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George Rodney Burt (United States) v. Great Britain (Fijian Land Claims)

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It results from the documents (United States memorial, p. 181) that Jesse Lewis was a poor, aged man, who was possessed of no means of any moment or value other than the said schooner, that his wife was an invalid, and that after his vessel was seized he was compelled to go to sea to earn a living for himself and his wife (United States memorial, p. 183). And, further, he appears as having been perfectly innocent of his master's conduct, whom he had expressly prohibited from entering Canadian ports, as it has been shown.

It is true, the proceedings which resulted in the confiscation of the *David J. Adams* constituted an *actio in rem* against the vessel and not against the owner; but finally all the consequences of the affair were inflicted on the owner and his abandonment of his right of appeal which might have succeeded as to the penalty, seems to have been partly due to his absence of pecuniary means.

Under these circumstances, this Tribunal thinks it is its duty to draw the special attention of His Britannic Majesty's Government to the loss so incurred by Jesse Lewis and it ventures to express the desire that that Government will consider favorably the allowance as an act of grace to the said Jesse Lewis or to his representatives, on account of his unfortunate misfortune, of adequate compensation for the loss of his vessel and the damages resulting therefrom. That compensation, this Tribunal earnestly urges upon the attention of the British and Canadian Government.

For these reasons

The tribunal decides that, with the above recommendation, the claim presented by the United States Government in this case be disallowed.

GEORGE RODNEY BURT (UNITED STATES) *v.* GREAT BRITAIN

(Fijian Land Claims. October 26, 1923. Pages 588-598.)

CESSION OF SOVEREIGNTY, ANNEXATION, SUCCESSION OF STATES: PRIVATE PROPERTY RIGHTS ACQUIRED PREVIOUS TO.—INTERPRETATION OF (PRIMITIVE) MUNICIPAL LAW.—EVIDENCE.—DENIAL OF JUSTICE: GOOD FAITH, PROCEDURE, VIOLATION OF LAW. Purchase in 1868 by Burt, United States citizen, of 3,750 acres in Fiji Islands from native chiefs. Evidence: three deeds and certificate. Cession of sovereignty in 1874 by native chiefs to Great Britain. Burt's claim for recognition and respect of property rights in 1884 disallowed by British Governor in Council on the ground that native chiefs had no power to grant private title to lands. *Held* by Tribunal that chiefs had such power and that title, originally valid, had subsisted, since evidence shows no abandonment of claim by Burt. *Held* also that Great Britain, though its authorities were bona fide and procedure employed in dealing with land titles was the customary and appropriate one, by refusing to recognize title failed to carry out obligation which, under international law, it assumed as succeeding Power in the islands: Tribunal looks only to general result which was reached.

DAMAGES: ACCURATE DETERMINATION. LOST PROFITS, LUMP SUM. The amount of damages necessarily unsusceptible of accurate determination (speculative valuation, prospective profits). lump award made.

Cross-references: Am. J. Int. Law, vol. 18 (1924), pp. 814-821; Annual Digest, 1923-1924, pp. 78-79.

Bibliography: Annual Digest, 1923-1924, p. 79.

I. On the tenth day of October, 1874, Great Britain acquired by peaceful cession "the possession of and full sovereignty and dominion over" the Fiji Islands. The deed of cession executed by Thakombau (or Cakobau), the then reputed overlord Chief or King in Fiji, and by twelve other natives styled the "high chiefs" of the islands reads as follows:

Whereas, divers subjects of Her Majesty the Queen of Great Britain and Ireland have from time to time settled in the Fijian group of islands, and have acquired property or certain pecuniary interests therein; and whereas the Fijian Chief Thakombau, styled Tui Viti and Vunivalu, and other high chiefs of the said islands, are desirous of securing the promotion of civilization and Christianity, and of increasing trade and industry within the said islands; and whereas it is obviously desirable in the interests as well of the natives as of the white population that order and good government should be established therein; and whereas the said Tui Viti and other high chiefs have conjointly and severally requested Her Majesty the Queen of Great Britain and Ireland aforesaid to undertake the government of the said islands henceforth; and whereas, in order to the establishment of British government within the said islands, the said Tui Viti and other the several high chiefs thereof, for themselves and their respective tribes, have agreed to cede the possession of and the dominion and sovereignty over the whole of the said islands, and over the inhabitants thereof, and have requested Her said Majesty to accept such cession; which cession the said Tui Viti and other high chiefs, relying upon the justice and generosity of Her said Majesty, have determined to tender unconditionally, and which cession, on the part of the said Tui Viti and other high chiefs is witnessed by the execution of these presents, and by the formal surrender of the said territory to Her said Majesty; and whereas His Excellency Sir Hercules George Robert Robinson, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Governor, Commander in Chief, and Vice Admiral of the British Colony of New South Wales and its dependencies, and Governor of Norfolk Island, hath been authorized and deputed by Her said Majesty to accept on her behalf the said cession:

