JILO BULELE, AS PERSONAL REPRESENTATIVE
OF BULELE (DECEASED), Plaintiff
v.
ALBERT LOEAK, Defendant

Civil Action No. 266

Trial Division of the High Court

Marshall Islands District

June 9, 1968

Action to determine apportionment of condemnation award. The Trial Division of the High Court, Joseph W. Goss, Temporary Judge, held that in absence of agreement between parties in interest made pursuant to a meeting between them according to custom, the court would divide the award according to the parties' actual interest in the land condemned.

1. Marshalls Land Law-"Iroij Elap"-Powers

   An *iroij elap* has the duty of making a correct division of any monies received on behalf of the *alabs* and *dri jerbals* under him and he has the duty of ascertaining whether there was ·agreement as to the acreages of the *wato8* for which payment was about to be made.

2. Marshalls Custom-Public Meetings

   Under Marshallese custom, questions of magnitude to the community, for example involving payment for the indefinite use rights to two

watos, from, whence approximately 100 people had been removed, should be settled, inpublic meeting.

3. Marshalls Land Law—Generally

Marshallese Commoners have relatively less in land rights than their fellow citizens of the other Districts of the TnistTerritory' because of the feudalistic social structure in the Marshalls whereby various members of the *Iroij* class own interests in most of the individual parcels throughout the District.

4. Marshalls Land Law-Generally

An *iroij* often owns rights in many *watos* on different atolls.

5. Marshalls Land Law-"lriojElap"-Powers

Under Marshallese custom, if there had been agreement at an open meeting between the *iroij elap,* the *alab* and the senior *dri jerbals* of the *watos* being sold, or their representatives, without undue pressure being placed upon the *alab* and *dri jerbals,* then a division of money received for such *watos* would be final.

6. Accord and Satisfaction-Generally

Acceptance of a sum of money without agreement as to satisfaction of the full obligation will not operate as either an accord or compromise.

7. Accord and Satisfaction-Offer and Acceptance—Conditions

To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if accepted it is in full satisfaction; and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts, he does so subject to the conditions imposed.

8. Custom-Burden of Proof

Where there is a dispute as to existence or effect of local custom, custom becomes a mixed question of law and fact and party relying upon it must prove it to the satisfaction of the court.

9. Marshalls Custom-"Iroij Elap"-Powers

Prior 'to foreign supervision an *iroij elap* was required to wage war offensively or defensively for the protection of his lands and the economic well-being of the people subject to him.

10. Marshalls Custom-"Iroij Elap"-Powers

Before foreign supervision the principal limitation on the powers of an *iroij elap* appears to have been the practical necessity of retaining the loyalty of enough of his subordinates so that they would effectively support him in power by force of arms and, so long as he could maintain control by force or threat of force, his personal decision was final.

11. Marshalls Land Law-"Iroij Elap"—Powers

Presently, in order for an *iroij elap's* decision to' have legal effect in land matters, theiroij must act within the limits of the law, including

the law of Marshallese custom so far as it has not been changed by higher authority.

12. Marshalls Land Law-"Iroij Elap"-Powers

Where the law leaves land matters to an *iroij elap's* judgment, he must act reasonably as a responsible official and not simply to satisfy his own personal wishes.

13. Eminent Domain-Compensation-Division of Proceeds

The proceeds of the condemnation of certain *wato* have the same character as the original *iroij elap, alabs* and *dri jerbals* in the land and those rights cannot be interfered with by an *iroij* unless there has been a neglect of a required duty to the *iroij.*

14. Marshalls Land Law-Use Rights

It would be contrary to current Marshallese customary law for an *iroij* acting alone and without the consent of his *kajur* to make a division of the proceeds from condemnation of indefinite use rights.

15. Marshalls Land Law-Use Rights

There is no Marshallese law of custom which specifically determines the division of proceeds from condemnation of indefinite use rights. and the amount of each share of such proceeds must be based upon the Marshallese custom for the type of apportionment which is most clearly related.

16. Payment-Burden of Proof

The plea of payment tenders an affirmative issue and the burden of proof must be assumed by the party interposing the plea.

