SIONE TONGA AND ORS. v. MINISTER FOR LANDS AND ORS.

(Land Court. Hunter J. Tongilava, Assessor, Nuku'alofa, 28th, 29th, 30th May, 1st and 5th June, 1956).

Devolution of tax allotments — Registration — Election by heirs — Claim to be lodged within twelve months — Estoppel — Tongan Custom — Law prevails — Cap. 27 (1928 Laws) Ss. 69, 73, 74, 76 and 95.

The plaintiffs were claiming the recovery of a tax allotment which evidence showed had been in their family for over 70 years. The allotment was registered in the name of Fili, a father of the plaintiffs and on his death in 1931 his widow held the allotment until her death in 1950. The plaintiffs (Fili's sons) all held allotments at the widow's death and therefore had a right to elect. On the death of the widow no claim was duly made in accordance with S. 76, although an application was made to the estate holder within the twelve months.

HELD: The failure to comply with S. 76 was fatal to the plaintiffs case, and that the allotment reverted to the estate holder.

Verdict for the defendants.

Finau and M. Tuli appeared for the plaintiffs.

S. Kinahoi (Clerk in Lands Department) appeared for the Minister.

Tu'akoi appeared for the 2nd and 3rd defendants.

C.A.V.

HUNTER J.: The Plaintiffs are suing for the recovery of a tax allotment which they claim should have vested in one of them, or one of their children as an "hereditary" allotment.

The Defendants — the Minister for Lands, the Estate Holder and Tuita Moahengi — submit that the allotments in question have been regularly granted to Tuita Moahengi and that it is now too late for the Plaintiffs to exercise any rights they may have had.

The tax allotment in question is situated on the estate of Tu'ilakepa. For many years it had been occupied by one Fili — the father of the Plaintiffs. On Fili's death in 1931 his widow held the allotment until her death in October, 1950 in accordance with the provisions of Section 69 of Cap. 27. On her death one of Fili's sons or grandsons who already held an allotment, acquired the right to elect to hold the allotment in question (Section 73 and 74 of Cap. 27).

It is clear from the evidence that this allotment had been in the family's possession for over 70 years. Fili's name appears in a Register of 1907 as the holder and his name was shown on the Lands Department plan as the holder. In the Register which I am told is in current use his name does not appear. In spite of this I am satisfied that at the date of his death the allotment was vested in Fili and that the provisions of the Act regarding the devolution of tax allotment apply and that, subject to the widow's life estate,

Fili's heirs who already held allotments — had the right to elect. The four sons of Fili living at the widow's death (The Plaintiffs) all had allotments of their own and were therefore entitled to elect.

According to the evidence they all, with the possible exception of Hufanga (and the other brothers also) wished the allotment to go to his son Tu'ifua who had no allotment. This ofcourse is not possible — see Section 74. However it may be that when Hufanga made an application to the Estate Holder he was making it on his own behalf. He said so in evidence but said that his real purpose was to get it for his son Tu'ifua.

The Act makes no provision as to how the election between the "heirs" is to be carried out or how such election is to be evidenced and it appears to me that an oral election between the parties is sufficient and that as long as the Minister is satisfied that an election has been made and that the person applying for registration is the person legally entitled then he is bound to register him.

However Section 76 provides that if no claim has been lodged with the Minister within 12 months from the death of the last holder (in this case the widow) the allotment, if on an hereditary estate, shall revert to the Estate Holder.

It appears to me that the onus of proving that a claim was lodged within the 12 months lies on the person claiming to be registered and in this case I am not satisfied that a claim was lodged within 12 months. It does seem that an application was made to the Estate Holder within 12 months but this does not help the Plaintiffs. It is with the Minister that the claim must be lodged (Section 76). In my view in the case of one of these "hereditary" allotments it is unnecessary to make an application to the Estate Holder. He has no voice in the matter. If the election is made and the claim duly lodged with the Minister he must register.

Section 76 does not indicate how the claim is to be lodged with the Minister but it seems that this must be done by presenting the deed of grant to the Minister in accordance with Section 95. This should be done within one month but I do not think that failure to do it within that time would defeat a claim provided that it is done within the 12 months referred to in Section 76.

The words of Section 76 are clear and unambiguous and if the requirement is not complied with the Act says that the allotment shall revert to the Estate Holder.

Finau, appearing for the Plaintiffs, submitted that even if this be so, the Defendants are now estopped from relying on this defence. I can not agree with this. Even if the Defendant Tu'i-

Jakepa be estopped I can see nothing in the words or actions of the Minister to raise an estopped. In any case the provisions of a section such as Section 76 can not be over ridden by estoppel.

Regrettable as it may be, for in my view the Defendants have no merrits whatever, I must find a verdict for the Defendants.

I have discussed the case with the learned assessor and I think his view is that according to Tongan custom the Plaintiffs should succeed, but custom can not overrule the clear provisions of an Act made by the Tongan Parliament.

The Court is bound by the Act just as every citizen is and whatever its sympathies may be it must interpret the law as it finds it.

Verdict for the Defendants. No order as to costs.