANTS – *Same*: The fact that a criminal conviction under 31 MIRC Ch. 1,

¹Ronald D. Libkuman, Esq. of the Hawaii State Bar, by appointment of the Cabinet.

²Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, by appointment of the Cabinet.

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§§ 5 and 38 is vacated pursuant to 37 MIRC Ch. 1, § 70(4) and (5) does not negate disciplinary findings based on said conviction and does not render appeal moot.

OPINION OF THE COURT BY LIBKUMAN, A.J.

This Disciplinary Proceeding No. 1990-1 is being reviewed pursuant to Rule 5 of the Court's "Order Creating Standing Committee on Professional Conduct." Rule 5 provides, in part, that the Supreme Court shall review the findings and recommendations of the High Court as well as the files and transcripts in a disciplinary proceeding and issue a final order. The High Court's "Findings and Recommendation for Disciplinary Action," dated April 9, 1991, relating to Anibar L. Timothy, have been reviewed in this proceeding along with the file and transcript. In addition, counsel have been allowed to present oral argument, heard by this Court on July 28, 1992.

Briefly, the disciplinary proceeding against Anibar L. Timothy (hereafter "Timothy") was commenced on June 27, 1990, by the Standing Committee on Professional Responsibility. After a hearing on March 27, 1991, the High Court on April 9, 1991, entered its "Findings and Recommendations for Disciplinary Action," which recommended Timothy be suspended from the practice of law for a period of two years.

The legal basis of the High Court's findings against Timothy was that he had violated Rule 6 of the "Order Creating Standing Committee on Professional Conduct," which Order incorporated various Disciplinary Rules of the American Bar Association, all recited in the High Court's "Findings and Recommendations for Disciplinary Action." The factual basis of the disciplinary action was that Timothy had received legal fees in four cases from clients, then "under false pretenses and with the intent to defraud," attempted to obtain money from the Government legal services fund for these same legal services. The High Court found that this conduct violated Rule 6 of the "Order Creating Standing Committee on Professional Conduct."

At the hearing, only one witness was presented against Timothy, the Chief Clerk of Courts who presented certified copies of Timothy's "Judgment" of conviction and "Judgment of

IN RE: THE MATTER OF ANIBAR L. TIMOTHY

Sentence” in Criminal Case No 1990-05. The High Court also took judicial notice of Timothy’s Admission to Practice Law as a Trial Assistant and his Order of Admission. In addition, Timothy testified on his own behalf, maintaining his innocence and stating his convictions were under appeal.

We now affirm the “Findings and Recommendations for Disciplinary Action” of the High Court.

[1,2] We found no basis for setting aside the criminal conviction in Criminal Case No. 1990-05. *See, RMI v. Timothy*, 1 MILR (Rev.) 270 (Aug 13, 1992). The convictions of the offenses charged in that case, namely violations of 31 MIRC Ch. 1, §§ 5 and 38, involved actions on the part of Timothy of sufficient moral turpitude as to clearly violate Rule 6 of the “Order Creating Standing Committee on Professional Conduct” and the Disciplinary Rules of the Code of Professional Responsibility of the American Bar Association, all as set forth in the “Findings and Recommendation for Disciplinary Action.” We will not set aside the findings of fact of the High Court in this disciplinary proceeding unless said findings are clearly erroneous, which is the standard of review in most jurisdictions for both civil and criminal cases. *See Abner, et al. v. Jibke, et al.* 1 MILR (Rev.) 3 (Aug 6, 1984) ; *United States v. United States Gypsum Co.*, 333 U.S. 364 (1948); and *State v. Patterson*, 58 Haw. 462, 571 P.2d 745 (1977), citing numerous other cases. While there is a split of opinion in various jurisdictions as to the admissibility of a criminal conviction in a civil case, the criminal convictions were properly admitted in this disciplinary proceeding. Timothy had a complete trial and opportunity to be heard in the disciplinary proceeding. This Court has found no error, much less clear error, in the High Court’s “Findings and Recommendation For Disciplinary Action.” Because said findings were based at least in part on the criminal conviction, this Court heard argument on the appeal of that conviction as well.³ No basis for setting the conviction aside was found. *See RMI v. Timothy* (S.Ct. Criminal No. 90-03), filed contemporaneously herewith.

³The appeal was heard notwithstanding the fact that defendant was entitled to have the judgment vacated pursuant to 31 MIRC Ch. 1, §§ 70(4) and (5) and the appeal was thus moot.

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[3] Timothy argues the Supreme Court cannot consider his criminal conviction in Criminal No. 1990-03 because that conviction has now been vacated by operation of law and he is entitled to be discharged pursuant to 31 MIRC Ch. 1, §§ 70(4) and (5). In essence, those sections provide that a sentence is vacated and the defendant may be discharged where he does not violate his probation. First, it is not clear whether Timothy has moved to have the convictions vacated. Assuming he has, we hold that the convictions can still be used as the basis for a disciplinary proceeding against Timothy. Timothy received a one-year probation for each of the four Counts in the criminal case, which were to run concurrently from about October 26, 1990. The criminal charges were a matter of record when the disciplinary action was commenced on June 27, 1990. The criminal conviction was a matter of record when the hearing on the merits before the High Court was held on March 27, 1991, and when the High Court issued its “Findings and Recommendations for Disciplinary Action” on April 9, 1991. Timothy was not eligible to have his convictions vacated until on or after October 26, 1991. Even though the “Findings and Recommendation for Disciplinary Action” does not become final until reviewed by the Supreme Court, the hearing on the merits before the High Court was held and the High Court’s recommendations were made before the criminal convictions were or could have been vacated. To require the High Court to conduct a second trial on the same issues merely because the purposes of the proceedings were different (criminal prosecution and attorney discipline) would not be reasonable or practical. Timothy had his opportunity to be heard both in the criminal and the disciplinary actions and did testify in both proceedings. Although he had the opportunity to present other evidence in the disciplinary proceeding, he did not do so. He was given a fair hearing in the disciplinary proceeding and we will not now vacate or reverse the “Findings and Recommendations for Disciplinary Action” of the High Court merely because the criminal convictions have been vacated pursuant to 31 MIRC Ch. 1, §§ 70(4) and (5).