Now these presents witness.

1. That the possession of and full sovereignty and dominion over the whole of the group of islands in the South Pacific Ocean known as the Fijis (and lying between the parallels of latitude of fifteen degrees south, and twenty-two degrees south of the Equator, and between the meridian of longitude of one hundred and seventy-seven degrees west, and one hundred and seventy-five degrees east of the meridian of Greenwich), and over the inhabitants thereof, and of and over all ports, harbours, havens, roadsteads, rivers, estuaries, and other waters, and all reefs and foreshores within or adjacent thereto, are hereby ceded to and accepted on behalf of Her said Majesty the Queen of Great Britain and Ireland, her heirs and successors, to the intent that from this time forth the said islands and the waters, reefs, and other places as aforesaid, lying within or adjacent thereto, may be annexed to and be a possession and dependency of the British Crown.

2. That the form or constitution of government, the means of the maintenance thereof, and the laws and regulations to be administered within the said islands, shall be such as Her Majesty shall prescribe and determine.

3. That, pending the making by Her Majesty, as aforesaid, of some more permanent provision for the government of the said islands, His Excellency Sir Hercules George Robert Robinson, in pursuance of the powers in him vested, and with the consent and at the request of the said Tui Viti and other high chiefs, the ceding parties hereto, shall establish such temporary or provisional Government as to him shall seem meet.

4. That the absolute proprietorship of all lands, not shown to be now alienated, so as to have become bona fide the property of Europeans or other foreigners, or not now in the actual use or occupation of some chief or tribe, or not actually required for the probable future support and maintenance of some chief or tribe, shall be and is hereby declared to be vested in Her said Majesty, her heirs and successors.

5. That Her Majesty shall have power, whenever it shall be deemed necessary for public purposes, to take any lands upon payment to the proprietor of a reasonable sum by way of compensation for the deprivation thereof.

6. That all the existing public buildings, houses, and offices, all enclosures and other pieces or parcels of land now set apart or being used for public purposes, and all stores, fittings, and other articles now being used in connexion with such purposes, are hereby assigned, transferred, and made over to Her said Majesty.

7. That, on behalf of Her Majesty, His Excellency Sir Hercules George Robert Robinson promises: (1) that the rights and interests of the said Tui Viti and other high chiefs, the ceding parties hereto, shall be recognized, so far as is consistent with British sovereignty and colonial form of government; (2) that all questions of financial liabilities and engagements shall be scrutinized, and dealt with upon principles of justice and sound public policy; (3) that all claims to titles of land, by whomsoever preferred, and all claims to pensions or allowances, whether on the part of the said Tui Viti and other high chiefs, or of persons now holding office under them or any of them, shall in due course be fully investigated and equitably adjusted.

In witness whereof, the whole of the contents of this instrument of cession having been, previously to the execution of the same, interpreted and explained to the ceding parties hereto, by David Wilkinson, Esq., the interpreter nominated by the said Tui Viti and the other high chiefs, and accepted as such interpreter by the said Sir Hercules George Robert Robinson, the respective parties hereto have hereunto set their hands and seals.

Done at Levuka, this 10th day of October, in the year of our Lord 1874.

(Signed) (L.S.) CAKOBAU, R.

