

THE SAMOAN PUBLIC TRUSTEE
as Administrator of the Estate of
the late JOSEPH COLLINS of Malie,
deceased

v

ANNIE COLLINS of Malie, Widow,
JAMES SCHUSTER of Apia, Carpenter,
ALFRED SCHUSTER of Apia, Carpenter,
GEORGE SCHUSTER of Apia, Carpenter,
THOMAS SCHUSTER of Suva, Fiji,
SILOFAGA of Malie, Spinster,
HARRIETTA MARTHA SCHWALGER of Malie,
WILLIE BROWN formerly of Malie, but
now of residence unknown,
ELIZABETH COLLINS of Malie,
SEAGA of Malie, FAISIOTA of Malie,
MILE of Malie, ELETISE of Malie,
TOU of Malie, SIO of Malie, MALO of
Malie, NETI of Malie, VILIAMU of
Malie, ALIITASI of Malie

High Court Apia
20, 21, 23 June 1933
Luxford CJ

ADMINISTRATION OF ESTATES - Determination of next of kin dependent on validity of alleged polygamous marriage of deceased, an American national born and domiciled in Samoa, with a Samoan woman in or about the year 1870 - Whether marriage valid according to Samoan custom - Whether children of union legitimate - Law applicable to succession - Conflict of laws - Historical retrospect.

MARRIAGE AND DIVORCE (Samoan custom prior to 1889) - Alleged polygamous marriage in or about the year 1870 - American national born and domiciled in Samoa marrying Samoan woman in accordance with Samoan custom - Dissolution of marriage in accordance with Samoan custom - Historical retrospect - Conflict of laws - Court of opinion marriage valid in accordance with Samoan custom and children of the union legitimate.

CASE STATED by the High Court of Western Samoa for determination by the Supreme Court of New Zealand of the question:-

Is a marriage performed in accordance with Samoan customs previously to any civilised government having jurisdiction in Samoa between a national of the United States of America and a Samoan woman a legal marriage? The said national of the United States was born in Samoa and of half Samoan blood. He lived as a Samoan, he had only a Samoan domicile, and he died in Samoa on the 21st day of February, 1920.

A. McCarthy for plaintiff.
G. Klinkmueller for first eight defendants.
W.K. Andrews for remaining eleven defendants.

Cur adv vult

LUXFORD CJ. The present action has been commenced by the Samoan Public Trustee as Administrator of the Estate of Joseph Collins, deceased, who died intestate on the 21st day of February, 1920 for the

purpose of determining (*inter alia*) his next of kin. The deceased was one of the seven children of the marriage between William Collins, an American subject, and a Samoan woman. No evidence was adduced to prove this marriage nor was its solemnisation challenged, so I assume for the purposes of this case that the children were the issue of a lawful marriage. The father and the mother predeceased Joseph. Two of his brothers or sisters (the evidence does not disclose their sex) also predeceased him leaving issue. Two sisters died subsequently leaving issue, and the remaining sister Annie Collins is still alive.

Annie Collins and the children of the deceased sisters are the first named eight defendants, and will hereafter be referred to as "the first defendants". They claim to be the next of kin of the deceased, and to be entitled to divide the estate between them *per stirpes*.

This claim is denied by the last named eleven defendants, to whom I will hereafter refer to as "the second defendants", who allege that they are the direct descendants of Joseph Collins by his marriage with a woman named Sina.

It is common ground between the first and the second defendants that the estate devolves according to German law, and that consequently their respective rights depend on the question of Joseph Collins' marriage with Sina. If that marriage is proved, the second defendants only are entitled to the estate *per stirpes*, if not, it must go to the first defendants.

The second defendants say firstly that Joseph went through a form of marriage with Sina in the village of Apai on the island of Manono.

An old woman named Feta'ai gave evidence that she was the younger half sister of Sina. She was positive that a London Missionary Society pastor named Mose performed the ceremony of marriage to unite Joseph and Sina as man and wife, and that she was present at the ceremony. Feta'ai is unable to state her age which, of course, is quite usual, but she has the appearance of a woman approaching the age of eighty. From her evidence I infer that she would be seven or eight years old at the time of the alleged ceremony, which fixes its date approximately in the year 1865. The legal positions will not be affected, however, if the date was fourteen years later as I will show when dealing with the questions of law that arise in this case.