Order: We affirm the High Court’s “Findings and Recommendations for Disciplinary Action” and impose the following discipline on Timothy pursuant to Rule 5 of the “Order Creating Standing Committee on Professional Conduct”:

IN RE: THE MATTER OF ANIBAR L. TIMOTHY

1. Timothy is suspended from the practice of law for two years. The interim suspension imposed by the High Court shall be credited towards this two-year suspension, and thus Timothy may again become eligible to practice law as a Trial Assistant on October 25, 1992.

2. On October 25, 1992, Timothy can petition the High Court for reinstatement upon a showing that:

- a. He has successfully completed his probation in Criminal Case No. 1990-05;
- b. He has not engaged in the practice of law during the term of his suspension;
- c. He has had no criminal convictions during the term of his suspension;
- d. He is a fit person to engage in the practice of law; and
- e. He has served upon the Standing Committee on Professional Responsibility a copy of his petition and has cooperated with the Committee in its investigation on his fitness to practice law.

Douglas F. Cushnie for Anibar L. Timothy

Philip A. Okney for Standing Committee on Professional Responsibility

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

THADDEUS SAMSON, *et al.*,

S.CT. CIVIL NO. 92-02
(NCT No. 26-003)

Complainants-Appellants,

-v-

**THE RONGELAP ATOLL LOCAL
DISTRIBUTION AUTHORITY,**

Respondent-Appellee.

ORDER DECLINING TO ENTERTAIN APPEAL

NOVEMBER 19, 1992

ASHFORD, C.J.

SUMMARY:

A Nuclear Claims Special Tribunal dismissed, without prejudice, a class action challenging the Rongelap Atoll Local Distribution Authority's distribution scheme that excluded nonresident owners of land rights on Rongelap. The Nuclear Claims Tribunal denied Complainants' Petition to Review, finding the case had been rendered moot by later amendments to the distribution scheme and that Complainants could still present their claims. The Supreme Court declined to entertain an appeal, because Complainants' rights to share in quarterly distributions were not affected by the Special Tribunal's and Tribunal's rulings and because neither abuse of discretion nor probable error in those rulings had been demonstrated.

DIGEST:

1. APPEAL AND ERROR – *Nuclear Claims Tribunal and Special Tribunal*: Section 6(3) of the Marshall Islands Nuclear Claims Tribunal Act (1987), as amended, clearly speaks in the disjunctive, permitting the Supreme Court to entertain an appeal from the final determination of the Tribunal or a Special Tribunal. It does not authorize a single appeal from both a final determination of the Special Tribunal and the determination of the Tribunal declining to review it.

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2. NUCLEAR CLAIMS TRIBUNAL – *Powers and Duties – Review of Special Tribunal’s Ruling*: Under § 31(q) of the Marshall Islands Nuclear Claims Tribunal Act (1987), as amended, a refusal of the Tribunal to review the conclusions of a Special Tribunal would be based either upon (a) a finding by the Tribunal that the decision did not involve a matter of public importance, or (b) the Tribunal declining to exercise its discretion in favor of reviewing the decision.
3. APPEAL AND ERROR – *Nuclear Claims Tribunal and Special Tribunal – Standard of Review*: The standard for Supreme Court review of a finding by the Nuclear Claims Tribunal that the decision of a Special Tribunal did not involve a matter of public importance would be *de novo* if it is a mixed question of law and fact or clearly erroneous if it is a question only of fact.
4. APPEAL AND ERROR – *Same – Same*: The standard for Supreme Court review of the action of the Nuclear Claims Tribunal in declining to exercise its discretion in favor of reviewing the decision of a Special Tribunal is abuse of discretion.
5. APPEAL AND ERROR – *Nuclear Claims Tribunal and Special Tribunal*: The Supreme Court’s current tentative view is that an appeal from a final determination of a Nuclear Claims Special Tribunal should not be entertained unless it suffers from one or more of the defects specified in the Marshall Islands Administrative Procedures Act 1979, §§ 17(7)(a) through (f).
6. APPEAL AND ERROR – *Questions Reviewable – Record and Proceedings Not in Record*: Appeals are on the record, without reference to current circumstances, other than those that render the appeal moot or otherwise justify departure from consideration of the record alone.

FACTS.

In June 1988, the Rongelap Local Government Council, acting as the Rongelap Atoll Local Distribution Authority (“Rongelap LDA”) under the Marshall Islands Nuclear Claims Tribunal Act 1987 (“NCT Act”), 42 MIRC Ch. 1, adopted a quarterly distribution scheme covering the funds to be paid to the people of Rongelap under Article II, Section 4 of the Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association (the “Section 177 Agreement”).¹ In November 1988, Appellants herein, as Complainants, filed a class action

¹Free Association Agreement. Signed June 25, 1983. Entered into force October 15, 1986. Treaties in Force, 1987.

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in the Nuclear Claims Tribunal under § 26 of the NCT Act challenging the Rongelap LDA's distribution scheme, which did not include them as recipients of portions of the quarterly payments. Complainants were not and had never been residents of Rongelap, but claimed land rights to wetos on Rongelap Atoll.² The Respondent in the action was the Rongelap LDA. In April 1989, some amendments to the distribution scheme were adopted, reducing amounts previously distributable, but still excluding Appellants and the class they represented.