Tui Viti and Vunivalu

(L.S.) MAAFU

(L.S.) TUI CAKAU

(L.S.) RATU EPELI

(L.S.) VAKAWALETABUA, TUI BUA

(L.S.) SAVENAKA

(L.S.) ISIKELI

(L.S.) ROKO TUI DREKETI

(L.S.) NACAGILEVU

(L.S.) RATU KINI

(L.S.) RITOVA

(L.S.) KATUNIVERE

(L.S.) MATANITOBUA

(Signed) (L.S.) HERCULES ROBINSON

I hereby certify that, prior to the execution of the above instrument of cession, which execution I do hereby attest, I fully and faithfully interpreted and explained to the ceding parties hereto, the whole of the contents of the said document (the several interlineations on p. , line , and on p. , line of the manuscript having first been made), and that such contents were fully understood and assented to by the said ceding parties. Prior to the execution of the said instrument of cession, I wrote out an interpretation of the same in the Fijian language, which interpretation I read to the several chiefs, who

one and all approved thereof. A copy of such interpretation is hereto annexed marked (A).

Dated this 10th day of October, A.D. 1874.

(Signed) D. WILKINSON
Chief Interpreter

II. Immediately after the cession, Great Britain established the appropriate machinery to investigate and pass upon the validity of titles to land. This machinery consisted of a board of land commissioners whose findings and conclusions were subject to review by the Governor in Council. Somewhat later provision was made for rehearing on a proper petition before a final Tribunal made up of the Governor and the members of his Council, with the Chief Justice of the Colony and the Native Commissioner sitting with them. It appears that between 1874 and 1882 more than 1,300 claims were thus considered and passed upon. Under the normal procedure where a claim was allowed a Crown grant covering the land involved was issued; where a claim was disallowed a Crown grant *ex gratia*, covering a portion of the land claimed, was sometimes made.

III. George Rodney Burt, a native citizen of the United States, came to the Fiji Islands in 1856 and, excepting the period from 1871 to 1874, hereinafter more particularly referred to, resided in the islands continuously until 1894. He at first carried on a general trading business and later engaged in farming on a comparatively large scale for this region. In 1862 he took up land on the upper Rewa River and is said there to have established the first real plantation in the islands. In 1866 he went to the Sigatoka River district and purchased a tract of land called Kavokai Nagasau, afterwards sold by him to a German subject who eventually obtained a Crown grant for it. In 1868 Burt purchased another tract known as Emuri and situated on the opposite side of the Sigatoka River from Kavokai Nagasau. It is the title to the Emuri tract, consisting of 3,750 acres, which is involved in this controversy.

IV. The purchase of Emuri is evidenced by three deeds and a certificate, running to Burt and his partner Underwood who was subsequently bought out by Burt. These papers are set forth in the appendix to the United States memorial at pp. 187-195. The first deed was executed on February 27, 1868, for a consideration of \$200 in merchandise. The description of boundaries being found unintelligible, a second deed, dated June 2, 1868, was executed, ostensibly to remedy this defect. The consideration in this latter instrument is given as \$220 in trade, apparently including the \$200 previously paid. Still later a third deed, dated October 28, 1868, was obtained by Burt in order to extend the boundaries of the tract. The consideration named in this final transfer is \$320 which included the \$220 already paid, and \$100 in gold paid down on the execution of the deed. The certificate referred to deals with a complication arising from a conveyance by other parties to some part of the land in question, and is a declaration by the principal chief signing the deeds to the effect that such conveyance was null and void.

The grantors in these deeds were Ratu Kini, who seems to have been at the time the undisputed paramount and ruling chief of the territory in which Emuri lies, and certain other subordinate chiefs or heads of tribes supposed to have an interest in the land. While the evidence is to some extent conflicting on the question of the voluntary execution of the deeds by some of the grantors other than Ratu Kini, and as to the receipt of any part of the consideration by such other grantors, we are satisfied that Burt and Underwood secured from the ruling chiefs such title to Emuri as they had power and right to give.