To the surprise of counsel for both sets of defendants, this old woman produced a wedding ring during her re-examination and deposed that it was the ring given to Sina by Joseph at the time of the alleged ceremony, and worn by Sina from that day until her death more than fifty years later. She alleged that Sina gave her the ring when she (Sina) was dying.

I disregard this evidence for it was demonstrated to the Court by Mr. Meiritz that the ring is quite modern, and under microscopic test does not disclose the wear or markings that usage for fifty years must have brought about.

Feta'ai also made reference to the marriage festivities that took place after the ceremony, but I confess that I was not impressed with her recollection. She spoke of the usual collection of fine mats, but that Joseph and Sina took the mats to their new home at Malie in Upolu, and there made distribution. I make every allowance for the vagaries of Samoan custom, but I would require very certain evidence to convince me that the daughter of Mala'itali of Safune would be allowed to take away the "ie toga" collected for her marriage, and to make distribution of them herself. Samoan custom is much more flexible than the common law of England - at least it is "modified" to meet the wishes and desires of those who are strong enough or clever enough about a modification, but I cannot conceive even to-day, much less seventy years ago, any one being strong or clever enough to deprive the talking chiefs of the bride's village of their traditional right to make the distribution, for deprivation to the talking chiefs it would surely be.

Evidence was adduced to prove that Joseph and Sina attended the church of the London Missionary Society and received the sacrament of Holy Communion. Further evidence was given by the Samoan Pastor of Apia that the rules of the church of the Society forbid the administering of the sacraments to a man and a woman who live together unless their union has been legalised by marriage.

The Pastor inferred that this has always been the rule of the church,

but he was unable to say how strictly it was observed sixty or seventy years ago.

The evidence adduced by the first defendants confirms that Joseph and Sina lived together as man and wife; that three children were born to them; and that the second defendants are the direct descendants of the union. But, the evidence also shows, and in my opinion, proves that Joseph had many other "wives", some during his alliance with Sina, and some subsequently to Sina's final separation from him, but that only one other than Sina bore a child to him.

According to Annie Collins, the sister of the deceased, the following is the narrative of Joseph's life of many marriages.

The first was a Manono woman called Vaitoelau, who came to Joseph's mat at Malie. Then Joseph paid a visit to his brother and sister at Fasito'o where he fell in love with Sina and eloped with her. The word eloped is the nearest English equivalent to the Samoan "avaga", which I will explain more fully subsequently.

Joseph returned to Malie with Sina, but he housed her in Annie's fale, because Vaitoelau still lived with him. This went on for four years, when Vaitoelau was sent back to her people, and Sina took her place by Joseph's side.

Joseph then eloped with a woman of Asala called Silafau, and brought her back to Malie to a European house. Sina remained in the Samoan fale.

Sina and Silafau decided that both should leave Joseph and go to the village of Faleasi'u a few miles to the westward of Malie. At this time Tatupu, the eldest child of Sina (called in these proceedings Elizabeth Collins) had been born.

The mother of Joseph went to Faleasi'u and brought back the child Tatupu to him. Sometime afterwards Sina came back to live with Joseph, and Silafau returned to her people.

Sina became pregnant to Joseph once more, and he brought a woman named Uese from Safotulafai to live with him while Sina went to Manono for the birth of the second child.

Uese apparently remained in Malie for sometime, and two other women, Po'upapalagi and Taeata, also joined the house of Joseph temporarily before the return of Sina with her new daughter Mele (Mary Collins). One of them, Po'upapalagi gave birth to a child, but of his or her life no evidence has been forthcoming.

Sina again lived with Joseph and gave birth to a son called Teve (David), but after awhile she left Joseph never to return. She lived with a European for sometime, and went with him to New Guinea, taking Teve with her. Tatupu and Mele remained with Annie Collins in Malie.

Joseph subsequently lived with Taunauma, and lastly with Sialatua, but apparently not until the end.