Complainants and Respondent filed Cross Motions for Summary Adjudication and Respondent filed a Motion to Dismiss. It appears there was no evidentiary hearing and the motions were submitted and decided upon affidavits, a stipulation and written memoranda.³ The Special Tribunal ruled on December 29, 1989: (1) it had jurisdiction to hear the Complaint, (2) the Rongelap LDA had discretion in proper circumstances to limit distribution to compensation for personal injury, (3) no Marshallese custom precluded that limitation and (4) payments to the Iroj Imata Kabua were tribute and not compensation for damage to land.⁴ The Special Tribunal denied Complainants' Motion for Summary Adjudication and granted the Respondent's Motion to Dismiss the Complaint, but without prejudice.⁵

On January 21, 1990, the Rongelap LDA amended the distribution scheme in its entirety.

²See Complaint, a copy of which is attached as Exhibit 6 to Appellee's Memorandum in Opposition to Appeal.

³See pages 4 and 6 of the Special Tribunal's Preliminary Ruling on the cross Motions for Summary Adjudication of Issues and Respondent's Motion to Dismiss ("Preliminary Ruling"), a copy of which is attached as Exhibit 1 to Appellee's Memorandum in Opposition to Appeal, and page 2 of the Special Tribunal's Ruling on Cross Motions for Summary Adjudication of Issues and Respondent's Motion to Dismiss ("Ruling"), a copy of which is attached as Exhibit 2 to Appellee's Memorandum in Opposition to Appeal.

⁴Ruling, pp. 18-19.

⁵Ruling, p. 1.

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The new distribution scheme⁶ specifically allowed individuals of Rongelap blood holding land rights in Rongelap, but who had never lived on Rongelap, to be recipients of portions of the quarterly distribution if they met criteria entitling them to be classified as “contributing to the community.” Shortly thereafter, Complainants timely petitioned the Nuclear Claims Tribunal (“Tribunal”), under § 31(q) of the NCT Act, for review of the Special Tribunal’s ruling.

The Tribunal, on February 3, 1992, filed its Order denying the Petition for Review. The Order noted: (1) on the basis of the January 1990 amendment to the distribution scheme, the Complaint was moot, (2) individuals having rights to distribution on the basis of land rights were not precluded from claiming those distributions in § 23, NCT Act, claims for loss or damage to property, and (3) issues related to the customary practice of “ekkan” were not central to the resolution of the case.⁷ On March 4, 1992, Complainants appealed to this Court under the provisions of § 6(3), NCT Act.

SCOPE OF THE APPEAL.

Appellants’ Notice of Appeal identified as the order appealed from the Tribunal’s Order dated February 3, 1992, declining to review the Order of the Special Tribunal dated December 29, 1989. The Notice, however, alleged errors of both the Tribunal and the Special Tribunal. This Court does not believe the statute authorizes double-barreled appeals. Section 6(3), NCT Act, states that “final determinations . . . issued by the Tribunal or by the Special Tribunal, if a request for review by the Tribunal under § 31(q) is denied or is not acted upon within 30 days, shall . . . be appealable to the Supreme Court within 30 days from the date of the final determination . . . of the Tribunal or within 30 days from the date that review by the Tribunal of the final determination . . . of the Special Tribunal is denied or is not acted upon for 30 days.”

⁶See Exhibit 4 to Appellee’s Memorandum in Opposition to Appeal.

⁷See Order, a copy of which is attached as Exhibit 3 to Appellee’s Memorandum in Opposition to Appeal, at page 2.

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[1] Section 6(3) clearly speaks in the disjunctive, permitting this Court to entertain an appeal from the final determination of the Tribunal or a Special Tribunal. It does not appear that, as was attempted in this case, the appeal to be entertained can be one from both final determination of the Special Tribunal and the determination of the Tribunal declining to review the Special Tribunal's determination. Further, the standards of review for those determinations would be different.

This Court has determined not to entertain the appeal (whether it is from the determination of the Tribunal or the Special Tribunal), but as an aid to parties appearing before the Tribunal and Special Tribunal, the Court in this case has undertaken to examine all of the grounds urged for it to entertain the appeal.

STANDARDS GOVERNING REVIEW.

Standard governing review of a Tribunal determination not to review a determination of the Special Tribunal.

[2-4] Under § 31(q), NCT Act, the Tribunal must first find that the decision involves a matter of public importance and, if it does, the Tribunal may review the special Tribunal's conclusion. The refusal of the Tribunal to review the conclusions of a Special Tribunal would be based, therefore, either upon (a) a finding by the Tribunal that the decision did not involve a matter of public importance, or (b) the Tribunal's declining to exercise its discretion in favor of reviewing the decision of the Special Tribunal.⁸ The standard for this Court's review of the action of the Tribunal in case (a) would be either *de novo* if it is a mixed question of law and fact,⁹ or clearly

⁸The text of § 31(q), NCT Act, reads: The Tribunal may, upon the filing of a timely petition for review and provided that the Tribunal finds that the decision involves a matter of public importance, review the Special Tribunal's conclusions and, if appropriate, orders or any part thereof. The Tribunal may render its own decision or remand, in part or in whole, to the Special Tribunal for reconsideration.

⁹*Lobo v. Jejo*, 1 MILR (Rev.) 224 (Jan 2, 1991); *United States v. Lindsey*, 877 F.2d 777, 783 (9th Cir. 1989).

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erroneous if it is a question only of fact,¹⁰ and in case (b) would be abuse of discretion.¹¹

The Tribunal's Order dated February 3, 1992 made no mention of any lack of public importance in the determination of the Special Tribunal. Rather, its denial of the review requested was expressly based upon findings that the issue determined by the Special Tribunal was moot and that Complainants were entitled to pursue their claims under § 23, NCT Act. Nothing has been presented to this Court that leaves it with the firm conviction that the Tribunal clearly erred in declining to review the Special Tribunal's Order dated December 29, 1989.