V. Burt and his partner entered into possession of the land in February, 1868, and proceeded to make substantial improvements. Buildings were erected, planting was done, and about 200 head of livestock were put on the property, approximately 500 acres being thus actually occupied during 1868 (memorial, p. 201). This occupation which the land commissioners specifically found to be "substantial" (memorial, p. 201) subsisted for some ten months when it was interrupted in January, 1869, by an incursion by a savage mountain tribe, described as the most unruly element in the islands. The buildings were burned, the land was devastated, and Burt barely escaped with his life. He went back six months later, but was not permitted by the members of this mountaineer tribe to resume operations or gather his crop of cotton; and he was, therefore, obliged to go away from the plantation and seek other remedies. Evidence produced at the hearing shows that early in 1869 Burt appealed to the United States authorities and presented a bill for damages in the sum of \$69,000 for raids and depredations of the natives, and that an investigation of the matter was conducted by Commander Truxton of the U.S. warship *Jamestown*. Commander Truxton found that Burt had been damaged to the extent of \$50,000, and referred the claim to Washington for such action as the United States Government might see fit to take. It also appears from the same evidence that at the beginning of April, 1869, Burt was in Sydney, New South Wales, attempting to raise money to resume operations in Fiji. He then went to the United States and during 1871 pressed his claim before the State Department in Washington. The proceedings before the Department were evidently protracted and it was not until June, 1873, that the final answer of the State Department was given. In substance the United States Government declined to incur the expense or risk of collecting Burt's claim, but it acceded to his request that the American Consular Agent in Fiji be directed to place no obstacle in his way.

In 1874 Burt was back in Fiji. Conditions meanwhile in the islands had manifestly remained more or less chaotic. An attempt had been made to set up an effective government through the creation of a native confederacy, but it can hardly be said that public order and a settled government, satisfactory either to the natives or to the white population, had been established. Perhaps the best evidence of this is to be found in the deed of cession of October 10, 1874, which recites the obvious desirability "in the interests as well of the native as of the white population that order and good Government should be established".

The record contains a deed dated in July, 1874, from Burt to one Ives of Coldwater, Michigan, purporting to sell Emuri for a consideration of \$10,200. It seems to be a reasonable inference that this transaction was in effect a transfer of the property as security for a loan. Evidently Ives was a personal friend; Burt left him a small sum of money in his will. Ives is not shown ever to have been in Fiji or to have had any other interest in the islands; and in 1879 he executed a deed, releasing the property to Burt for the same consideration, to wit, \$10,200. Whether this is the proper construction of the transaction or not, we are of the opinion that for the purposes of this case the situation was not essentially affected by it.

In 1875, when the title stood in Ives, Burt filed with the Board of Land Commissioners a claim for a Crown grant in Ives' name but over Burt's own signature. This claim was not pressed and was never brought on for hearing. From 1875 on for a number of years the whole subject of land titles was in the hands of the local British authorities, and claims were being considered in the order in which they were filed. The process was clearly a lengthy and somewhat complicated one. In 1879 a time limit was fixed for the filing of claims, and Burt, in that year and after the release to him from Ives, filed his claim to

Emuri in his own right. In May, 1880, the Board of Land Commissioners disallowed the Burt claim but recommended that he be given an *ex gratia* grant for 160 acres. In July of that year the Governor in Council, in a decision which was not published at the time, approved the finding of the Land Commissioners but cut the *ex gratia* grant down to 100 acres, whereupon Burt went into possession of the 100 acres and made substantial improvements. In November, 1882, a petition for a rehearing was presented by the Native Commissioner on behalf of two natives claiming an interest in the land. This rehearing was not gazetted until March, 1883, and a decision was not given until April, 1884, when the claim was disallowed in its entirety, and Burt was excluded from the 100 acres which he had occupied a year and a half earlier.

VI. On these facts the precise question before this Tribunal is whether Great Britain, as the succeeding Power in the islands under the deed of cession of 1874, failed in any respect to observe and carry out any obligation toward Burt which it may be properly said, from the point of view of international law, to have assumed. If Burt had at the time a valid title to the lands, it is plain that under all the circumstances the Government was bound to recognize and respect it. In this connexion we do not concern ourselves with the methods and the procedure adopted and employed in dealing with land titles. We have no criticism to make in this regard; on the contrary we feel that good faith is rightly attributable to the authorities at every stage and that the procedure was the customary and appropriate one for handling a situation of this nature. We look only to the general result which was reached and note that this result was the ultimate denial of Burt's right.