Martha Schwalger, a niece of Joseph, continues the narrative of his life. He went to Martha Schwalger sometime after Sina had returned from New Guinea in 1914. Joseph wanted to borrow money from his niece, who made the suggestion that he should marry Sina. Sina had acquired money in New Guinea, and had brought it back to Samoa.

Martha Schwalger asked, "Why don't you go back to Sina and marry her? She has plenty of money." Joseph said, "You say that to me. You want me to take back Sina and marry her. I could not do it because she has an awful face. It looks like a monkey. I could not take her as a wife." And his niece replied, "I won't ask you again. Take the money."

This quotation from Martha Schwalger's evidence strongly suggests that Joseph Collins did not consider himself the husband of Sina according to the European conception of the marriage tie.

The course of Joseph's matrimonial life would preclude me from treating the factum of cohabitation between him and Sina as evidence of a lawful marriage under English law. The German law gives less weight to cohabitation as evidence of marriage than does the English law. Consequently, as I do not place any reliance in the evidence of Feta'ai, I am unable to find as a fact that any ceremony of marriage according to the rites of the church of the London Missionary Society was performed to join Joseph and Sina as man and wife.

Although the blind Pastor Ueli has such an extraordinary faculty or habit of giving the exact year of various happenings that one might

doubt his accuracy, he stated definitely that there were no native pastors in the villages previous to 1875, but there were "teachers" who married eloping couples. By that I assume the teachers would give a blessing to couples who had become man and wife after elopement. I quote Ueli's evidence, however, to show the improbability of Feta'ai's account of a marriage by a Samoan pastor in the year 1865.

The second defendants contend, however, that they are entitled to succeed because they are the issue of a marriage held in accordance with and recognised by the usages and customs of the Samoan people. This ground raises a very important question and one which may have far-reaching effects. It has arisen incidentally previously, but has never been the subject of a decision. It becomes necessary, therefore, to make a short retrospect of past history.

Apart from the extra-territorial rights that were acquired by Great Britain, Germany and the United States in 1879 for the purpose of establishing a Municipal Council of three consuls to control and govern a small area in the vicinity of Apia, there was no constitutional government in Samoa as understood by Europeans until 1889, the year in which the Treaty of Berlin was signed.

In the year 1872, the Imperial Parliament passed an Act intituled the Kidnapping Act, 1872. I will quote from the preamble of that Act to show how the Pacific Islands, were regarded juridically by the Home Government at that time:-

Whereas criminal outrages by British subjects upon Natives of Islands in the Pacific Ocean, not being in Her Majesty's dominions nor within the jurisdiction of any civilised power

In the year 1875, the Kidnapping Act, 1872 became part of the Pacific Islanders Protection Act, 1875 whereunder Her Majesty took power to apply legislation to her subjects within the Pacific Islands "as fully and effectually as any such law or ordinance could be made by Her Majesty in Council for the government of Her Majesty's subjects within any territory acquired by cession or conquest". See section 6.

On the 13th August, 1877 Her Majesty made the Western Pacific Order in Council, 1877, which by subclause 1 of clause 5 thereof was made applicable to the Navigators' Islands, which of course are the Samoan Islands.

I am unable at the moment to quote the authority whereunder the Consular officers of Germany and the United States were given a specific jurisdiction over the nationals of their respective countries. However, I merely refer to the English Acts and the Order in Council to illustrate the constitutional position of Samoa.

Several abortive attempts were made to form a Government of Samoa, but until the Treaty of Berlin came into operation it is impossible to say that a de facto Government existed, although a de jure Government had been recognised when Malietoa Laupepa was appointed King on the 12th day of July, 1881. The course of events between 1881 and 1890 are fully referred to (inter alia) in Stevenson's Footnote to History.

On the 10th day of February, 1890 the Samoan Government constituted under the Treaty of Berlin made an Ordinance to regulate marriages and divorces in Samoa, which remained in force until it was specifically repealed by The Samoan Marriages Ordinance, 1921.

The Ordinance of 1890, which is known as the Malietoa law concerning marriage and divorce, was the first statutory enactment of the country to regulate these matters. Previous to the enactment, marriages and divorces were controlled only by the usages and customs of the Samoan people with this exception, the Consular officers of European nations appointed to Samoa could exercise in respect of their nationals the customary jurisdiction in matters matrimonial.

