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Isaac M. Brower (United States) v. Great Britain (Fijian Land Claims)

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Now, therefore:

The decision of the Tribunal in these cases is:

(1) *Laucala.* That the claim of the Government of the United States of America be disallowed.

(2) *Nukulau.* That the claim of the Government of the United States of America be disallowed.

(3) *Nukubalavu.* That the British Government shall pay to the Government of the United States of America the sum of £ 150.

ISAAC M. BROWER (UNITED STATES) *v.* GREAT BRITAIN

(Fijian Land Claims. November 14, 1923. Pages 612-616.)

CESSION OF SOVEREIGNTY, ANNEXATION: PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO—.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—EFFECTIVE OCCUPATION. Purchase in 1863 by two United States citizens of six small islands in Fiji from Fiji chieftain. Purchase in 1870 of a half interest in same islands by Brower. United States citizen. Cession of sovereignty in 1874 by native chiefs to Great Britain. Subsequent claim for Crown grant presented by Brower disallowed in 1881. *Held* that chieftain had power to give title (reference made to Burt case, see p. 93 *supra*) and that, since islands never had been inhabited, no question as to their effective occupation by Brower could arise.

CONTRACT: INTERPRETATION, MOST REASONABLE VIEW.—PRESENTATION OF CLAIM ON BEHALF OF INTERESTED PARTY. Terms of arrangement entered into by Brower with two individuals some time before disallowance of claim for Crown grant. In the absence of precise facts, the Tribunal interpreting the arrangement takes the most reasonable view. *Held* that title to a half interest was properly vested in Brower at time of cession of sovereignty and at date of filing of claim before Tribunal and that Great Britain, as succeeding Power in the islands, under the obligation assumed at time of cession should have recognized title.

DAMAGES: SPECULATIVE AND PRECARIOUS VALUE, NOMINAL DAMAGES. Since value of islands rested entirely upon rumour of buried treasure, only nominal damages awarded.

Cross-reference: Am. J. Int. Law, vol. 18 (1924), pp. 832-835.

This claim is presented by the United States on behalf of Isaac M. Brower for the sum of $1,250, with interest. It arises out of the disallowance of Brower's application for a Crown grant to certain lands in Fiji. The facts are as follows:

In 1863, two American citizens, Thompson and Gillam, purchased from a Fiji chieftain known as Tui Cakau a group of small islands, six in number, forming a part of the Fijian group. The islands were designated on the charts as the Ringgold Islands, the native appelation being Yanuca-i-Lau, meaning "bad islands". They were not inhabited. Not more than three of them were of any potential value, the rest being described as "mere rocks" (memorial, p. 439) or "sand banks" (memorial, p. 424). The natives appear to have gone there intermittently to get turtles.

The circumstances surrounding the purchase were somewhat peculiar. Gillam and Thompson came to Fiji apparently with the idea that buried

treasure existed on these islands. They first consulted with Brower, United States Consul, who directed them to Tui Cakau as the owner. They then bought the islands from Tui Cakau, paying $250, in Chilean ten-dollar gold pieces. The purchasers at once went to the islands and spent about two months digging over the ground evidently in a vain search for treasure. At the end of this period they abandoned the enterprise and went away from Fiji, leaving in Brower's hands a blank deed of sale. Brower subsequently sold under this deed to one Barber, who put an agent named Macomber in charge to maintain a sort of constructive possession with the intention of some day going there to occupy them (memorial, p. 423).

In 1870, Brower bought a half interest from Barber for the sum of £ 30, and in 1873 the remaining half interest was sold to one Halstead.

On October 23, 1875, immediately after the cession of Fiji to Great Britain, Brower and Halstead applied for a Crown grant. In November, 1880, the application was denied by the Land Commissioners on the grounds of: (1) insufficient and fictitious occupation; (2) long-continued adverse occupation (memorial, p. 421).

In 1881, at the request of Brower, there was a rehearing at which further evidence was adduced, and in October of that year a final judgment of disallowance was rendered.

Upon the final hearing in 1881, the attorney for Brower and Halstead asked leave to amend the petition and to substitute the names of two half-castes called Valentine for that of Brower, and the amendment was allowed (memorial, p. 431).

Some three years previously it seems that Brower had entered into some arrangement, the terms of which are not found in the record, for the disposal of his interest to the Valentines for the sum of £ 100. After the failure to secure a Crown grant the Valentines sued Brower in the Supreme Court of Fiji for the repayment of the £ 100, and in August, 1884, recovered judgment. This phase of the subject is dealt with as follows in the report made by George H. Scidmore, United States Special Agent:

"Previous to the hearing of this claim by the Fiji Land Commission Brower entered into a contract with William Valentine and his two brothers (half-castes by an American father and native mother) for the sale of his (Brower's) interest in the islands, and received from the Valentines £ 100. Brower prosecuted the claim before the Commission in his own name, but failed to obtain a Crown grant. He was subsequently sued in the Supreme Court of Fiji by the Valentines for the repayment of said £ 100, and, in August, 1884, they recovered judgment for that amount, with interest and costs" (memorial, p. 433).

On these facts it is contended by counsel for Great Britain: first, that good title to the islands was never secured because Tui Cakau had no power to dispose of them; and second, that in any event no recovery in Brower's favour can be had because before final judgment in the proceedings for a Crown grant he had withdrawn in favour of the Valentines.

On the question of the chief's power to give title we are of opinion that the facts bring this case within the principles laid down in the decision of the Burt case already made by this Tribunal. Tui Cakau was conceded to be the paramount chief of the district in which the Ringgold islands lay. Quoting again from the Scidmore report:

"Tui Cakau was paramount chief of Cakau-drove, and these islands were within his dominions. His capricious will was the supreme law there, and the time, labour, property, wives, children and lives of his people were at his mercy" (memorial, p. 434).