17. Interest-Unliquidated Claims

Where exact amount due was uncertain and hence claim was unliquidated, interest would not be allowed until after a decision as to the amount due.

GOSS, *Temporary Judge*

FINDINGS OF FACT

1. Prior to July 11, 1960, when the Trust Territory of the Pacific Islands took possession of the *watos* Lono and Ulejkan, Ennylabegan Island, Kwajalein Atoll (See Marshall Islands Civil Action No. 136, *In the Matter of the Proceedings of the Trust Territory of the Pacific Islands, Plaintiff, for the Condemnation of the Property of Albert, Iroij Elap,. Jubble, Alab,. Bulele, Alab,. Bition, Dri Jerbal,. Nuke, Dri Jerbal,. Jokio, Dri Jerbal and Unknown*

Others, Defendants (1963», possession of those *watos* had been in the plaintiff's predecessor in interest-the *Alab* Bulele (also spelled BuIile)-and the *Dri Jerbals* holding under him. Approximately 100 persons (consisting of the *Alab* Bulele, the *Alab's* family, and other *Dri Jerbals)* were removed from the two *watos* as a result of the condemnation.

2. There was no meeting of those *Alabs* of Ennylabegan Island (or their agents), who were under *Iroij Elap* Albert Loeak, at which pursuant to Marshallese custom, the *Alabs* agreed with the defendant as to the manner of sharing of money received under the Judgment Order entered in said Civil Action No. 136. The formula for the shares allotted to the *Alab* and *Dri Jerbals* of the two *watos* was determined by the defendant. Any meeting of Kwajalein Island, Kwajalein Atoll, *Iroij* and *Alabs* pertained to a different condemnation award and resulted in a different formula. The Kwajalein Island meeting in itsef did not establish a Marshallese custom binding on other islands.

3. Neither Nuke Bulele nor DIe Bulele were authorized to enter an accord or compromise of the amounts due for the two *watos,* nor did they reach any agreement with defendant as to the amount due.

4. The majority of the copra produced on Lono in 1960 was grade 1 copra. The coconut trees on Ulejkan were destroyed during World War II, and there was no copra produced therefrom in 1960. At that time the value of a pound of copra, grade 1, produced in the area was not less than $.05.

5. In 1960, an *Iroij Elap* of a *wato* in the Ralik chain, where Kwajalein Atoll is located, received from the *Alab* of the *wato* $.003 for each pound of grade 1 copra marketed therefrom. This was equivalent to 6 percent of the net value of the copra. The copra percentage share is an

important indication of the value of the *lroij Elap* interest in a *wato* capable of producing copra.

6. Besides the cash payment in Finding No.5, the defendant was entitled to receive from the *Alab* of Lono and Ulejkan *watos* ceremonial gifts of food, coconut oil, mats, shell ornaments and other handicrafts.

7. The defendant has a possible future interest in the *watos* which would come into effect (a) on the death of an *Alab* if no one were legally entitled to succeed him, or (b) on the exercise of the right to evict an *Alab* or *Dri Jerbals* in the event they do not conduct themselves in accordance with Marshallese custom as recognized by the Courts. There were approximately 100 members of Bulele's *Bwij* in 1960, and the possibility of a lapse in the *Alab* title is somewhat remote.

8. In 1960, the *Alab* and *Dri Jerbals* of a Ralik chain *wato* together received $.047 per pound of grade 1 copra marked therefrom. This was equivalent to 94 percent of the net value of the copra. The copra percentage share is an important indication of the value of the *Alab* and *Dri Jerbals'* interest in a *wato,* but the Court must also take into account that the *Alab* and *Dri Jerbals* bear the cost of planting, tending, harvesting, cutting, drying and transporting the copra.

9. Prior to the condemnation and in addition to the right to a share in any copra crop, the *Alab* and *Dri Jerbals'* interest in the *watos* Lono and Ulejkan entitled them to: (a) possession of the land for living space, building sites, the raising of livestock and poultry, and access to reef and lagoon; and (b) the right to obtain from the land plant food and raw materials for building and for handicrafts.

