

# **REPORTS OF INTERNATIONAL ARBITRAL AWARDS**

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## **RECUEIL DES SENTENCES ARBITRALES**

**Benson Robert Henry (United States) v. Great Britain (Fijian Land Claims)**

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BENSON ROBERT HENRY (UNITED STATES) *v.* GREAT BRITAIN*(Fijian Land Claims. November 2, 1923. Pages 599-605.)*

CESSION OF SOVEREIGNTY, ANNEXATION: PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO.—EVIDENCE: BURDEN OF PROOF. Cession of sovereignty over Fiji Islands by native chiefs in 1874. Petition presented by Henry, United States citizen, for Crown grant to 480 acres in island of Fiji. Petition disallowed by Governor in Council in 1887. Claim for compensation made before Tribunal. Burden of proof: claimant must prove that on date of cession of sovereignty he was proprietor in his own right of 480 acres in question. *Held* that no evidence brought to that effect.

*Cross-reference:* Am. J. Int. Law, vol. 18 (1924), pp. 821-827.

This is a claim for compensation, preferred by the Government of the United States of America on behalf of one, Benson Robert Henry, an American citizen, arising out of the disallowance of his title to 480 acres of land in the island of Fiji. We propose to state the facts of this case only in detail sufficient to explain the character of the claim and to elucidate our decision which turns, as will presently appear, on one single question, namely, whether on October 10, 1874, the date of the cession of Fiji to Great Britain, the claimant was, in his own right, proprietor of the lands in question or any part of them.

In September, 1855, Commander Boutwell, of the United States Navy, whose ship was then visiting Levuka, imposed upon the chief Cakobau the payment of about £9,000 as compensation for destruction and theft by Fijian natives of property belonging to American citizens. This sum was to be paid in 12 months. In 1867 only a small portion of it had been paid; and on July 12 of that year Cakobau signed a document hypothecating certain lands as security for payment of the balance.

In 1868 two gentlemen, by name Brewer and Evans, arrived in Fiji from Melbourne as agents for the Polynesia Company, Limited, of Melbourne, then about to be formed; and on July 23, 1868 a charter was granted them, as such agents, by Cakobau, who is chief signatory, with the ratification and confirmation of six principal chiefs under Cakobau.

By the material portion of that charter, Brewer and Evans undertook on behalf of the said company to provide for the payment of the compensation, already referred to, to the United States of America; and, in consideration thereof, Cakobau ceded, granted, and transferred to Brewer and Evans as trustees for the said proposed company about 200,000 acres of land as specified in the schedule. Paragraph 4 of the schedule is as follows:

"4. Also Suva, its harbour, territories, and district, commencing from Lami, running along the coast towards Rewa, to the township of Kalabo, and running inland to the Waimanu" (memorial, p. 259).

The lands so described include those in respect of which Henry's claim arises.

This charter was accompanied by the following agreement:

"The Company agree not to alienate any of the land until the whole of the American debt is paid. Should the amount not be paid within the time specified in the agreement of the Company with Dr. Brewer, the land reverts to King Thakombau" (memorial, p. 259).

On the following day, July 24, Evans and Brewer executed an agreement under seal, by which they undertook to pay the balance of the compensation due from Cakobau to the United States of America, the first instalment on their return to Melbourne, the second and final instalment on or before July 24,

1869. These instalments were, in fact, paid by the Polynesia Company, Limited, on July 13, 1869, and on November 19, 1870, respectively.

By a deed dated July 13, 1869, Cakobau and one Natika, with the ratification and confirmation of nine other chiefs and landowners, who also signed, conveyed to the Polynesia Company, Limited, certain lands at Suva to the extent of about 27,000 acres, wherein were included the 480 acres in respect of which this claim for compensation is made.

The Polynesia Company, Limited, having been formed, issued its regulations in November, 1869, under which land warrants were to be issued to shareholders entitling them to "select" lands in districts declared by the Company "open for settlement". The Suva lands were declared open for settlement. No shareholder might make more than one frontage selection in the Suva district; and any selection with a sea frontage was limited to 160 acres.

On August 12, 1870, Jacob Brache, a director of the Polynesia Company, Limited, T. Copeland and the claimant Henry entered into the following agreement at Melbourne:

*"Articles of Agreement"*

"Melbourne, Australia

"August 12, 1870

"We, the undersigned Jac. Brache and T. Copeland and B. R. Henry, do agree to associate ourselves together for the purpose of selecting land in Fiji from shares and land warrants of the Polynesian Company Limited now held by the said Jac. Brache and for said purposes do hereby agree to send B. R. Henry to Fiji to select and locate upon such lands as he may deem best for agricultural purposes and we further agree to give to B. R. Henry in consideration of his services when the association is entered in and agreed to, one-third of one hundred and sixty of the above-named shares, and Thos. Copeland agrees to pay J. Brache one hundred and forty pounds sterling for eighty of the above shares if the said B. R. Henry reports that land can be cultivated in Fiji profitably and to the mutual advantage of each of the undersigned.