The British Consulate was established in 1856, and on the 14th July, 1857 there is a record of the marriage of one Schmidt to a Samoan woman "according to the form of the Church of England in this Her Britannic Majesty's Consulate".

The number of marriages recorded in the first four years of the Consulate is only three, and includes the marriage of a German subject

to a Chilean lady.

At that time there was an American Consulate in Samoa but, unfortunately, its records were removed from the country after the closing of the Consulate.

The marriage customs of the Samoan people are well known, but before I describe them I will refer to the effect upon them of the introduction of Christianity. Christianity was readily embraced by the Samoan people after the arrival of John Williams in the year 1830, and for seventeen years the church of the London Missionary Society alone administered to their spiritual needs. In 1847, the Catholic Mission arrived and subsequently, the Wesleyan, Latter Day Saints, and the Seventh Day Adventist Missions.

Notwithstanding the rapid spread of Christianity, marriages have been performed in accordance with the customs of the Samoan people even to the present day, but their validity subsequently to the Malietoa law may be a matter of doubt. However that question does not arise in the present proceedings.

The London Missionary Society endeavoured to enforce the sanctification by its church of all marriages between the men and women who adhered to its teachings, but previous to the Malietoa law, neither its church nor the church of any other Mission had direct legal authority to celebrate marriages in Samoa. Still Samoan custom recognised and accepted these marriages as valid, but not to the exclusion of marriages performed in accordance with its own rites.

There is still a further matter for consideration before I discuss the marriage customs in detail. This matter is the status of persons who are not of full Samoan blood.

According to the law at the present time, the term Samoan means "a person belonging to the Polynesian race, whether by pure or mixed descent" except, however, persons registered as Europeans, or the legitimate children of a European father. See section 3, Samoa Act, 1921. From the same section we also find that "Polynesian" includes "Melanesian", "Micronesian" and "Maori", while a European is everybody who is not a Samoan.

Most anthropologists and ethnologists support the view that there was a large migration many centuries ago from Egypt and Persia to the East Indies, and on to the Islands of the Pacific, including Polynesia, while a negroid migration from Africa reached Melanesia where it halted but subsequently went on in part to the Fiji Islands, where it coalesced with the fairer skinned people of the first migration. Samoan tradition shows that all the Islands of Polynesia originally were ruled by Tuimanu'a, the King of Manu'a, the group of islands which now form part of American Samoa, but that his power weakened until finally each group had its own King. According to Kramer, "Die Samoa Inseln", this happened in the year 1100 A.D., or about 100 years before Tonga conquered Samoa.

I make reference to this to show that nearly a thousand years ago the component parts of what we now term Polynesia, although peopled by the descendants of a common migration, were independent Kingdoms or states in much the same way as the countries of Europe.

The legends, or what we should call the history of Samoa, show that there was communication between the various groups, particularly between Tonga, Fiji and Samoa; that the descendants of marriages between Samoans, Fijians and Tongans were successors to the highest titles in Samoa; that arts and crafts were brought from one country and introduced into the other.

From this I deduce that custom acknowledged the right of a foreigner to come to Samoa and there lawfully to wed according to its rites a Samoan person. The skins of the Tongans are similar to the skins of the Samoans, but the skins of the Fijians are darker. But I have found nothing, nor has anything been placed before me, from which I have been able to deduce that custom did not acknowledge the same rights in respect of a foreigner whose skin is fairer than the Samoan skin. Of course, I speak of the period previous to the passing of the Malietoa law.

Unfortunately, so far as I have been unable to find there is no official copy of the English version of the Malietoa law in existence, but a translation from the Samoan version shows the following provisions in Part III:-

A marriage of a Samoan to a subject of a power who has a Consul

in Samoa.

1. A marriage between a Samoan and a European shall be performed by the Consul of the Government of the European.
2. The Government of Samoa has not recognised in the past nor will it recognise in the future any marriages between a Samoan and a European which have not been performed by the Consul of the Government of the European.
3. (No dissolution of Consular Marriage by Samoan Court).
4. (Religious ceremony only if authorised by Consul).