10. The Marshallese custom for division of proceeds from copra sales is the Marshallese custom most applicable to the issue of determining the *Iroij Alab,* and *Dri Jerbals'* shares of condemnation proceeds for the *watos* Lono and

Ulejkan, providing that the value of all the rights set forth in Findings 5 through 9 above are taken into account.[1]

11. In 1960, the value of the *Alab* and *Dri Jerbal* rights listed in Finding No. 9(a) and (b) for the *watos* Lono and Ulejkan was at the least equivalent to the sum of (a) the value of the ceremonial gifts due to the *Iroij Elap* (Finding No.6), (b) the value of Defendant's possible future interest (Finding No.7), and (c) the value of the labor required in connection with the copra (Finding No.8).

12. On July 11, 1960, Defendant's interest in the land was not greater than 6 percent of the value thereof and the *Alab* and *Dri Jerbals'* interest was together at least 94 percent of the value thereof.

13. Defendant has not been able to prove that he paid to Bulele's son, HIe, or to Bulele more than $6,850, plus the $2,000 received by David.

14. Further attempts at settlement of the dispute, by public meeting or otherwise, would in all probability prove fruitless.

OPINION

On May 20, 1963, judgment was entered in the above cited eminent domain action awarding to the Trust Territory of the Pacific Islands the indefinite use rights to the *watos*[2] Lono and Ulejkan and others on Ennylabegan Island, Kwajalein Atoll. In that judgment the Trust Territory was ordered to pay to Defendant *Iroij Elap*[3] Albert, *Alab*[4] Bulile (now spelled BUlele), *Dri Jerbal*[5] Nuke, and others the sum of $40,000.65 as compensation for the indefinite use rights to the *watos* condemned, which *watos*

1 Mixed findings of fact and conclusion of law. See *Kenyul v. Tamangin,* 2 T.T.R. 648.
2 Sections of land.
3 Paramount chief.
4 Person in immediate charge of a *wato.*
5 One of the persons possessing worker rights in a *wato.*

included Lono and Ulejkan. This sum was computed on a basis of a finding that $500 per acre ($35,263.50 for approximately 70.527 acres) was a fair value for the indefinite use rights and that the owners were entitled to $4,838.15 in interest to the date of judgment. Thereafter interest was to run at the rate of 6 percent per annum to the date of payment. The judgment recognized that the Defendantlroij Albert Loeak, the *Alab* Bulele (original Plaintiff herein), and the *Dri Jerbal* Nuke Bulele were among the owners of the *watos* condemned, but the judgment did not specify any apportionment of the proceeds among them.

This action was originally brought by the *Alab* Bulele's son, Ille. At a pre-trial conference Bulele was substituted for Ille as Plaintiff. Bulele brought the action as *Alab* and also as representative of the *Dri Jerbals* of the *watos* Lono and Ulejkan. Upon the decease of Bulele during the trial, JUo Bulele was substituted as Plaintiff in the capacity of Personal Representative of Bulele. It is claimed that the land is *Ninnin*[G] land.

Plaintiff sues for additional moneys allegedly due for the *Alab* and *Dri Jerbals'* share of the award and interest in the condemnation action for the indefinite use rights to Lono and Ulejkan, Plaintiff's principal claim being as follows:-.

> "There is no clear Marshallese custom as to how the money received from the Trust Territory Government should be divided. The closest custom-the division of money received from sales of copra-should be followed." (Memorandum of Pre-Trial Conference and Order, p. 3).

There is also a disagreement as to the amount of acres for which payment should be made and a disagreement as to the amount of money which has been paid.

GLand given by a father to his children. See Land Tenure Patterns, Trust Territory of the Pacific Islands, Vol.l, Tobin, p. 27-30.

In *Jatio8 v. Levi,* 1 T.T.R. 578, it was recognized that the *Iroij,* the *Alab* and the *Dri Jerbals* are all owners of the land under the Marshallese system of land ownership:

"All the different levels of owners have rights which the Courts will recognize, but they also have obligations to each other which severely limit their control over the land. There is a duty of loyalty all the way up the line-dri *jerbal,* to *alab,* to *iroij erik.,* to *iroij lablab,* a *corresponding duty of protection of the welfare of 8ubordinates running down the line,* and a strong obligation of cooperation running both ways." (Emphases added).