"J. Brache (in trust)

"T. Copeland

"B. R. Henry"

(in memorial, p. 264).

On the same day, in pursuance of this agreement. Henry signed a receipt in these terms:

"Melbourne, August 12, 1870.

"Received from Mr. Jacob Brache one hundred and sixty shares in Polynesia Company Limited with land warrants for six hundred and forty acres and also, warrants for six town lots, such shares and warrants to be held in trust by the undersigned in accordance with the Articles of Agreement between Jacob Brache, Thomas Copeland, and Benson Robert Henry, dated August 12, 1870; also another warrant for six town lots by the Polynesia Company Limited in the name of Franz Bleaker and are in the name of Charles Brache all the above mentioned shares and land warrants to be held in trust by the undersigned.

"B. R. Henry

"Numbers of issue of shares, viz.: 504, 505, 507, 508, 509, 510, 511; 17 land warrants, viz.: 382, 129A, 190A, 466, 468, 469, 470, 471, 472, 473, 214A, 189A" (memorial, p. 268).

This document is ungrammatical and confused; and the number of warrants specified in the footnote is irreconcilable with the receipt itself. In our opinion, the first sentence of the receipt refers to the four land warrants Nos. 586, 587, 588 and 589 hereinafter mentioned.

In December, 1870, the claimant Henry and Copeland arrived in Suva and selected four lots of 160 acres each, represented by warrants numbered 586 to 589 inclusive. Two contiguous lots, the warrants for which were numbered 586 and 588 fronted on the Tamavua River, and are hereinafter referred to as the Tamavua Block; two other contiguous lots, further south, fronting on Sauva Harbour, are hereinafter referred to as the Harbour Block, and were covered by warrants 587 and 589.

Warrant No. 586 passed into the possession of Jacob Brache and was lost. The land held thereunder formed the subject matter of a conveyance from the Polynesia Company, Limited, to the claimant Henry date April 12, 1875. Warrant No. 588 is made out to Charles Brache and his assigns, and is endorsed under date of December 23, 1870, by Henry, as attorney for Charles Brache, to Copeland. Warrant No. 587 is made out to Henry and his assigns and is endorsed with an assignment in blank by Henry, also under date of December 23, 1870, thus becoming negotiable. Warrant No. 589 is made out to T. Copeland and his assigns and is not endorsed. It is with the 480 acres under warrants 586, 587 and 588 that this claim is concerned.

On July 29, 1873, Henry and Copeland executed a power of attorney to Jacob Brache, authorizing him, *inter alia*:

"... for us and in our names and as our names and as our acts and deeds to sign, seal and deliver all deeds and documents, receipts &c. and receive all moneys, lands, warrants, and conveyances of land to which we may become entitled in virtue of our shares in the Polynesia Company Limited and selections made by us in Suva, Fiji, under the regulations of the aforesaid company, also to vote and act for us at all meetings of the Polynesia Company Limited and to sue and be sued in our behalf (in all matters relative to the aforesaid company)..." (memorial, p. 279).

On August 12, 1873, Jacob Brache, acting under this power, assigned all right, title, and interest of Copeland and Henry in both the Harbour and Tamavua Blocks to Charles Brache, to be held in trust for a certain proposed company until certain payments were made to Jacob Brache by Henry and Copeland. There is no evidence that these payments were ever made.

In April, 1874, Henry pledged the Harbour Block warrants, Nos. 587 and 589, to one Simmonds for £ 45, and shortly afterwards in that year left Fiji; nor, except that he is alleged to have been subsequently in communication with his attorney in Fiji, Mr. Scott, is he heard of again till 1898, when, in connexion with proposed action by the United States State Department on his behalf in the matter of his Fiji land claims, he swears in Oregon an affidavit containing statements of doubtful accuracy.

In October, 1874, Fiji was ceded to Great Britain and the Lands Commission was instituted by Great Britain to inquire into existing land titles in Fiji in accordance with the undertaking contained in the deed of cession.

In December, 1874, Jacob Brache redeemed the pledged Harbour land warrants from Simmonds, who enclosed a receipt to Brache in the following letter:

*"Receipt for £ 43. 17s. 5d.*

"Mr. Jacob Brache

"Dear Sir,

December 7, 1874

"I hereby acknowledge to have received from you (and for which you have a separate receipt) the sum of £ 43. 17s. 5d. for money advanced by Mr. W. Simmonds, of Suva, to Mr. B. R. Henry, of Suva, on certain warrants of land selected by him for you, and which said warrants I have handed to you.

"Yours truly,

"C. SIMMONDS"

(British answer p. 9).

