FIFITA MANAKOTAU v. VAHA'I (Noble).

(Land Court. Hunter J. Tongilava, Assessor. Nuku'alofa, 13th, 16th February, 1959 and 31st March, 1959).

Registration of town allotments — Grant of town allotment by Estate holder before Land Act 1927 — Grant by Minister not necessary — Constitution Clause 107 — Land Act 1927 Ss. 22, 23, 76, 81 — 1903 Act Ss. 557, 558, 558, 560, 563.

The defendant wished to lease an area of land in his tofi'a. The plaintiff objected and asked the Court for a declaration that she had a life estate in the land, as a town allotment.

HELD: That although neither the plaintiff nor her husband had been registered as the holders of this allotment it had been validly granted to the plaintiff's husband and that she was entitled to a life estate therein.
Verdict for the plaintiff.

Finau appeared for the plaintiff.

Hale Vete and Kioa appeared for the defendant.

C.A.V.

HUNTER J.: The Defendant wishes to lease an area of land in his tofi'a to the Mormons. If the lease is approved the Mormons propose to erect a church on the land. The Plaintiff objects to the leasing of this land on the ground that it was her husband's town allotment and she has a life estate therein. The Plaintiff lodged an objection with the Minister of Lands, who after considering the matter advised the parties to refer it to this Court. The Plaintiff then issued the writ and in effect is asking for a declaration that she has a life estate in the land and therefore the Defendant is not entitled to enter into the proposed lease. I reserved my decision as it appeared to be a matter of difficulty.

I am satisfied of the following facts:

(a) The Plaintiff is the widow of Manakotau, who died in 1934.

(b) After their marriage the Plaintiff and her husband lived at first with his grandfather but later moved to the allotment in question. There is no evidence of the date of the marriage but it must have been in the early twenties if not earlier.

(c) This allotment was a town allotment and was "given" to Plaintiff's husband by the Vaha'i who at that time was Sekona.

(d) There is no evidence of the date of this "gift" but it must have been before 1926 as Sekona ceased to hold the tofi'a in that year as the result of a judgment of this Court. (See Vilisoni Manoa v. Vaha'i. Land Court 31st March, 1926).

(e) The Plaintiff and her husband occupied this town allotment (the allotment in question) until 1934 when the husband died.

(f) Since 1934 until the present time the Plaintiff has retained possession of this allotment although some time after her husband's death (there is no evidence of the date) the Plaintiff moved to Te'ekiu and has lived there ever since.

(g) The Plaintiff, since the death of her husband, has regularly paid the rent for the tax allotment (which her husband acquired at the same time as the land in question) to the Tofi'a holder.

(h) The Plaintiff herself has always regarded it as her allotment and has on several occasions paid fines awarded against her by the Magistrate for not keeping the allotment clean.

(i) There is no record in the Registers of the Lands Department that either the Plaintiff or her husband were ever the holder of this allotment.

(j) The name Manakotau is written on a town allotment on a plan — Exhibit A. This is not the allotment in question Manakotau's name has been crossed off and 'Apolosi written in in pencil. No reference to Manakotau as the holder of this allotment appears in the Register, and there is no evidence to explain the entry of his name on, nor its deletion from, the plan. Without any explanation I feel I must disregard it.

(k) I found both the Plaintiff and Defendant honest witnesses as far as their recollections went.

(l) I was impressed with the witness Taniela Tai. He was an old man (73½ years) but I regard him as truthful and as having a clear recollection of the events in the past.

(m) I also found the witness Tevita Pau'u reliable.

The defendant's counsel submits that there must be a verdict for the defendant because (a) there is no evidence on which the Court could act to show that Manakotau was ever the holder of the allotment in question; (b) even if there is such evidence the Plaintiff must still fail as neither Manakotau nor his widow ever registered the allotment in their names; and (c) Section 81 of Chapter 45 (The Land Act) provides that if the widow fails to make a claim within twelve months from the death of her husband the allotment reverts.

The Plaintiff's counsel on the other hand submits that there is convincing evidence that Manakotau was the holder; (b) that failure to register an allotment is not fatal; and (c) that Section 81 does not apply because it cannot have a retrospective operation.

After careful consideration I am convinced that Vaha'i (Sekona) gave the land in question to the Plaintiff's husband some time well before the Land Act 1927 was enacted and that Manakotau and his wife occupied it until his death in 1934 and that the Plaintiff has had undisputed possession of it ever since, until the question of the lease arose.