At one time there was a dispute as to the boundary line between the *wato* Lono and the *wato* Munikiuo, of which Jubble is *Alab.* During the pre-trial conference it was stipulated that the *Alab* Bulele and Jubble (also spelled Jubile) had prior to April 7, 1960, agreed that the disputed area was a part of the *wato* Lono. Defendant, however, in error determined that the *Alab* and *Dri Jerbals'* portion of money received in the eminent domain proceeding for the disputed area should be paid to Jubble rather than to Bulele, and Defendant made payment on that basis.

[1] Any payment mistakenly made by Defendant to Jubble did not relieve Defendant of his obligation to make full payment to the *Alab* Bulele of the proper share for the whole of the *wato* Lono. With the title and rights of an *Iroij* go many responsibilities. *Abija v. Larbit,* 1 T.T.R. 382 and *Liakmo v. Abija,* 1 T.T.R. 382. As *Iroij Elap,* the Defendant had the duty of making a correct division of any monies received on behalf of the *Alabs* and *Dri Jerbals* under him, and he had the duty of ascertaining whether there was agreement as to the acreages of the *watos* for which payment was about to be made. There is no indication that Bulele or anyone on his behalf in any way misled Defendant in connection with this payment. The Defendant is therefore responsible for making payment to the

Plaintiff (as Bulele's representative) of the amount properly due for the acres formerly under dispute.

The main issue in the case is the method by which the condemnation proceeds for the two *wato8* should be divided. Defendant has admitted that for 70.527 acres on Ennylabegan Island, he received $35,263.50 as payment for the indefinite use rights and $4,857.20 as interest. The Defendant claims that at a meeting it was agreed to divide the proceeds as follows:-

Iroij Elap-one-third

Alab and *Dri Jerbals-two-thirds.*

It will be noted that according to Defendant's Exhibit No. 1, the Defendant was apparently confused as to computation of these divisions. The computations show that the *Iroij Elap's* share was to be one-fourth of the total of $40,120.70 and the *Alab* Jubble and Bulele and *Dri Jerbals'* share was to be three-fourths of the total.

[2,3] Under Marshallese custom, questions of magnitude to the community, here involving payment for the indefinite use rights to two *watos* from whence approximately 100 people had been removed, should have been settled in public meeting. See *Lojob v. Albert,* 2 T.T.R. 338. In the entire twenty-nine atolls and five low coral islands of the Marshall Islands there are only seventy-four square miles of dry land. The Marshallese Commoners have relatively less in land rights than their fellow citizens of the other Districts of the Trust Territory, because of the feudalistic social structure in the Marshalls whereby various members of the *Iroij* class own interests in most of the individual parcels throughout the District. *Jatios v. Levi,* supra.

[4] An *Iroij* often owns rights in many *watos* on different atolls.

The Marshall Islands population is 'steadily increasing,- as is the cost of living.· The importance· of possession of land to the .persons removed isoindicated. by the following quotation from Land Tenure Patterns, Trust Territory of the Pacific Islands, Vol. 1, Tobin, p.2:-

. "Land is of paramount importance to the Marshallese people whose agricultural economy is based on copra production and much of whose food comes directly from -their land. -

"The Marshallese system of land tenure provides for all eventualities and takes care of the needs of all of the members of the Marshallese society. It is, in effect, its social security. Under normal conditions no one need go hungry for lack of land from which to draw food. There are no poor houses or old peopleis homes in the Marshall IslandS. The system provides for all members of the Marshallese society, each of whom is born into land rights."

-[5-8] If, under Marshallese custom, there had been agreement at an open meeting of the Defendant *IroijElap,* the *Alab* Bulele, and the senior *Dri* J*erbals* of the two *watos,* or their representatives, without undue pressure being placed upon the *Alab* and *Dri* J*erbals,* then the division would be final. The issue of whether there was such a meeting or any agreement by Bulele was fundamental to the case, as indicated in the pre-trial order, which superseded the pleadings herein:-

". . . the Plaintiff claims as follows:

1 . There was no meeting of the *Alabs* or people.of Ennylabegan Island to establish the shares to be received by the *Iroij,* the *Alabs* and the- *Dri Jerbals."*

. -- the Defendant claims as follows:

i. The distribution of the money received from the Trust Territory of one-third to the *Iroij* and two-thirds for the *Alab* and *Dri Jerbals* was agreed to at a meeting of the Plaintiff, David and Jakeo, who represented Jubile."