Standards governing exercise of discretion to entertain an appeal from a final determination on the merits.

[5] In its Order filed November 20, 1992, in *Defender of the Fund, et al. v. Rongelap Atoll LDA*, 1 MILR (Rev.) 289 (Nov 20, 1992) (NCT No. 27-001), this Court stated its current tentative view that an appeal from a final determination, on the merits, of the Tribunal should not be entertained unless it appeared likely that the determination appealed from suffered from one or more of the defects specified in the Marshall Islands Administrative Procedures Act 1979 (6 MIRC Ch. 1, §§ 17(7)(a) through (f)). For the reasons set forth in that Order, this Court holds the same view with respect to entertaining appeals from the Special Tribunal. The defects of which Appellants complain do not appear to fall within the ambit of § 17(7), but will be hereinafter specifically discussed.

¹⁰*Abner, et al., v. Jibke, et al.*, 1 MILR (Rev.) 3 (Aug 6, 1984); *Ebot v. Jablotok*, 1 MILR (Rev.) 8 (Aug 6, 1984); *Nakap v. Lokkon*, 1 MILR (Rev.) 69 (Feb 5, 1987); *RMI v. Timothy*, 1 MILR (Rev.) 270 (Aug 13, 1992). See, also, 27 MIRC Ch. 2, § 66(2).

¹¹Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. *Abatti v. Commissioner*, 859 F.2d 115, 117 (9th Cir. 1988).

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ERRORS ALLEGED.

Questions of law relating to issues of custom and tradition.

Appellants contend that the Special Tribunal failed to understand either the general obligations of custom and tradition or the specific meaning of the term “ekkan” and the Tribunal compounded the error by finding that the issues relating to “ekkan” were not central to the resolution of the case. These are the grounds underlying Appellants’ assertion that the distributions by the Rongelap LDA are not in accordance with custom.

In its ruling, the Special Tribunal noted that when “custom is firmly established and widely known, the courts will take judicial notice of it,” but when “there is a dispute as to the existence of custom and a court is not satisfied as to its existence or applicability, custom becomes a mixed question of law and fact. In such case the party relying upon alleged custom must prove it by evidence satisfactory to the court.”¹² Had there been a full evidentiary hearing, it is possible that Appellants could demonstrate that the Special Tribunal’s ruling on custom was erroneous because it was against the weight of satisfactory evidence. It is not probable, however, that such could be demonstrated merely by the affidavits, stipulation and written memoranda of counsel. Further, the dismissal was without prejudice and the Tribunal noted that persons in Complainants class are entitled to pursue their claims under § 23, NCT Act.

Questions of law relating to the constitutional issue of equal protection.

The Special Tribunal made a thorough review of Appellants’ equal protection claim¹³ and found that it was not substantiated. Appellants’ memorandum in support of the appeal fails to demonstrate probable error in the ruling. To the extent the memorandum relies on facts not in the record before the Special Tribunal, those facts will not be considered by this Court.

¹²Ruling, p. 6.

¹³Ruling, pp. 13 to 17.

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Public importance of the issues involved.

As already discussed,¹⁴ the Tribunal based its refusal to review the decision of the Special Tribunal, not upon any lack of public importance, but upon other grounds. This supposed issue, therefore, need not be addressed.

Questions of procedure with regard to the Tribunal's denial of Appellants' Petition for Review.

[6] Appellants complain that the Tribunal did not timely act upon the Petition for Review and that it relied solely on documents filed more than two years earlier without attempting to determine current circumstances prior to denying the petition. The delay of the Tribunal in acting upon the Petition for Review, if unreasonably long, would not constitute a basis for entertaining the appeal inasmuch as Appellants could have sought review by this Court when the Tribunal failed for thirty days to act upon the request for review.¹⁵ Further, it is elementary that appeals are on the record, without reference to current circumstances, other than those that render them moot or otherwise justify departure from consideration of the record alone.

Exclusive authority of this Court to provide judicial review of the Tribunal's final determinations.

While it is true that this Court has exclusive authority to review final determinations of the Tribunal, that fact is irrelevant to the question whether, in a particular case, this Court should review the final determination of the Tribunal or a Special Tribunal.

¹⁴See preceding page.

¹⁵Section 6(3), NCT Act. This Court is not called upon at this time to decide whether the appeal was required to be filed within 30 days after the Tribunal had failed, for 30 days, to act upon the request for review.

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OTHER ISSUES.

The foregoing discussion disposes of questions numbered 2, 3, 4, 7 and 8 in Appellants' Notice of Appeal.

Question 1 therein does not state a determination made by either the Special Tribunal or the Tribunal, neither of which purported to rule that the January 21, 1990 amendment to the distribution scheme provided "a realistic basis and sufficiently clear procedures" for qualifying persons to receive distributions on the basis of land rights. Therefore, alleged Question 1 will not be considered.

Questions numbered 5 and 6 in the Notice of Appeal refer to events occurring subsequent to the ruling of the Special Tribunal and that are outside of any record that could be presented to this Court of proceedings before the Special Tribunal and the Tribunal. Therefore, they will not be considered.

Because the rights of Appellants, whatever they may be, to share in quarterly distributions have not been precluded either by the action of the Special Tribunal or the Tribunal and because neither abuse of discretion by the Tribunal nor probable error in the conclusions of the Special Tribunal have been demonstrated, this Court declines to entertain the appeal.

S. Joshua Berger, Defender of the Fund, and William Graham, Public Advocate,
for Complainants-Appellants
E. Cooper Brown for Respondent-Appellee

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**DEFENDER OF THE FUND,
JOHNSAY RIKLON, *et al.*,**

S.CT. CIVIL NO. 92-01
(NCT No. 27-001)

Complainants-Appellees,

-v-

**THE RONGELAP ATOLL LOCAL
DISTRIBUTION AUTHORITY,**

Respondent-Appellant.