At first it would appear that section 2 of Part III concluded the question raised in the present case, but on further consideration of the section I have come to the conclusion that the declaration of non-recognition refers only to marriages subsequently to the 12th day of July, 1881.

The "Government of Samoa" means the Government referred to in the Treaty of Berlin. In the second paragraph of Article 1 of the Treaty appear these words:-

It is further declared, with a view to the prompt restoration of peace and good order in the said islands, and in view of the difficulties which would surround an election in the present disordered condition of their Government, that Malietoa Laupepa, who was formerly made and appointed King on the 12th day of July, 1881, and was so recognised by the three Powers shall again be so recognised hereafter in the exercise of such authority

The non-recognition of marriages between the two races extended only to those in which a national of England, Germany or the United States was a party for no other countries had a consular representative in Samoa. When in 1881 the three Powers recognised the Government of Malietoa Laupepa, it is quite reasonable to infer that their nationals should be debarred from intermarrying with Samoans except by a ceremony of marriage performed by their respective Consuls, or at least that the Government of Samoa should refuse to recognise such marriages unless so performed: see Churchward, "My Consulate in Samoa" at page 298. But, in my opinion, specific words would be necessary to invalidate such a union previous to that time.

Samoa became a German Imperial Protectorate on the 17th February, 1900, but although the Malietoa law continued in force the Imperial Governor had very grave doubts about the validity of the marriages between Europeans and Samoans. At page 169 of Volume IV, Government Gazette (Blatt) appears a protocol of the meeting of the Government Council on the 18th January, 1913 to discuss a resolution of the Reichstag referring to the question of mixed marriages. I will quote from the translation made for the Court by Mr. Klinkmueller:-

That so far as Samoa was concerned marriages have been performed until recently between whitemen and Samoans, but that for several years the Registrar of marriages has declined the performance of such marriages for legal reasons. And that doubts have arisen as to the legality of such marriages performed in former times. The Chairman recommended to open the debate on the following questions:-

1. Shall marriages between whitemen and Samoans which were performed in previous years in the protectorate by the Registrar be declared valid by legislation?
2. Shall such marriages be permitted in the future?

A lengthy discussion took place and certain recommendations covering all marriages (not only those which were performed since 1900) were made. These recommendations were under consideration by the Reichstag when the World War commenced, and consequently no further action was taken.

The Imperial Judge in Samoa was also Registrar of Marriages, and

held the view that marriages between Europeans and Samoans were illegal. A Writ of Mandamus was sought against him by a German doctor, but was refused. An appeal from this decision was taken to the Reich, but as the appeal was dismissed on technical grounds the legality of the Registrar's refusal was not determined.

I have made reference to these two incidents to show the doubts which existed during the German regime relative to the question involved in the present case.

Although Joseph Collins was presumably an American citizen, the evidence shows that he was in fact a Samoan. It is true that he managed a store, and acted as a policeman, but that is not incompatible with his de facto status. He was recognised as the head of a branch of the Su'a family. He held the Matai title of Su'a. He adopted his nephew James Schuster in accordance with the Samoan custom, and thus James Schuster became his successor to the title.

As Samoan custom recognises the marriages of Samoans to foreigners, so does it allow people who are not Samoans to hold Matai and even Ao titles. It may be a matter for administrative consideration whether it is wise to allow this, but at the present time the custom exists and is practised. But the mother of Joseph Collins was of the family of Su'a, and his rights to succession came through her.

I have heard it said very often, indeed at one time I assumed that the legitimate children of a European father had no rights to Samoan property through their mother, but on searching for authority for this common belief I found none. In practice, of course, most of such children live in European fashion and inferentially relinquish the rights (if rights they be) to which they are entitled through their mother.

But Joseph Collins made no inferential or other relinquishment of the rights to which he was entitled.