No adequate proof as to Defendant's position was presented at the. trial. Defendant's witness Jakeo, himself, testified he had not attended such a meeting. At the trial

Defendant testified that he dealt individually with Nuke and with Ille Bulele. Defendant admitted that he did not hold a meeting under Marshallese custom:-

"LEVI: Do you know what place Jubile and all of you got together and decided about this one-third division?

fROU: There wasn't a time. Jubile only decided about this division.

LEVI: Was there a time you and Nuke talked about the division?

fROU: I did not hold a meeting with them as to how the division should be made...."

Defendant contends that if Ille Bulele objected to the division, he should not have taken any of the money and that since he did so, he binds the Plaintiff as *Alab* Bulele's representative. In advancing this position, Defendant's first burden is to show that Ille, the *Alab* Bulele's youngest son, had authority to commit the *Alab* and the *Dri Jerbals* of the two *watos,* or that there was a later ratification of Ille's alleged accord. *Eckert-Fair Const. Co. v. Capitol Steel & Iron Co.,* 178 F.2d 338, cert. den. 339 U.S. 298, 94 L.Ed. 1349, 70 Ret. 626 (1950). 1 Am. Jur.2d, 306, 307, Accord and Satisfaction, §§ 7, 8. Acceptance of a sum of money without agreement as to satisfaction of the full obligation would not operate as either an accord or compromise.

"... To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligation, accompanied by such acts and declarations as amount to a condition that if accepted it is in full satisfaction; and the condition must be such that the party to whom the offer is made is bound to understand that if he accepts, he does so subject to the conditions imposed." *Nelson v. Chicago Mill and Lumber Co.,* 76 Fed. 17, 24, 100 A.L.R. 87 (1935). 1 Am. Jur. 2d, 301, 302.

No proof was presented of any authority of Nuke or Ille to commit their father, nor of any accord, compromise or ratification thereof. With approximately 100 people re-

moved from the two *watos* almost three years before payment was made by the Trust Territory, HIe Bulele was in no position to individually refuse whatever money was tendered. He had no authority to approve or contest an *Iroij* determination without consulting his *Alab* and *Dri Jerbals.* Under the circumstances it was proper for him to accept the money tendered and to then refer the matter to the *Alab* and the *Dri Jerbals.*

From the attempts which have been made at settlement of this dispute, the court has reluctantly concluded that further meetings hereon would be fruitless.

Assuming the absence of any agreement as to division, the parties are in disagreement as to the existence and effect of the traditional Marshallese law and custom which would determine the matter. The court has concluded that the question as to such custom is a mixed question of law and fact, and that the following language incorporated into *Kenyul v. Tamangin,* supra, applies:-

> "If a local custom is firmly established and widely known, this court will take judicial notice of it. (Trust Territory Code Section 21). When, however, as in this case; there is a dispute as to the existence or effect of a local custom and the court is not satisfied as to either its existence or its applicability, such custom becomes a mixed question of law and fact, and the party relying upon it must prove it to the satisfaction of the court."

[9-12] In the days before foreign supervision, it is probable that the division of an *Iroij Elap* would have been final, for his powers and his responsibilities were much greater than they are today. He was required to wage war offensively or defensively for the protection of his lands and the economic well-being of the people subject to him. The principal limitation on the powers of an *Iroij Elap* appears to have been the practical necessity of retaining the loyalty of enough of his subordinates that they would effectively support him in power by force of arms, par-