ORDER DECLINING TO ENTERTAIN APPEAL

NOVEMBER 20, 1992

ASHFORD, C.J.

SUMMARY:

A Special Tribunal of the Marshall Islands Nuclear Claims Tribunal held that an assignment by the Rongelap Atoll Local Distribution Authority, of future payments to be made to Rongelap under Section 177 of the Compact of Free Association, was void for lack of a quorum at the meeting authorizing the assignment. On appeal, the full Nuclear Claims Tribunal found that the defect had been cured at a subsequent meeting, but that the assignment was void for failure to give advance public notice of the proposed assignment as required by the Nuclear Claims Tribunal Act 1987. The Supreme Court declined to entertain an appeal by the Rongelap Atoll Local Distribution Authority because (1) it did not appear that the Tribunal's decision suffered from any defect which would have been grounds for appeal under the Marshall Islands Administrative Procedures Act 1979 and (2) because the issues in the case, perhaps, had been resolved by subsequent events.

DIGEST:

1. **APPEAL AND ERROR – *Nuclear Claims Tribunal and Special Tribunal***: The Supreme Court has tentatively concluded that probably it should not entertain an appeal from the Nuclear Claims Tribunal or Special Tribunal unless it appears likely that the action appealed from

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suffered from one or more of the defects specified in § 17(7)(a) through (f) of the Marshall Islands Administrative Procedures Act 1979, 6 MIRC Ch. 1.

2. NUCLEAR CLAIMS TRIBUNAL – *Powers and Duties – Review of Transfers of Funds*: If a sound basis exists for the Tribunal to invalidate an assignment or proposed assignment of funds, independent of the question whether the purpose of the assignment is consistent with the Section 177 Agreement, the Tribunal has the duty and power to make that determination.

3. NUCLEAR CLAIMS TRIBUNAL – *Rules and Procedures – Public Notice of Assignments of Funds*: Section 12(d) of the Nuclear Claims Tribunal Act and § 404 of the regulations adopted by the Tribunal require each local distribution authority to put all proposed assignments of future proceeds in writing and give public notice of the same at least 75 days prior to consummation of the proposed assignment.

4. NUCLEAR CLAIMS TRIBUNAL – *Same – Public Notice of Regulations*: The Tribunal does not have to give advance public notice of, or to have a hearing on, proposed regulations. The regulations become effective upon adoption by affirmative vote of the Chairman and one member of the Tribunal. They are thereafter to be published and made available to the public in printed form.

5. NUCLEAR CLAIMS TRIBUNAL – *Powers and Duties – Authority to Halt Distribution of Borrowed Funds*: The Tribunal has broad authority with respect to local distribution authorities, including the power to halt distribution by a local distribution authority of borrowed funds representing an advance against future proceeds.

Ruling on a challenge by individual complainants and the Defender of the Fund, a Special Tribunal of the Marshall Islands Nuclear Claims Tribunal held that an assignment, by the Rongelap Atoll Local Government Council, acting in its capacity as the Local Distribution Authority for Rongelap (the “Rongelap LDA”), to American Security Bank, N.A., a national banking association in Washington, D.C., of future payments to be made to the Rongelap LDA under the Agreement Between the Government Of The United States And The Government Of The Marshall Islands For Implementation of Section 177 of the Compact of Free Association (the

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“Section 177 Agreement”¹, was of no force and effect. The Special Tribunal’s ruling was based on the lack of a quorum of Council members at the meeting which adopted the ordinance authorizing the assignment. On appeal, the Nuclear Claims Tribunal (the “Tribunal”) held that the defect was cured by a later ratification of the assignment by the Rongelap Council at a meeting at which a quorum was present. The Tribunal held that the assignment was void for another reason, however. It ruled that the Rongelap LDA had failed to give the minimum 75-day advance public notice of the proposed assignment required by § 12(d) of the Marshall Islands Nuclear Claims Tribunal Act 1987 (the “NCT Act”), 42 MIRC Ch. 1. The Rongelap LDA has asked this Court to entertain an appeal from the decision of the Tribunal, citing in its Notice of Appeal the same five points it had urged upon the Tribunal as errors committed by the Special Tribunal. In addition, a sixth ground, not specified in the Notice of Appeal, has been urged as error in the Opening Brief.

[1] For a number of reasons, including a strong belief that more experience is needed with the kinds of appeals to be expected from the Tribunal, this Court has not identified the criteria guiding its exercise of discretion in determining whether to accept or to decline an appeal from the Tribunal.² Nor will it do so here. However, the Court has concluded that inasmuch as the Tribunal is much like an agency within the meaning of the Marshall Islands Administrative Procedures Act 1979, 6 MIRC Ch. 1, § 2(a), this Court should give weight to the provisions of § 17(7) of that Act, concerning the grounds for judicial reversal or modification of agency decisions in contested cases. At this juncture, and subject to further experience, the Court has tentatively concluded that probably it should not entertain an appeal from the Tribunal unless it appears likely that the action appealed from suffered from one or more of the defects specified in § 17(7)(a) through (f). That section provides that, on appeal, the High Court may reverse or

¹Free Association Agreement. Signed June 25, 1983. Entered into force October 15, 1986. Treaties in Force, 1987.

²Final determinations by the Tribunal or the Special Tribunal may be reviewed by the Supreme Court at its discretion. 42 MIRC Ch. 1, § 6(3).