In the following description of the marriage customs I have been assisted by a translation of an essay entitled, "The Family Property and Succession Rights of the Samoan People", written by Dr. Schultz, who was Imperial Judge of Samoa for a number of years, and was Imperial Governor from 1910 to 1914. The translation was made recently by the present Chief Surveyor, Mr. G.F.K. Hufnagel-Betham, who kindly forwarded to me a copy of his manuscript. I have made reference also to the manuscript translation of Dr. Kramer's comprehensive work, which was published in the German language nearly thirty years ago under the title, "Die Samoa Inseln".

Both these learned gentlemen deal with the marriage customs very fully and my somewhat intensive experience of the last four years enables me to adopt their formulations with confidence.

Although the Samoan marriage customs are well known, they, like the other customs of the people have not been free from variations on the grounds of expediency in special cases, or because someone has been powerful or clever enough to enforce a variation. I referred to this phase in a previous passage of this Judgment.

It is not too much to say that Samoan custom accepts as right what has been brought about by might. That is Dr. Schultz' view as appears in the final formulation of his essay:-

The entire result of all these manifestations is that in many Samoan families ownership does not depend on right. It is to be taken then that one accepts might before right (club law) as a legal maxim and as a consequence all adopted variations brought about by force are regarded as legal.

But I would define might to include might of personality, intellect, wealth, or physical power.

Thus we find Joseph Collins living a polygamous existence, and each wife acknowledged as such by the people, to the extent of being addressed as Faletua. The word "Faletua" is not the equivalent of the very convenient French word "Madame", but rather of the English "legal wife".

Polygamy is not contrary to Samoan custom but the right to a plurality of wives at one and the same time was reserved (generally speaking) to the holders of the higher titles. The holder of the lower titles and the untitled men were allowed only one wife at a time, but as consent was necessary for the union, so was it necessary for severing

the union.

The present case does not call for a consideration of the complicated ceremonies of the wooing of a taupou by a High Chief, or of the final ceremony of defloration before the marriage was complete. Needless to say, the ceremony of Faamaseiau has gradually disappeared under Christian influence.

The ordinary form of matrimonial contract is the consent of the girl's parents to her running away with the man of her choice, or, more correctly speaking, the man chosen for her, after the customary exchange of foodstuffs between the two families. This is termed "avaga i le loto o le aiga o ona matua" - an elopement in accordance with the wishes of the family of her parents.

If a woman eloped with a man without the consent of her parents she would become outcast and so remain until a reconciliation had been brought about. Then would the union be recognised.

It necessarily followed that children of a union which was not recognised were considered illegitimate and were known as "children of the night", but subsequent recognition of the union removed the stain of illegitimacy.

There were other methods of removing the stain to which it is not necessary for me to refer.

I will quote from Dr. Schultz' Essay to describe the method of severing a legal union (paragraph XVI):-

To annul a marriage the actual separation does not in accordance with the old Samoan conception complete the act. This ensues mostly from the husband's side when the purpose of the marriage has been attained, namely, when a child is born, or when the purpose of the marriage has not been achieved, that is, in the case of sterility: and further, in the case of adultery when there is no prospect of condonement and such like cases. The husband is then termed tane "mafana" and the wife "fafine mafana". If the man is justified in accordance with his rank to practise polygamy he can make further marriages. Otherwise, however, the rights and duties of the husbands are not terminated by separation Only when both parties have declared that they grant each other freedom termed "magalo" does the marriage become definitely void.

The evidence in the present case satisfies me that Sina became the wife of Joseph Collins according to the customs of the Samoan people somewhere about the year 1870, and that she remained his wife until after the birth of the third child Teve. The marriage was dissolved in accordance with the said customs when finally she separated from Joseph to go to another man. It is admitted that the second defendants are the direct descendants of that union, and that they alone are entitled to the estate if the union is recognised by this Court.

The policy of the mandatory power, as evidenced by the Samoa Constitution Order, 1920 and the substitutionary Samoa Act, 1921, has been towards the validation of marriages performed previous to the 1st day of May, 1920, the date on which the Constitution Order came into force. It is enacted in subclause (4) of clause 376 of the Order that:-

All marriages which at the commencement of this Order are valid under the laws theretofore in force in Samoa shall be deemed to be valid marriages for all purposes hereunder including that of the legitimation of any child of the parties to any such marriage born before such marriage.