ticularly in war. So long as he could maintain control by force or threat of force, his personal decision was final. Even under these conditions certain interests in land and the principles as to inheritance became established by custom, which an *Iroij Elap* was expected to consider and generally recognize and practice. The German administration changed the situation drastically by prohibiting war between the Marshallese. The basic traditional restraint on the *Iroij Elap* was largely replaced by an obligation to comply with the requirements of the administering authority and the possibility of appealing to that authority in the case of serious dispute. By 1941 it had become clear that the *Iroij Elap,* in making a determination as to rights in land under him, must act with an honest regard for the welfare of his people and with reasonable consideration for the rights of those having an interest in the land under Marshallese custom. There must be good reasons for the decisions of the *Iroij Elap,* especially those which would upset rights that have become clearly established. In other words, in order for an *Iroij Elap's* decision to have legal effect in land matters, the *Iroij* must act within the limits of the law, including the law of Marshallese custom so far as it has not been changed by higher authority. Where the law leaves matters to his judgment, the *Iroij Elap* must act reasonably as a responsible official and not simply to satisfy his own personal wishes. These concepts were understood after the 1954 Trial Division decision in *Limine v. Lainej,* 1 T.T.R. 107, 231, was affirmed by the Appellate Division in 1 T.T.R. 595.

[13] An *Iroij Elap's* more limited present day powers over rights and lands under him have also been considered by this court in *Lalik v. Elsen,* 1 T.T.R; 134; *Lalik v. Lazarus,* 1 T.T.R. 143; *Abija v. Larbit* and *Liakmo v. Abija* (supra); and *Likinono v. Nako,* 3 T.T.R. 120. In that case the following language appears:-

"The court has several times held that the decisions of an *iroij lablab* are entitled to great weight, but it has also held the freedom of discretion of *iroij lablab* under the Marshallese system is much more limited than it used to be, and that their decisions to be effective must be made like those of a responsible official, with due regard for rights already established."

The proceeds of the condemnation have the same character as the original rights of the *Iroij Elap, Alabs* and *Dri Jerbals* in the land. The rights which an *Alab* and his *Dri Jerbals* hold in a particular *wato* are rights which cannot be interfered with by an *Iroij* unless there has been a neglect of a required duty to the *Iroij.* (See *Lalik v. Lazarus,* supra).

Over the years some of the services which the *Iroij Elap* performed for his people have fallen into disuse. New forms of government have been superimposed on top of the *Iroij* system. The *Alabs* and *Dri Jerbals* of the Marshall Islands now support in some degree-through various forms of assistance-the municipal governments, the District executive government and legislature, the Trust Territory executive government and legislature, and the system of Community, District, and High Courts. Experience indicates that the expense of government does not decrease over the long term, and that taxes for governmental purposes are inclined to rise. From observations and inquiries during residence in the Marshall Islands, it is believed that these factors are being considered by the *Iroij* in their dealings with their people, so that the Marshallese customs may be kept viable and all may share in the hoped-for progress.

[14,15] That it would be contrary to current Marshallese customary law for an *Iroij* acting alone and without the consent of his *Kajur*[7] to make a division of such

[7] Refers to all of the people under an *Iroij.*

condemnation proceeds was indicated at the trial on September 20, 1967, by Defense witness,. Atidrik:-.

"LEVI: From your own knowledge, if Ille was to be absent and let's say, *Iroij* Albert, by himself, made the distribution or the arrangement to make the division, would it be correct?

ATIDRIK: I don't think that is correct.

RE-DIRECT EXAMINATION

IROlJ: Did you think I, myself, could have made the arrangement of this division?

ATIDRIK: I don't think an *Iroij,* being by himself, can divide something without the consent of the *Kajur."*

The maxim that there must be good reasons for an *Iroij's* decisions *(Abija v. Larbit, etc.,* supra) applies with,even greater force when an *lroij* is making apportionment between himself and his people. Defendant has presented no evidence of any interest in Lono and Ulejkan in addition to those set forth in Findings No. 5, 6 and 7-the right to share in the profits therefrom (6 percent of the pr()ceeds of copra sales), the right to ceremonial gifts (food, cocoriut oil, mats, handicrafts), and a possible future interest in the land if the *Alabs* or *Dri Jerbals;* title should lapse or forfeit. Neither has Defendant presented any basis, in Marshallese custom or in fact, for his particular division of the condemnation proceeds. There is no Marshallese law of custom which specifically determines the division of proceeds from condemnation of indefinite use rights. The amourit of each share of such proceeds must be based upon the Marshallese custom for the type of apportionment which is most closely related.