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modify the agency decision where substantial rights have been prejudiced because the decision is: (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory property [sic – authority?] of the agency; (c) made upon unlawful procedure; (d) affected by other error of law; (e) clearly erroneous in view of the reliable, probative, and substantial evidence in the whole record; or (f) arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Statements in the Appellant’s Opening Brief also incline this Court to wonder whether the appeal may be moot. Evidence not in the record, but appended to the Opening Brief (Exhibit 4), demonstrates that something less than 10% of the initial loan proceeds, secured by the assignment, is currently retained by the Rongelap LDA (Op. Br., footnote 3). It also appears that the Rongelap LDA is taking, or has completed, action (consistent with the Tribunal’s Decision and Order) to pay off the loan with which the Tribunal’s decision was concerned (Op. Br., footnote 4). In order to provide some guidance concerning appeals, to the Tribunal and to parties appearing before it, however, this Court has carefully examined the issues raised by the Opening Brief.

Scope of the Tribunal’s power and responsibility.

Appellant asserts that the issues identified in its Notice of Appeal are “underlain by the larger question of whether the full Tribunal . . . failed to fulfill its statutory mandate to determine whether, based upon the ‘preponderance of the evidence . . . the particular assignment or proposed assignment [was] inconsistent with the Section 177 Agreement.’ Section 27(10), NCT Act” (Op. Br. p. 6, emphasis added in the original).

[2] Section 27, NCT Act, outlines the procedural context for challenging an assignment or proposed assignment of funds by a local distribution authority (“LDA”). It assumes that a valid assignment has been or will be made, in requiring that the claimant prove by a preponderance of the evidence that the purpose of the assignment is inconsistent with the Section 177 Agreement. Section 27, however, does not limit the Tribunal’s power and responsibility to inquire concerning the disposition of funds over which it has jurisdiction. Section 4(b) of the NCT Act states that

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one of the purposes of the Tribunal is to render final determination in disputes arising from distributions under Articles II and III of the Section 177 Agreement. The duty to decide such disputes is imposed by § 5(1), NCT Act, and the power to decide those disputes is expressly conferred by § 6(1), NCT Act. In other words, if a sound basis exists for the Tribunal to invalidate an assignment or proposed assignment, independent of the question whether the purpose of the assignment is consistent with the Section 177 Agreement, the Tribunal has the duty and power to make that determination.

Compliance with public notice requirement.

[3] Section 12(d) of the NCT Act requires the Tribunal to promulgate regulations requiring each LDA to put all proposed assignments of future proceeds in writing and give public notice of the same at least 75 days prior to “consummation” of the proposed assignment. These requirements are incorporated in § 404 of the Regulations adopted by the Tribunal. In this instance, public notice of the proposed loan and assignment was given by print and voice media in the period from late May through mid-June, 1989. The first transfer of Section 177 quarterly payments was made to the bank in October 1989. The Joint Statement of Undisputed and Disputed Facts filed with the Tribunal on November 5, 1990 (Op. Br., Exhibit 1, paragraph 10) states that the loan proceeds, less certain costs, were paid by the bank to the Rongelap LDA on July 21, 1990 (sic). The chronology of events in the proceedings before the Special Tribunal, however, makes it clear that the loan proceeds had probably been disbursed on July 21, 1989, as stated at page 3 of the Tribunal’s Decision and Order (Op. Br., Exhibit 5).

In any event, Appellant apparently does not dispute that at least some of those funds were disbursed within the 75-day period following the giving of public notice. Appellant’s Opening Brief states, at page 16, that in October 1989 Appellant was “unable to meet its loan repayment obligation . . . from any other source but the Section 177 quarterly proceeds” and argues that since payment from those proceeds was not made until October 31, 1989, there was no “consummation” of the assignment until that date.

This argument is devoid of merit. It is the equivalent of claiming that a mortgage is not

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effective until steps to foreclose it are taken. Neither is the argument supported by the authorities cited by Appellant. The assignment was not a contract to transfer proceeds to be received in the future, it was a current assignment of those proceeds. The language employed was “hereby assigns . . . to Bank all of its right . . . to the Distributable Portion of all quarterly payments which are now or may hereafter become due. . . .” (Op. Br., Exhibit 3, p. 5). The statute and Regulation make no distinction between outright assignments and assignments as security; or, for that matter, between legal assignments and equitable assignments. The contract may have been executory until loan proceeds were disbursed, but upon that event, the right of the bank to satisfaction from future Section 177 payments became vested.

Failure of the Tribunal to publish its regulations and make them available to the public in printed form.

[4] The Joint Statement of Undisputed and Disputed Facts lists as facts in dispute the claims that, to the date of that document, public notice of Chapter 3 and § 404 of the Regulations was never given, nor were they made available to the public in printed form (Op. Br., Exhibit 1, paragraphs 28 and 29). However, Appellant has not disputed the Tribunal’s statement (Decision and Order, p. 3) that the Defender of the Fund, by letter of May 22, 1989 to the Rongelap LDA, set out the requirements for public notice of the proposed assignment. Indeed, in its May 19, 1989, letter to the Defender of the Fund, the Rongelap Atoll Local Government acknowledged the § 12(d), NCT Act, requirement for public notice, which it said it was “preparing to initiate” (Op. Br., attachment to Exhibit 1).

Under the Marshall Islands Administrative Procedures Act 1979, thirty days advance, detailed public notice of proposed rules must be given by posting and by radio broadcast, all interested persons must be given a reasonable opportunity to submit their views and, in certain circumstances, a public hearing must be held. 6 MIRC Ch. 1, § 4. Rules adopted do not become effective until approved by the Cabinet. 6 MIRC Ch. 1, § 6. Thereafter, they must be published in the Chief Secretary’s monthly bulletin and copies must be distributed to each local government and be kept on file for public inspection. 6 MIRC Ch. 1, § 7. Despite these detailed

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requirements for public notice before and after adoption, failure to meet the requirements does not void any rule, but authorizes a court merely to order compliance. 6 MIRC Ch. 1, § 3(2). By contrast, the Tribunal does not have to give advance public notice of, or to have a hearing on, proposed regulations.³ The regulations become effective upon adoption by affirmative vote of the Chairman and one member of the Tribunal. 42 MIRC Ch. 1, § 10(11). While they are thereafter to be published and made available to the public in printed form, the statute does not specify when or in what manner. 42 MIRC Ch. 1, § 10(11).