The subclause is now subsection (3) of section 372 of the Samoa Act, 1921. The Constitution Order was amended on the 29th day of November, 1920 by the inclusion of the following enactment:-

Notwithstanding anything in the Samoa Constitution Order, 1920, the Malietoa law of the tenth day of February, 1890 (Concerning marriages in the Islands of Samoa and decree of divorce certificate) shall be and shall be deemed to have continued in force in Western Samoa until hereafter repealed by the Administrator by an Ordinance

and all marriages under the said law shall be deemed to be valid marriages for all purposes.

This reference to the Malietoa law has no bearing on the present case beyond showing the concern of the mandatory power for the validation of former marriages. The provisions of subclause (4) of clause 376 of the Constitution Order should have been sufficient for the purpose without specifically reviving the Malietoa law, but I assume it was done to set aside the doubts that had been raised during the German regime.

The subclause, or rather the subsection, is remedial and should receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object . . . of such provision . . . according to its true intent meaning and spirit: see Acts Interpretation Act, 1924.

The words "all marriages which at the commencement of the said Order were valid under the laws theretofore in force in Samoa" may mean:-

- (a) marriages subsisting at that time;
- (b) marriages dissolved by law or death previous to that time;
- (c) marriages valid under the specifically enacted laws in force up to that time;
- (d) marriages valid under any law specifically enacted subsequently to the 12th July, 1881;
- (e) marriages validly performed previous to 12th July, 1881 by a Consular representative or according to the customs and usages of the Samoan people.

The only difficulty in determining the true interpretation of the subsection is the meaning of the word "laws", whether it means only laws specifically enacted by the recognised Government of Samoa subsequently to 12th July, 1881 and International law applicable to Samoa previous thereto, or includes all customs that had the force of law.

The provisions of section 368 have some bearing on this question. There it is enacted "save so far as may be otherwise provided by Regulation or Ordinance, the right of succession to the property, whether real or personal, of a Samoan shall be determined in accordance with Samoan custom, and all other laws in force in Samoa with reference to succession shall be subject to such custom accordingly".

The underlined word "other" probably refers to the authorised Regulation or Ordinance, and shows an intention on the part of the Legislature to differentiate between the terms "custom" and "law" and the other "specifically enacted law", but I am unable to make a similar distinction in the use of the word "laws" in subsection (3) of section 372.

It is important to note that subsection (3) refers to "the laws theretofore in force", that is, the laws in force previous to the coming into operation of the Constitution Order, but it does not add the words "and which were repealed thereby". This would indicate an intention to validate customary marriages.

Having regard to the intent, meaning and spirit of the subsection, I am of opinion that there is a specific validation of all marriages performed in Samoa previous thereto, whether in accordance with International law, specifically enacted law, or the customary law of Samoa.

I have previously expressed a doubt on the effect of the Malietoa law upon customary marriages, and that doubt still remains in spite of the provisions of section 378, but there is no necessity for me to express an opinion upon this question in the present proceedings.

Mr. Klinkmueller contended that the German law alone must be applied in determining the questions involved in this case, and German law would not even recognise the right of a European to marry a Samoan under any circumstances.

It is quite true that the Imperial Judge as Registrar of Marriages so interpreted the law, but I do not know upon what grounds he based his determination. Suffice it to say that the Malietoa law remained in

full force and effect throughout the period of German Government, which ex facie gave the right that the Imperial Judge denied.

It is clear from the provisions of Part XVII of the Constitution Order and Part XVI of the Samoa Act that existing rights under laws repealed by the Constitution Order are preserved, although the wording of the enactments does not make mention of rights acquired under laws which had ceased to be in operation at that time, but in my opinion the provisions of section 20 of the Acts Interpretation Act, 1924 would extend the benefits of preservation to those rights.

If, therefore, Joseph Collins and Sina acquired the legal status of husband and wife the status of their descendants is and remains legitimate.

I have already held that Joseph and Sina had that status, and it follows that the second defendants are entitled to succeed to his Estate.

I appreciate the difficulties surrounding this case, and that the position of the parties, and the smallness of the Estate will preclude an appeal from any decision I may give. The only asset in the Estate is a piece of land originally valued at £400, but of problematical value today.

