
Separate Judgment of
the PRESIDENT of the
JOINT COURT.

WILLY and other natives of LELEPPA.

v/ Captain ASHTON

In view of the paramount importance of the decision to be given by the Court in this case I avail myself of the opportunity offered by the English procedure to state a dissenting opinion based on the following argument:

The plaintiffs, in this case, natives of LELEPPA, have asked the Court to issue an order restraining the defendant, Captain ASHTON, until the question of the ownership of the land hereafter mentioned shall have been decided by this Honourable Court in due course, from entering upon and disturbing the plaintiffs in their occupation and possession of certain land at Savannah Harbour known as BALAU, which land has been continuously occupied and possessed by the said plaintiffs and their tribe as occupiers thereof for more than thirty years, and upon which land the said Captain ASHTON claiming to be entitled to dispossess the plaintiffs by virtue of a title which the plaintiffs dispute, has now entered and commenced to clear the same against the will of the plaintiffs whereby the plaintiffs are greatly damaged.

There is no dispute to the facts, it is admitted that the natives are and have been from time immemorial occupiers and possessors of the said grounds; it is admitted also that the defendant, Captain ASHTON, has commenced to dispossess them against their will. - All the elements which would be required to justify an injunction, under English law (and that it is under that law that the injunction is asked for) are admittedly existent. Neither can it be disputed that the only Court (if any) competent to deal with this matter, is the Joint Court ^{under} ~~and~~ article 12 1 ^{and} B of the Convention, reading thus:

" The Joint Court shall have jurisdiction:

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- (1) - In civil (including commercial) cases:
- (A) Over all suits respecting land in the Group;
- (B) Over suits of every kind between natives and non-natives.

The only questions which appear disputable are these:

1e Is the Court able to deal with this matter now ?

2e If so can the English law be applied to it ?

On the first question :

It has been argued that this matter cannot be dealt with at this moment on the two following grounds:

A - That the question of possession is so intimately connected with the one of title as to be inseparable and to make this a land dispute in the meaning of the Convention -

B - All actions in this matter have been suspended by ^{decree} ~~order~~ of the 20th of July 1915 for the duration of the war -

Both grounds in my opinion fail.

In all legislations as far as I am aware an exceeding sharp distinction has been made between the protection of possession and that of ownership, so much so that the possessory actions (of which this is one) can be intended even against the owner without this owner being able to rely on his ownership (Dictionnaire de Droit Action possessoire 1. et 2 in fine). The decision in the matter of possession cannot in the least affect or prejudice the rights of the owner.

It is therefore in my opinion in vain that the defendant tries to obscure the principle ^{le} governing this application by setting up a so called " title ", which in reality is only a document that he may present to this Court later on as documentary evidence in support of a possible claim for ownership. It has no place whatever in this case. We find the same confusion of the words " title " as ownership and title as document in support of a claim and title as final certificate to be delivered by the Court, in the different articles of the Convention.

As to the order of 20th July 1915 which suspends the work in connection with the establishment of land claims, a perusal of its

text and reasons is sufficient to show, in my opinion, its limited scope

" We have the honour to inform you that our Governments have agreed
" that for the duration of the war, the work of the Joint Court connected
" with the registration of land titles shall be suspended."

It is clear to my mind that this suspension only applies to the work in connection with the establishment of titles to land; and this suspension which ^{delays} ~~differs~~ a definite settlement of land claims makes, it, if anything, more indispensable to protect possession and more imperative than ever, to maintain the statu quo till such time as a final decision on property can be given.

20 I now come to the second question:

If the Court is competent and can deal with this matter now which law has to be applied? Is it the English law? The objection to this is that Article XIII 1 A of the Convention prescribes that for land disputes the law to be applied shall be: the principles laid down by the Convention. I may point out in passing that whilst the English text speaks of principles, thus allowing the Court a certain freedom of action the French text mentions far more strictly: " les règles spéciales tracées par la présente Convention? " As it happens however, the Convention exclusively confines itself to laying down rules for the establishment of land titles, and never even mentions the means for protecting the right of the possessor. Must we, then, take it, that the legislation did not mean to safeguard possession and occupation? In my opinion, certainly, not: for not only does this protection in any community form the basis of social order, but the authors of the Convention themselves give "occupation" as the main, and practically only foundation on which natives can eventually base their claim to land, or, at all events, their caveat against other people's claims. If such occupation, the main basis for future native claims, could be freely disturbed and taken from them

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by any non-native who covets it, the protection of native rights to land, with which the Convention is so obviously concerned, would prove completely fallacious. But a careful perusal shows - and I would emphasize this fact - that the Convention, in laying down rules for the governance and guidance of the Court, confines itself exclusively to matters which are peculiar to this country, such as provisions relating to the application of national law, to labour matters, to the establishment of land titles, etc. In all other matters it leaves the common law intact, thus it does not indicate the means to protect possession, which is adequately provided for by common law. And so, in my opinion, this protection is still available to natives, under Art. XII, which gives the Court competence to hear all suits between natives and non-natives, whilst Art. XIII A points out the law to be applied, i.e., the English law. Admitting this, it must be asked whether in the case of a French defendant, the French law would give a similar remedy against him, as otherwise an invidious distinction between the two nationals would result. We find, however, that the French "action possessoire" attains exactly the same object (voir : Dalloz - Dictionnaire de Droit - "Action possessoire" - "1. Les actions possessoires sont celles qui ont pour objet de protéger la possession..... 2. A plus forte raison n'y a-t-il pas lieu de se préoccuper des moyens opposés par le défendeur. - L'action reste possessoire bien que ce dernier prétende être propriétaire, ou n'avoir agi que conformément à son titre, ou même qu'il déclare ne point contester la possession du demandeur, du moment d'ailleurs que les faits allégués constituent une atteinte réelle à cette possession.")

It would seem, then, that it would not be detrimental to either national to have his own system of law applied to him.

In conclusion I would make the following remarks:- I had the advantage of reading the judgments made by my colleagues and gladly

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note that they appreciate the injustice resulting from what they consider an omission in the Convention, and I agree with the suggestions made to remedy this omission. But, whilst fully appreciating their arguments, I should like to emphasize two fundamental differences between us which, to my mind, are mainly responsible for our difference of opinion in this case :

1. Whilst they adhere to the strict letter of the Convention, in its narrow interpretation, I am of opinion that the authors, who could not provide for every contingency that might arise, confined themselves to laying down general lines for the guidance of the Court, and that it lies with the Court, the judgments of which are final, to make up by a wide interpretation for such deficiencies as experience may bring to light;
2. Instead of relying on ameliorations of the Convention, which may or may not be made in the future, I would prefer to make the fullest use of the instruments at our disposal. It is only thus, I think, that we can avoid relapsing into the abuses to which the Convention was meant to put an end.

For the reasons set forth, I am of opinion that the order asked for could, and should, be issued.

Wm. James Berenson

ACTING PRESIDENT OF THE JOINT COURT.