Appellant has not established in the material furnished to this Court that the regulation at issue was not published and made available to the public in printed form. Even if it was not, no reason appears why that regulation should be held void, as distinct from merely ordering compliance. This is particularly true in view of the fact that the Rongelap LDA acknowledged the public notice requirement and was given express written notice of the regulation and its contents by the Defender of the Fund within a few days of signing the loan documents.

Failure of Appellees to give public notice of their complaint challenging the Rongelap LDA's assignment of funds.

Section 303(e) of the Tribunal's Regulations requires public notice to be given of complaints challenging an LDA's assignment of funds. Paragraph 34 of the Joint Statement of Undisputed and Disputed Facts cites as a fact in dispute that the public notice required by this section was not given. The Tribunal's Decision and Order, however, establishes that the notice was not given, by stating at page 18 "(w)e find that failure of the complainants to give required notice in this case does not warrant the dismissal of the Complaint."

While acknowledging the differences, pointed out by the Tribunal, between the notice provisions to which LDAs and complainants are subject, and the purposes of those notice provisions, this Court believes that the Tribunal should impose upon all parties before it, and its own staff, with equal rigidity or leniency, the burdens of complying with notice provisions of the

³In the promulgation of rules and regulations, the Tribunal is exempted from application of the Marshall Islands Administrative Procedures Act 1979. NCT Act, § 10(11).

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statute and regulations. However, because of questions concerning the possible mootness and scope of this appeal earlier noted, the lack of uniformity demonstrated in this case is not sufficient, alone, to dispose this Court to entertain the appeal.⁴

Authority of Defender of the Fund to initiate complaints.

Appellant's Notice of Appeal identified as one of the questions to be presented the question whether the provisions of the NCT Act authorizing the Defender of the Fund to initiate claims challenging an LDA's assignment or proposed assignment exceeds the authority of the Tribunal (sic) contemplated by the Section 177 Agreement.⁵ Appellant's Brief asserts that "the Nitijela extended the Tribunal's authority, through creation of the Office of the Defender of the Fund, to serve a prosecutorial role as well."⁶ Neither the reasoning underlying this statement nor any arguments in support of it are set forth in the Brief. Neither are there any arguments made on the question of authority stated in the Notice of Appeal. Further, both the statement and the question ignore the finite nature of the Fund⁷ and the Section 177 Agreement's recognition of the

⁴The Notice of Appeal filed herein did not mention the Tribunal's denial of a Motion To Intervene filed by a number of Rongelap adult residents. Hence, that matter is not considered by this Court.

⁵The question stated in the Notice of Appeal was:

"4. Whether the legislative grant of authority to the Office of the Defender of the Fund, to initiate and prosecute the underlying complaint herein on its own behalf, is inconsistent with, in violation of, and outside the scope and authority bestowed upon the Nuclear Claims Tribunal by the Section 177 Agreement to the Compact of Free Association."

⁶Op. Br. p. 12.

⁷See the Section 177 Agreement, Article I, Section 1, identifying the \$150,000,000 (the "Fund") to be provided by the United States as the means to address the consequences of the Nuclear Testing Program "in perpetuity," and Section 1(d) prohibiting disbursements from the Fund (as distinguished from earnings, that is, "Annual Proceeds," of the Fund), except as "required" by the Agreement, so as to achieve "a perpetual means" of addressing needs resulting from the Nuclear Testing Program.

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fact that the Fund would need to be protected against unfounded, excessive or spurious claims.⁸ The Court need not reach the question whether the “prosecutorial role” assigned to the Defender exceeded the Nitijela’s (or the Tribunal’s) authority, nor need it reach the question whether conditions precedent to initiation of a claim by the Defender of the Fund were met,⁹ because the Decision and Order this Court is asked to review were the result of proceedings initiated by individual recipients of Rongelap LDA payments, who were later joined by the Defender of the Fund and other individual complainants.¹⁰

The Tribunal’s injunction against use of the loan proceeds.

Appellants assert that the Tribunal’s exercise of authority over the bank loan proceeds exceeded its jurisdictional authority under the NCT Act. The theory, apparently, is that since the Tribunal was established to deal only with the Fund, it has no jurisdiction to deal with money obtained from another source by an LDA. This analysis ignores the fact that the Tribunal’s injunction ran, not against the loan proceeds, but against the Rongelap LDA with respect to its use of those proceeds.

LDAs are the organizations designated to receive, distribute, invest or otherwise expend funds provided pursuant to the Section 177 Agreement or the NCT Act. NCT Act, § 2(g), as relettered by Marshall Islands Nuclear Claims Tribunal (Amendment) Act of 1989 (the “1989 Amendment”), and as amended by Marshall Islands Nuclear Claims Tribunal (Amendment) Act 1990 (the “1990 Amendment”).

[5] The Tribunal has broad authority with respect to LDAs. It has the power to require them to put into writing the distribution schemes adopted by them and any proposed changes thereto

⁸See the Section 177 Agreement, Article IV, Section 2, recognizing that costs of proceedings before the Tribunal would include “the cost of defending the Fund.”

⁹See NCT Act, § 18(b), as amended by Marshall Islands Nuclear Claims Tribunal (Amendment) Act 1990, P. L. 1990-101.

¹⁰Decision and Order, at Page 3.