I appreciate also that owing to the paucity of books of legal reference, it has been impossible for counsel to deal adequately with the legal aspects of the case: further, that counsel have delegated to me the task of ascertaining historical and ethnological data, which strictly speaking should have been placed before the Court by expert witnesses.

A careful consideration of the cases collated in Part IX of the Conflict of Laws in Volume II of The English and Empire Digest, particularly the South African case of Canham's Estate v. The Master and the recent English case of Nachimson v. Nachimson [1930] P. 217, [1930] All E.R. Rep. 114 is necessary, but the reports are not available in Samoa.

It cannot be denied that the effect of a Judgment in accordance with my opinion will have far-reaching effects, for I understand that there are numerous other people in Samoa similarly situated to the defendants in the present case. It is at once apparent how difficult would be the finalising of the list of descendants of Europeans who lived the life of Joseph Collins, but whose many wives each bore issue. Legislation may be necessary to deal with the question, but the legal position should be determined by the highest judicial authority before legislation is attempted.

I propose, therefore, to state a case to the Supreme Court of New Zealand in the following form:-

Case stated by the High Court of Western Samoa on a question of law for determination by the Supreme Court of New Zealand:

1. The Samoan Public Trustee commenced an action in the High Court of Western Samoa to have determined the next of kin of Joseph Collins, deceased, who died in Samoa on the 21st day of February, 1920.
2. Annexed hereto and numbered pages 1 to 3 is the Statement of Claim filed in the said action.
3. The first eight defendants are entitled to the estate of Joseph Collins unless the last eleven defendants are the legal descendants of the deceased and a Samoan woman named Sina.
4. Joseph Collins was the legitimate issue of the marriage in Samoa of William Collins, a citizen of the United States, to a Samoan woman.
5. Joseph Collins lived in Samoa throughout the whole of his life.
6. His method of living was more in accordance with that of the indigenous population of Samoa than of the European people.
7. Joseph Collins became the controller of a branch of the Su'a family. He held the title Su'a, and adopted a nephew who became his successor to the title.
8. A Samoan woman called Sina became the wife of Joseph Collins according to the customs of the Samoan people somewhere about the year 1870 when Samoa was not within the jurisdiction of any civilised government.

9. Sina bore to Joseph three children, one of whom is still alive. The remaining ten second defendants are the descendants of Mary Collins, the second daughter of Joseph and Sina. David Collins died without issue previous to the death of Joseph.
10. The union between Joseph and Sina was severed by a customary divorce after the birth of David.
11. The case came on for hearing the 20th, 21st, and 23rd days of June, 1933 when the Court heard the evidence adduced on behalf of the two sets of defendants.
12. Annexed hereto and numbered pages 1 to 17 is the note of the evidence adduced at the hearing.
13. At the hearing it was contended that no marriage recognised by the law of Germany existed between Joseph Collins and the Samoan woman Sina, and consequently that the last eleven defendants are not entitled to the estate of Joseph Collins.
14. It was contended, however, on behalf of the last eleven defendants that as Sina became the wife of Joseph Collins in accordance with the customs of the Samoan people at a time when no civilised government had jurisdiction in Samoa, the Court should declare the union valid and also that they are the true descendants thereof.
15. The Court, on its own motion, has decided to state a case for the determination by the Supreme Court of New Zealand of the questions of law that have arisen in the present proceedings.
16. The question of law for determination by the Supreme Court of New Zealand is:

Is a marriage performed in accordance with Samoan custom previous to any civilised government having jurisdiction in Samoa between a national of the United States of America and a Samoan woman a legal marriage? The said national of the United States was born in Samoa and of half Samoan blood. He lived as a Samoan, he had only a Samoan domicile, and he died in Samoa on the 21st day of February, 1920.

NOTE

The Judgment of Luxford CJ was affirmed by the Supreme Court of New Zealand 13 December 1961 sub nom THE SAMOAN PUBLIC TRUSTEE v. ANNIE COLLINS AND OTHERS AND ELIZABETH COLLINS AND OTHERS [1960-1969] WSLR 52.