The suggestion underlying this letter, that the original selection of Suva lands by Copeland and Henry was made on behalf of Jacob Brache, is repeated in another letter written to Jacob Brache by Copeland, which is in these terms:

"My dear Mr. Brache,

Levuka, June 21, 1875.

"Yours of the 31st ultimo to hand. I enclose you the power of attorney, signed as requested, and sincerely trust you will come out of the Polynesia 'spec' all right.

"T. A. COPELAND

"P.S. The Governor and Land Commissioner have arrived. I shall put in my application for the Suva Block, and send you full power of attorney. It is the only way left to secure you the block" (answer, p. 10).

And again, in a letter to the Commissioner of Lands, Fiji, dated Melbourne, September 28, 1875, Jacob Brache, referring to Copeland's 160 acres of the Harbour Block, writes:

"... As I am the holder of the said warrant under assignment, the title for such land must naturally pass in my hands" (answer, p. 12).

Some correspondence between Jacob Brache and the Lands Commission ensued; and on January 13, 1876, Jacob Brache, as attorney for one Alfred Asbeck, presented a petition for a Crown grant in respect of the Harbour Block alleging therein that Asbeck on September 1, 1873, had purchased these lands from Copeland and Henry and had paid £ 160 for them. This petition was heard in March, 1878, and, no evidence being offered, was disallowed.

On January 28, 1880, Jacob Brache preferred two more petitions to the Lands Commission, one, as attorney on behalf of Henry and Copeland, in respect of the Harbour Block of 320 acres; another, on behalf of Henry, in respect of the Tamavua Block of 320 acres. The two petitions were heard and were disallowed by the Governor in Council on January 31, 1882. The Tamavua Block petition was reheard and dismissed on August 21, 1883. In connexion with the rehearing of the Harbour Block petition, a question was raised as to the authority of Mr. Jacob Brache to represent Henry and Copeland. The point was argued before the Council on November 23, 1886, when Mr. Scott, as counsel for the petitioners, states that he appeared in a twofold position, representing Brache: (1) as attorney for Henry and Copeland; (2) as being pecuniarily interested in the claim (answer pp. 194, 195). This petition, as being one in which the Crown had an interest, was referred, under ordinance XXV, of 1879, to the Acting Chief Justice, who delivered an opinion to the effect that the claim be disallowed. This opinion was confirmed and the petition

disallowed by the Governor in Council on September 12, 1887. These appear to us to be all the facts necessary for the decision of this claim.

For the purpose of our decision we make the following assumptions:

1. That Cakobau and his co-signatories gave a valid title in the Suva lands to the Polynesia Land Company Limited.
2. That the Polynesia Land Company Limited gave to their transferees valid titles in the Suva lands.
3. That a land warrant was a good muniment of title, whether perfected by a conveyance or not.
4. That no breach of the regulations of the Polynesia Land Company Limited had been committed.
5. That the title of the transferees of the Polynesia Land Company Limited was not affected by the fact that the payment of the second instalment of the indemnity by the Polynesia Land Company to the United States of America was made 16 months after the appointed date.

We now address ourselves to the decisive question:

Was the claimant Henry on October 10, 1874, the date of the cession of Fiji to Great Britain, proprietor, in his own right, of the 480 acres of land in question or of any part of them?

The onus of satisfying the Tribunal on this point lies on the claimant.

Our answer to that question is in the negative.

The reasonable inference in our opinion to be drawn from Henry's operations and conduct, viewed in the light of the documents, and, in particular, of:

- (1) The land warrants themselves;
- (2) The agreement between Jacob Brache, Copeland and Henry dated August 12, 1870 (memorial, p. 264);
- (3) The receipt signed by Henry dated August 12, 1870;
- (4) The assignment by Jacob Brache to Charles Brache dated August 12, 1873 (memorial, p. 316);

is that Henry was acting from the beginning, whether he be correctly described as trustee or as agent, not on his own behalf. In any case, the evidence falls far short of discharging the onus of proof which is imposed upon the claimant.

But, further, even if it be assumed that, in the first instance, Henry acquired these 480 acres of land for himself, having regard to the facts and documents already referred to and to the sale on September 1, 1873, for valuable consideration of Henry's 160 acres of the Harbour Block to Alfred Asbeck (answer, p. 14), we can not, in the absence of any explanation of these transactions by Jacob Brache, find ground to warrant us in making any award in favour of the claimant.

*Now therefore:*

The decision of the Tribunal in this case is that the claim of the Government of the United States of America be disallowed.

## HEIRS OF JOHN B. WILLIAMS (UNITED STATES) v. GREAT BRITAIN

(*Fijian Land Claims. November 8, 1923, Pages 606-611.*)

CESSION OF SOVEREIGNTY, ANNEXATION: PRIVATE PROPERTY RIGHTS ACQUIRED  
PREVIOUS TO.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—