that the "owners" were not on the land at the time American forces drove out the Japanese is not, in itself, sufficient to establish that there had been a governmental taking.

Likewise, where record title is in a party, he cannot be precluded from showing that title in an action against a government officer, or tenant. See, for example, *Andros v. Rupp*, 433 F.2d 70 (9CCA—1970), where officers of the United States had asserted dominion over the land in question for over sixty years; the plaintiff was nevertheless held to be entitled to assert his claim.

For an authoritative review of the rules which determine sovereign immunity, see *Malone v. Bowdoin*, 369 U.S.—643, 82 S.Ct. 980 (1962); for the view that I would wish to see followed in the Trust Territory, see the dissenting opinion of Mr. Justice Douglas, at page 984.

TRUST TERRITORY OF THE PACIFIC ISLANDS
v.
CHRISTINA TARKONG

Criminal Appeal No. 37
Appellate Division of the High Court
November 22, 1971

Trial Division Opinion—5 T.T.R. 252

Appeal from judgment granting defendant's motion to quash information on grounds of vagueness of statute. The Appellate Division of the High Court, Arvin H. Brown, Jr., Associate Justice, affirmed holding that section of Trust Territory Code relating to abortion was so vague and indefinite as to constitute denial of due process of law.

Abortion—Constitutionality

The statutory provisions of the Trust Territory Code were so vague and indefinite that enforcement of it in case in question would have constituted a denial of due process of law as to the defendant. (11 T.T.C., Sec. 51)

Counsel for Appellant: JAMES E. WHITE, ESQ., *District Attorney*
Counsel for Appellee: WILLIAM E. NORRIS, ESQ., *Assistant Public Defender*

Before BURNETT, *Chief Justice*, BROWN, JR., *Associate Justice*, MUECKE, *Temporary Judge*[1]

BROWN, *Associate Justice*

This is an appeal from a judgment entered in Yap District Criminal Case No. 128, 5 T.T.R. 252, which granted defendant's motion to quash the Information upon the ground that the statute under which the criminal charge made is too vague and indefinite to permit due process of law, and judgment based thereon.

Defendant was charged with a violation of then Section 405 of the Trust Territory Code (now 11 T.T.C. 51). The Information stated that on or about April 13, 1970, at Colonia, Yap, defendant did unlawfully cause the miscarriage or premature delivery of a fetus from herself with the intent to do so.

Prior to the arraignment, the Assistant Public Defender moved that the Information be quashed on the ground that the statute was so vague and indefinite that it was not enforceable and that it constituted a denial of due process of law guaranteed by then Section 4, Trust Territory Code (now 1 T.T.C. 4).

The crime of abortion of which defendant was charged consists of the unlawful use of drugs, instruments or other means with the intention of causing a miscarriage.

The statute under which defendant was charged stated:—

"Abortion. Whosoever shall unlawfully cause the miscarriage or premature delivery of a woman, with the intent to do so, shall be guilty of abortion and upon conviction thereof shall be imprisoned for a period of not more than five years."

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[1] Judge, United States District Court, sitting by designation pursuant to 5 T.T.C. 203.

A literal reading of the statute would indicate that every abortion is unlawful whenever or by whomever performed, even though the abortion should be performed by a physician who intends to preserve the life or health of a pregnant woman. The statute does not state when, or under what circumstances abortion may ever be lawful.

It is stated in 16 Am. Jur. 2d, Constitutional Law, Section 532:—

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The statute under which the defendant was charged is so vague and indefinite that enforcement of it in this case would have constituted a denial of due process of law as to the defendant.

Of course, not all statutes pertaining to abortion are unconstitutional. As was stated by the court in the case of *People v. Ballard*, 335 P.2d 204 (Cal.):—

"A great deal of misunderstanding would be avoided in abortion matters if they were considered in the light of the fact that abortion is not necessarily, in and of itself, an illegal procedure or act, in other words, not all abortions are illegal."

In the case of *United States v. Vuitch*, 39 LW 4464, the Supreme Court of the United States considered the constitutionality of 22 D.C. Code 201 which provides, in part:—

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; . . . ."

The district judge dismissed the indictment on the ground that the abortion statute was unconstitutionally

vague. However, the Supreme Court, reversing the judgment of the district court, held that the statute in question was not unconstitutionally vague. It pointed out that all abortions were not outlawed, but only those which were not performed under the direction of a competent, licensed physician, and those not necessary to preserve the mother's life or health.

Likewise, until recently, the California statute on abortion recognized as lawful an abortion under the advice of a doctor as to cases of necessity to preserve the mother's life. Recently, that statute, being Penal Code Section 274, was held unconstitutional in the case of *People v. Belous*, 458 P.2d 194 (Cal.). However, in *Belous*, the court expressly refrained from commenting on the validity of California's "therapeutic abortion act" which was adopted in 1967 and which broadens the conditions under which an abortion is permitted and establishes procedures for determining those conditions. In general, that act holds that an abortion may be performed if one or both of the following conditions are found to exist: (a) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother; or (b) the pregnancy resulted from rape or incest. The statute specifies the meaning of impairment of mental health as: "mental illness to the extent that the woman is dangerous to herself or to the person or property of others or is in need of supervision or restraint."

Unfortunately, the statute under which the appellant was charged, and the present statute, fail to set forth conditions which would permit anyone, including a doctor, to perform an abortion even if it were necessary to save the life of the pregnant woman or to prevent grave physical or mental illness.

We note that the trial court, in its order of dismissal, stated that abortion statutes by their terms are applicable

to the person causing the abortion, but they do not apply, without specific provision, to the pregnant woman herself.

Two lines of authority are to be found, one of which holds that the pregnant woman, herself, cannot be guilty of abortion upon the theory that she is the victim of the offense charged. The other line holds that the pregnant woman may be guilty of the crime of abortion. Better practice would dictate that the legislative branch express its own intent in specifically providing whether or not the pregnant woman herself is to be covered under the statute.

Since Section 405 of the Trust Territory Code (now 11 T.T.C. 51) denies due process of law to the defendant because of its vagueness and indefiniteness and is, therefore invalid, the trial court's order of dismissal and judgment based thereupon are affirmed.

KEBLIIL era KEDAM, or YOULKEDIDAI by RISONG RECHETMOL, Appellants

v.

MUKUI UCHERREMASCH, IDERRECH, and DIRREMASCH OCHEBIR, Appellees

Civil Action No. 406

Appellate Division of the High Court

Palau District

July 27, 1971

Trial Court Opinion—4 T.T.R. 459

BROWN, JR., *Associate Justice*

Appellants, by their counsel, John O. Ngiraked, having moved this day that the Court dismiss their appeal filed on January 21, 1971, and good cause appearing therefor,

It is hereby ordered that the appeal in the above-entitled action be, and it is hereby dismissed without any cost to the parties.