In the case of a lease; which is in some ways analogous to a transfer of indefinite use rights, there is apparently precedent for the *Alab* to receive the entire payment:-·

"Rentals involving Marshallese alone have beehvery rare. One such case which is operative today and which occurred very recently has political motivations rather than a mere desire for

monetary gain. The land involved had been rented during the Japanese regime to a Japanese entrepreneur. Interestingly enough in the recent dispute, the *alab* involved, in pressing her claim for rent, made the distinction between land used for business purposes (bakery and store) and that part of her land being used for dwelling purposes. Rentals were demanded for land falling in the former category only.

An individual who has obtained the *alab's(s)* permission to erect a building on other than his own lineage land may from time to time voluntarily bring food to the *alab* of that land. However, the concept of rent per se, is not implied.

The future trend was seen recently in the request of several *alab(s)* for cash rentals from various individuals whose lineage lands are in other areas and who have built retail stores and bakeries on the *alab(s)* lineage lands which are adjacent to the administrative center at Majuro."B Land Tenure Patterns, Trust Territory of the Pacific Islands, Vol. 1, Tobin, p. 25, 26.

At the time of the condemnation the Defendant had no right to possession of either Lono or Ulejkan. The rights to present possession of the *watos* were transferred to the Trust Territory from the *Alabs* and *Dri Jerbals* holding such rights. When and if the Trust Territory or its successor relinquishes its indefinite use rights, possession will revert to the successors in interest of the *Alab* Bulele and the *Dri Jerbals* of the *watos.* The right to possession will not revert to the Defendant or to his successors in interest unless there is a lapse or forfeiture of the *Alab* or *Dri Jerbals'* title.[D]

The Plaintiff contends that the condemnation proceeds should be divided in the same manner that the *lroij, Alab,* and *Dri Jerbals* divide the proceeds of the sale of a copra crop, and that this is the Marshallese custom mostapplicable to the present problem. The court agrees with this position, provided that all of the factors set forth in Findings No.4, 5, 6, 7, 8, 9, 11, and 12 are taken into account.

[B] There is no *Iroij* for the Majuro *wat08* formerly held by Jebrik.
[9] A lapse in an *Iroij* title has also occurred in the past.

The *Iroij Elap* received income from the sale of the copra crop raised by his *Alabs* and *Dri Jerbals* on the *wato* Ulejkan (the trees on Lono having been cut down during the war), and for this reason the condemnation of the *watos* was of great importance to him, but the loss of use and possession was of extreme importance to the 100 persons removed from the land. The Defendant did not live on either *wato,* but lives on the Ailinglaplap Atoll 150 miles away. The *Alab* and *Dri Jerbals* were entitled to use the *watos* for living space, building sites, the raising of livestock and poultry and access to the reef and lagoon. They had the right to obtain from the land plant food and raw materials for building and for handicrafts.

When the possession of the *watos* was taken by the Trust Territory and transferred to the United States Government, it was the *Alabs* and *Dri Jerbals* who were physically dispossessed. It is the *Alab* and *Dri Jerbals* who will continue to be without the most important of the rights which were condemned.

Since the Defendant was not entitled to possession, it could be determined that he had no present right to any of the proceeds from the condemnation, but only the right to regularly receive 6 percent of the income from the proceeds, plus his ceremonial gifts, and a right to a possible future interest should the *Alab* or *Dri Jerbals'* rights lapse. This approach would require that the total condemnation payment for the two *watos* be deposited in a trust account with'the Bank of Hawaii, Kwajalein Branch, or in some other secure investment. From the interest payments made by the Bank, the Defendant would be regularly entitled to receive his 6 percent of whatever interest is earned, plus ceremonial gifts. Because of the likelihood of long-term use by the Trust Territory and its assigns, however, and because the condemnation has so radically altered the relationship of the *Iroij, Alab* and *Dri Jerbals* in connec-

tion with the two *watos,* the court concludes that the better approach is to divide the proceeds themselves among those entitled to share.