The final judgment of disallowance states:

"We do not doubt that the purchase in question was honestly made nor that any rights which attach to the possession of the deed has, after passing through several hands properly vested in the present claimants. We are however of opinion that Tui Cakau had no right to sell these lands without the consent of the taukeis . . ." (memorial, p. 431).

The right of the paramount chiefs to sell without taukei consent has been fully dealt with in the opinion in the Burt case already mentioned.

It is hardly necessary in this connexion to discuss the subject of occupation, for a careful examination of the record discloses nothing rising to the dignity of effective occupation either by natives or by the purchasers, although there is evidence indicating that the latter took steps to maintain possession by placing their agents from time to time upon the islands, and that Tui Cakau at their request on one or two occasions undertook to keep the natives off. The islands were to all intents and purposes uninhabited. We consider, therefore, that the title was vested in Brower and Halstead at the time of the cession to Great Britain.

The issue founded upon Brower's alleged withdrawal from the situation requires especial attention. Did the subsequent proceedings, particularly the Valentine transaction, operate to defeat his claim? We are somewhat in the dark as to just what took place between Brower and the Valentines. According to Scidmore, a contract for the sale of Brower's interest was entered into. Whether there was an out and out conveyance by deed is not clear. It may have been an arrangement conditioned upon the final issuance of a Crown grant. Whatever it was we may assume that the Valentines were regarded as the real parties in interest at the time of the substitution in 1881. The effect of the transaction was manifestly a matter of dispute; otherwise the subsequent litigation between Brower and the Valentines would not have taken place. It is contended that if Brower made a sale and the title failed because of the refusal to issue a Crown grant a proper pleading of this act of the State would have been a perfectly good defence to the Valentine suit for recovery of the purchase price and that therefore title can not be regarded as having properly revested in Brower. The difficulty with this contention is that facts sufficient to support it are not before us. We do not know what the precise arrangement with the Valentines was: we do not know whether they brought suit for damages for breach of contract to convey or whether they sued for recovery of the purchase money under some condition expressed in the deed. We do not know whether the plea above referred to was made and disallowed by the Court, or whether Brower neglected to take advantage of such a defence, if it existed. It seems idle to speculate on these matters in the absence of the facts. The most reasonable view is that Brower did try to dispose of his interest; that the transaction was upset by the failure to secure a Crown grant and that the final result was to place him exactly where he stood in the beginning. The effort to sell was abortive and he was obliged to pay back what he had received. We find no evidence that the title definitely passed to the Valentines and remained in them; but their complete disappearance from the situation raises an obvious presumption against the supposition that Brower's interest actually passed to them.

We hold that the title to a half interest in the Ringgold islands was properly vested in Brower at the time of the cession to Great Britain; that this title should have been recognized by Great Britain as the succeeding Power in the islands under the obligation assumed at the time of the cession; and that Brower was the holder of the title at the date of the filing of the claim against Great Britain by the United States.

Passing to the question of damages, it is plain that the islands forming the subject matter of this claim had only a speculative and precarious value. Nobody had ever taken the trouble to occupy and settle upon them. There is no evidence of any improvements. In their natural state they apparently formed only a fishing ground for turtle. The chart indicates that they were little more than reefs or points of rock. Their value apparently rested entirely upon a rumour of buried treasure. The original purchase for a fantastic consideration paid in gold pieces is explainable on no other theory. The subsequent dealings were clearly based upon the same speculative consideration. The treasure tradition evidently persisted and the same fictitious valuation is reflected in the purchase by Brower of a half interest for £ 30, and in the purported transfer of that interest to the Valentines for £ 100. With the lapse of time the islands as such did not assume any real value, for as late as 1898, Mr. Allardyce, the Colonial Secretary and Receiver-General, made the following report upon them:

"These are six small islands of the Ringgold group. They are mere islets with a few cocoanut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them" (answer, p. 11).

In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages.

Now, therefore:

The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.

EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED (GREAT BRITAIN) *v.* UNITED STATES

(November 9, 1923. Pages 73-81.)

SEA WARFARE.—DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—SUBMARINE CABLES, INTERNATIONAL CONVENTION FOR THE PROTECTION OF—, GENERAL PRINCIPLE OF INTERNATIONAL LAW, COMMUNICATIONS OVER HIGH SEAS, NEUTRALS, CONTRABAND, BLOCKADE. Destruction by United States naval authorities on May 2, 1898, in Manila Bay, during Spanish-American War, of submarine cables owned by neutral company *held* legitimate. Unlimited right of destruction in time of war recognized by article 15 of International Convention for the Protection of Submarine Cables of 1884. Such right also based upon general principle of international law entitling belligerent to deprive enemy of communications over high seas, whether or not communications kept up by neutrals (contraband, blockade).

NECESSARY WAR LOSSES.—REQUISITION, EXPROPRIATION, ANGARY, SEIZURE OF NEUTRAL-OWNED CARGO.—NEUTRALITY AND PUBLIC SERVICE.—INTERNATIONAL CHARACTER OF SUBMARINE CABLES.—EQUITY, COMITY, AWARENESS OF RISK, DISCRIMINATION BETWEEN (1) ALIENS, (2) OWN NATIONALS AND ALIENS. Destruction in time of war of neutral-owned submarine cables *held* not to give rise to legal right of compensation. No analogy with requisition, expropriation, or exercise of right of angary. No analogy either with seizure