Although registration is very strong evidence of ownership I can find nothing in the Act to say that a person claiming an allotment must be able to show he is registered as the holder of that allotment. Nowhere does the Act make registration the test of ownership. The intention of the Act is that registration will be a method of proof, nothing more. This was the view taken by the Privy Council in Tu'i'afitu and Anor. v. Mesui Moala (Privy Council 25. 1. 57) the Privy Council in the course of their judgment said : "It was one of the main contentions of the Appellant both in the Land Court and on the hearing of this appeal that the Respondent was not entitled to succeed in his claim because of his failure to become registered as the holder of these allotments. The learned trial judge held that the Respondent had taken all steps required by the Land Act Section 76 and that whilst registration is evidence of ownership it is not always necessary to prove registration before ownership can be established. With this statement of the law we agree." Therefore it is clear that the omission of Manakotau's name from the Register is not of itself sufficient to deprive him (and through him his widow) of his right to this allotment.

Apart from the question of registration it was suggested to the Court during argument that it was the Minister, and only the Minister, who had power to grant allotments and as the evidence in the present case shows that the grant of the allotment in question was made by the Estate Holder, and not the Minister Manakotau never obtained any legal title to this allotment, and therefore could not transmit any title to his widow. Hale Vete (for the Defendant) referred to Section 23 Chapter 45 which provides that the Minister shall define holdings and boundaries. Section 23 is in Division II of Part II of the Act, a Division dealing with areas and boundaries. There is no dispute as to areas or boundaries here, and I do not think that Section 23 has any bearing on the problem under consideration.

It is true that under the present act application for an allotment must be made to the Minister and until he approves of the application no title to the land can pass.

However the grant in this case was made long before the passing of the present Act, and it becomes necessary to examine the Act of 1903 which was the law in force at the relevant time. On a careful examination of this Act a curious position emerges and it is this : Under the old law there was a difference in the procedure necessary for a grant of a town allotment and tax allotment. Why this should be so I do not know but the wording of

the sections puts it beyond doubt and the Court Interpreter informs me that the meaning in the Tongan version is exactly the same.

The first section of the 1903 Act dealing with the matter is Section 557. That section reads as follows : "Every male Tongan subject who has attained the age of sixteen years and is lawfully residing on the estate belonging to any Noble or to the Crown shall be entitled to a village allotment and a tax allotment in such estate or Crown land and such allotment shall be granted and registered by the Minister of Lands and such allotments shall be hereditary in the male line and the Noble shall receive the sum of one dollar ($1) per annum from every occupier of tax allotments on his estate." These words mean that the allotment which is to be granted and registered by the Minister is the tax allotment; the town allotment is not included otherwise the section would have read "such allotments" That the use of the word "allotment" and not "allotments." is not a slip which the Court might be entitled to correct is born out by the wording of Sections 558, 559 and 560 in which there is no mention of Town (or village) allotments. However the matter is put beyond doubt by Section 563 which, after providing that every male Tongan is entitled to an hereditary village allotment and tax allotment, goes on to say "And the Minister of Lands shall grant a tax allotment to every person ..... And every tax allotment so granted shall be recorded in the Register .....". There is no mention of the Minister granting a village allotment. Then who is to grant such an allotment to which the section (and indeed Clause 109 of the Constitution) says he is entitled ? Obviously the holder of the estate on which the allotment is situated. If the allotment happened to be on Crown land then the Minister would make the grant as the representative of the Crown, but otherwise it was to be done by the estate holder, and although a tax allotment had to be registered there was no provision making registration of a town allotment obligatory, although many of them were so registered. It follows therefore that the grant of the allotment in question by the then Vaha'i to Manakotau was valid. I cannot agree with Counsel's third submission that Section 81 of the Land Act applies and that as the widow failed to make a claim within 12 months of the death of her huband the allotment has reverted to the Tofi'a holder. The husband died in 1934. In the section as it stood then it was only the heir who was obliged to make a claim within 12 months, there was no mention of the widow. It was not until the amendment of 1943 that the widow was included. Of course at that time it was impossible for the plaintiff to make a claim within twelve months of the death. This amendment can only apply in cases where the last holder has died less than 12 months before the date of the amendment. If the Legislature intended that the widow should claim whenever her husband had died it would have been necessary to insert some such words as "or within 12 months of the date of this Act coming into force

whichever is the later." This was not done, and the Court has no power to write in such words.

I find therefore that the original grant to Manakotau was valid, that he occupied the land until he died in 1934 and that his widow has been in lawful possession of it ever since. It follows that Vaha'i has no power to enter into the proposed lease. I would like to add that this result cannot cast any adverse reflection on the Defendant; he has acted perfectly properly and fairly throughout.

Verdict for the Plaintiff and declare that she is entitled to a life interest in allotment in question as a town allotment. I suggest that the records of the Department be put in order by registering the Plaintiff as the holder of an estate for life. The allotment itself is not in doubt, it clearly appears on one of the plans shown to me during the hearing.