The Plaintiff has limited her claim to a division on the basis of the equivalent of 6 percent to the *Iroij* and 94 percent to the *Alab* and *Dri Jerbals.* The court makes no finding as to whether or not the value of the *Alab* and *Dri Jerbals'* possessory and use rights in the *watos* could have exceeded 94 percent, but does conclude that on July 11, 1960, the ,Defendant's interest in the land was not greater than 6 percent of the value thereof and the *Alab* and *Dri Jerbals'* interest was altogether at least 94 percent of the value thereof.

[16] An especially difficult problem for the court is Defendant's claim that he paid to HIe as Bulele'srepresentative the sum of $8,554 in addition to the $2,000 he paid to David, and the Plaintiff's claim that while the amount paid to David was $2,000, the amount to HIe was $6,850. The court is convinced that the dispute is based on a mistake rather than on any deliberate falsification by either witness. The Defendant testified that the original of Defendant's Exhibit No. 1 showed the amounts actually paid, but that he could not locate it. The original of this paper was filed in the case at the time of the Pre-Trial Conference to show Plaintiff's claims and was marked, "Plaintiff's No. 1." Neither Plaintiff's No.1 nor any other document introduced into evidence purports to be a record of payments actually made. Instead, Plaintiff's No. 1 shows Defendant's computations of amounts to be paid. The misunderstanding could have resulted from Defendant's confusion as to his division into one-fourth rather than one-third shares, as discussed. It is a clearly established rule of law that

> ". . . a party (Plaintiff) is not called up to prove his negative averments .... The plea of payment tenders an affirmative issue;

and the burden of proof must be assumed by the party interposing the plea. Thus a defendant alleging payment as defense in an action ... has the burden of proving it ...." 40 Am. Jur., 893, 904, Payment, § 278, *Simonton v. Winter et al.,* 5 Pet. (U.S.) 141, 8 L.Ed. 75 (1831).

The requirement that in certain matters an *Iroij* act as a responsible official has been referred to above *(Likinono v. Nako, supra).* An *Iroij* dealing with those under him is in the best position torequire the normal formalities. It is his obligation to keep a complete record of payments made and he should require that receipts be given for payments, especially where large sums are involved. Considering the circumstances, the court has made the finding that payment of the additional money to HIe or to Plaintiff's predecessor has not been proved.

[17] Although the *Alab* and the *Dri Jerbals* have been denied for some years the use of a portion of their share of the proceeds of the condemnation payment, and the Defendant has had the use of such money, the exact amount due was uncertain and hence the claim was unliquidated. As such, interest is not allowed until after a decision as to the amount due. *Riley v. National Auto Insurance Co.,* 77 N.W.2d 241, 248 (1956), 57 A.L.R.2d 1219. 30 Am. Jur. 36, 37, Interest, § 40.

On the basis of the findings set forth above, the proportionate share of the condemnation payment for the two *watos* should have been computed as follows:-

Acres

Lono	17,045 acres	
Ulejkan	12,339 acres	
	29,384 acres	

Payment for indefinite use rights

$500 x 29.384 acres	$14,692.00

Payment for interest

29.384
70.527 x $4,857.20 2,023.68

$16,715.68

Share of Iroij Elap

$16,715.68 x 6 percent 1,022.94

Share of Alab and Dri Jerbal

$16,715.68 x 94 percent 15,712.74

Less amounts previously paid:

To David $2,000

To Ille 6,850 8,850.00

Amount due to *Alab* Bulele and *Dri Jerbals* and unpaid $ 6,862.74

These funds should be held by Plaintiff for later distribution in accordance with paragraph 1 of the Order set forth at the end of the judgment. In the Matter of the Estate of Bulele, deceased, Marshall Islands District Probate Case No.5 (1968).

JUDGMENT

It is ordered, adjudged, arid decreed as follows:-

1. Defendant shall pay to Plaintiff as the representative of the *Alab* and *Dri Jerbals* of the *wato8* Lono and Ulejkan, the amount of $6,862.74. These funds shall be retained by Plaintiff until such time as an *Alab* is selected in accordance with Marshallese custom to succeed Bulele. Upon the selection of such successor *Alab, and* the certification of the *Iroij* and senior *Dri Jerbal* of the abovenamed *wat08* that such successor has been selected, Plaintiff is hereby authorized to transact said funds to the succeeding *Alab.*

2. No costs are assessed against either party.