VII. We therefore come to the particular question involved: whether Burt had at the time of the cession such an interest as to entitle him to invoke the obligation of the succeeding Power. His title to Emuri, resting as it did upon a conveyance from the ruling chiefs of the territory in which the land was situated, naturally depended upon the power of such chiefs to convey. It has been strenuously contended by counsel for Great Britain that, in the then existing state of land tenures in Fiji, the chiefs acting alone could not convey the equivalent of a fee-simple title to land. It is asserted that under the native custom a certain class, known as "taukeis" and defined as occupiers of the soil, had specific rights which could not be alienated without their express consent. It was, therefore, urged that inasmuch as the taukeis were not parties to the deeds, no valid title could have been conveyed. The record contains much in the way of opinion and argument upon this question. Various theories were advanced both at the time of the cession to Great Britain and afterwards. As time passed, the taukei view commanded more and more attention, and some years after the cession seems to have been rather definitely taken by the local authorities. We think it must be recognized that in this period of transition from primitive native custom to the white man's law it would be difficult, if not quite impossible, to lay down at any particular moment of time an exact definition of land polity in the Fiji Islands. We entertain grave doubts about the existence at any time of an intelligible system of feudal tenures or a consistent law of real property, as we understand it, among the natives. If there is any one fact which stands out with striking prominence during the entire period anterior to the cession it is that the law of the club pretty effectually dominated the situation. On the other hand there are well authenticated instances in which the chiefs themselves took fairly high ground in this matter and regarded themselves virtually as trustees for their people. They certainly assumed the right to dispose of land as they chose, but sometimes they did so with a commendable caution and in a spirit of great fairness to their subjects. We find Thakombau

stating frankly that all that was needed in such a case was his own word and that whether he ought to give his word and would do so was the real question. In discussing the question of the cession to Great Britain with his own chiefs, he declared that they must consider it with the utmost care because, as he said, "what we do today can not be undone tomorrow". It stands without dispute that the most solemn and consequential act affecting land and sovereignty in the islands was performed on the theory that the chiefs had the power to act. The British authorities of the day did not proceed hastily in this momentous transaction; they took advice on the point. They had before them the conflicting theories and deliberately adopted the view that the chiefs were competent to convey. Sir Hercules Robinson, Sir John Thurston and Sir Arthur Gordon may be considered on this record to have committed themselves clearly in this respect at the critical moment of the cession. We can not help feeling that, on the whole case, the chiefs had the power, and that the distinction between want of power and possible abuse of power goes far towards reconciling the conflicting views. One hesitates to believe that the people on the ground, either whites or natives, in their practical dealings were or could under the circumstances be profoundly influenced by ideal considerations on the subject of land tenures. They were confronted not by a theory, but by an actual condition, and we do not feel called upon at this distance of time to take up the academic task of laying down and applying principles which would evidently run so decidedly against the current of actual dealings on the spot.

At this point it is proper to note that the Land Commissioners in 1880 solemnly held that if the signatures of the three chiefs attached to the deed of June 2, 1868, were "genuine and were obtained bona fide, they were undoubtedly the proper persons to have executed the grant".

VIII. Passing now to the question of the subsistence of Burt's right up to the date of the cession to Great Britain, we have only to enquire whether a reasonable construction of the evidence shows any abandonment by him of his claim. The inference to our minds is irresistible that if he had not been dispossessed of Emuri by the wrongful, violent act of an uncontrollable mountain tribe—an event which the Land Commissioners found to have no bearing upon his title—he would have continued in occupation, and it is not an unwarranted assumption to say that if the cession to Great Britain had taken place in 1869, Burt would have almost automatically received a Crown grant. We fail to find anything in the subsequent events which indicates any intention on his part to abandon; on the contrary he diligently prosecuted his claim so far as the circumstances and his limited resources permitted, and was at no stage of the proceedings in default. He stood upon his rights under the conveyances from the chiefs, and, on the view which we take, the Crown authorities by refusing to recognize his title, failed to carry out the obligation which Great Britain, as the succeeding Power in the islands, must be held to have assumed.

IX. The damages are necessarily unsusceptible of accurate determination. The memorial of the United States presents the maximum possible claim. The demand is for \$232,929.50 with interest from April 25, 1884. We can not avoid the impression that the bill as presented comprises a large element of speculative valuation and prospective profits, and we have reached the conclusion that upon the whole case full justice would be done by a lump award of £ 10,000 or its equivalent in dollars as of the date of the award.

Now, therefore:

The Tribunal decides that the British Government shall pay to the United States the sum of £ 10,000.