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(NCT Act, §§ 12(a) and (b)) and to put into writing and give notice of proposed assignments of future proceeds (NCT Act, § 12(d)). It has the duty to decide claims challenging distribution schemes and the LDAs administration of them (NCT Act, §§ 5(b) and (c)). It has the power to issue orders suspending any or all distributions by an LDA and to dissolve, place in receivership or replace an LDA (NCT Act, §§ 6(4)(g) and (h), as renumbered by the 1989 Amendment and amended by the 1990 Amendment). These powers authorize the Tribunal to halt the distribution by an LDA of borrowed funds representing an advance against future proceeds.

Conclusion.

With the possible exception that the Tribunal has lacked consistency in its interpretation of the meaning and effect of provisions for public notice, it has not been made to appear that any of the issues to be considered on appeal is *prima facie* a defect of the nature delineated in § 17(7) of the Marshall Islands Administrative Procedures Act 1979. Therefore, this Court declines to entertain the appeal.

S. Joshua Berger, Defender of the Fund, and William Graham, Public Advocate,
for Complainants-Appellees

E. Cooper Brown for Respondent-Appellant

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

LEMARI, et al.,

Plaintiff-Appellants,

-v-

BANK OF GUAM,

Defendant-Appellee.

S.CT. CIVIL No. 92-03

(High Ct. Civil No. E-1992-011)

ORDER DISMISSING APPEAL

DECEMBER 17, 1992

ASHFORD, C.J.

SUMMARY:

The High Court denied Appellant's motion for a jury trial and certain oral rulings. The Supreme Court dismissed the appeal since the orders appealed from were interlocutory and not final and appealable.

DIGEST

1. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: A final judgment or order is one that disposes of the case, whether before or after trial. After such an order or judgment, there is nothing further for the trial court to do with respect to the merits and relief requested.
2. APPEAL AND ERROR – *Same – Same*: The Constitution, statutes, rules and caselaw in this jurisdiction establish that only a final adjudication, however styled, can be appealed. Article VI, Section 2(2) of the Constitution states that appeals lie to the Supreme Court only from “final decision(s).”
3. APPEAL AND ERROR – *Same – Same*: The Supreme Court has consistently held that appeals from interlocutory orders will not be entertained.

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The Notice of Appeal in this matter stated that it was “from that certain Order entered in this action on the 14th day of October, 1992 and those various oral rulings made in the hearing on the 12th of October, 1992.”

There may be circumstances in which this Court would consider an oral ruling to be final and appealable, but they would be exceptional. Among other reasons, courts do not entertain appeals from oral rulings because of the lack of certainty as to the precise language of the rulings and the fact that until written, signed and filed, they are always subject to change and, ordinarily, do not take effect.

The Order filed October 14, 1992 denied Plaintiffs’ demand for a jury trial and struck that demand from the Complaint. In response to an Order of this Court, the parties filed memoranda addressing the question whether the October 14 Order is a final judgment or order appealable as of right. This Court has concluded that it is not.

[1] The U.S. Supreme Court has stated that “(n)o self-enforcing formula defining when a judgment is ‘final’ can be devised.” *Republic Natural Gas v. Oklahoma*, 334 U.S. 62, 67, 92 L.Ed. 1212, 1219 (1947). It has also recognized that the considerations that determine finality must take into account the interest of the court in maintaining the smooth functioning of the judicial system as well as the interests of the parties. *Id.* at 69, 92 L.Ed. at 1220. In general terms, however, a final judgment or order is one that disposes of the case, whether before or after trial. After such an order or judgment, there is nothing further for the trial court to do with respect to the merits and relief requested. The Order of October 12, 1992, was not a final order disposing of the case because it remains to be tried or otherwise be determined by the Court.

Appellants have urged this Court to acknowledge the policy underlying and to subscribe to the conditions under which interlocutory appeals may be taken to United States courts of appeal under the provisions of 28 USC 1292. Paragraph (a) of that statute expressly confers jurisdiction on courts of appeal to hear appeals from interlocutory decisions involving injunctions, receiverships and admiralty jurisdiction. Paragraph (b) of that statute permits a court of appeal, in its discretion, to accept an interlocutory appeal when an order is certified by the trial

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judge to involve “a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal . . . may materially advance the ultimate termination of the litigation.”

[2] The Republic has no similar statute, however, nor any rule allowing interlocutory appeals. Further, all of the Constitution, statutes, rules and caselaw in this jurisdiction establish that only a final adjudication, however styled, can be appealed. Article VI, Section 2(2) of the Constitution states that appeals lie to the Supreme Court only from “final decision(s).” The Civil Procedure Act, 29 MIRC Ch. 1, Section 31, provides that appeals may be taken within 30 days after entry of “the judgment, order or decree appealed from.” The Marshall Islands Appellate Rules of Procedure contemplate only appeals from judgments (Rules 3 and 4), but also recognize that the order, decree or other action of the court disposing of a case with finality is appealable (Rule 8), absent some statutory limitation on the right to appeal. As to the latter, see, for example, 29 MIRC Ch. 1, Section 32(1).

[3] Finally, this Court has consistently held that appeals from interlocutory orders will not be entertained. *MIDC and Leon v. MALGOV and RMI*, 1 MILR (Rev.) 209 (Sep 10, 1990); *Piamon v. Lanitur-Bulele*, 1 MILR (Rev.) 129 (Jun 9, 1989); *RMI v. Balos, et al. (4)*, 1 MILR (Rev.) 133 (Jul 17, 1989).

The appeal is dismissed.

**IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS**

**REPUBLIC OF THE MARSHALL
ISLANDS,**

S.CT. CRIMINAL No. 92-01
(High Ct. Crim. No. 1991-039)

Plaintiff-Appellee,

-v-

ANTARI JASON,

Defendant-Appellant.

ORDER ALLOWING WITHDRAWAL OF APPEAL

JANUARY 13, 1993

ASHFORD, C.J.

On motion of Appellant Antari Jason, the appeal herein commenced by the filing of Notice of Appeal on February 26, 1992, in the High Court, is permitted to be withdrawn.