THE SAMOAN PUBLIC TRUSTEE v. ANNIE COLLINS AND OTHERS AND ELIZABETH COLLINS AND OTHERS

Supreme Court of New Zealand. Wellington. 1961. 4, 5, 6, 13 December. Full Court. HUTCHISON J. McGREGOR J.

Case stated from High Court of Western Samoa - determination of next of kin - Validity of marriage between national of the United States of America and Samoan woman - recognition of marriage according to Samoan custom - law applicable. Intestacy - Succession - Conflict of laws.

Joseph Collins, the son of an American citizen and a Samoan woman, himself an American citizen, was born in Western Samoa, was domiciled here and lived all his life here as a Samoan. He died intestate on 21 February 1920. In 1933 an action to ascertain those entitled to his estate was commenced by the Samoan Public Trustee as administrator of the estate against two groups of defendants; first, his next of kin on the basis of his not having been legally married; and secondly, the descendants of a Samoan woman Sina, he having been the father of her children.

The case came before Luxford C.J. in the High Court in Apia and he, after hearing evidence, found as a fact that Joseph Collins and Sina were married in Western Samoa according to the customs of the Samoan people about the year 1870, when Samoa was not within the jurisdiction of any civilized Government. He expressed the opinion that the marriage of Joseph Collins and Sina by Samoan custom was a legal marriage, and accordingly held that the status of their descendants was a legitimate status and that they were entitled to succeed to the estate.

The learned Chief Justice, however, recognised the difficulties involved and the possible far-reaching effects of his conclusion and thereupon decided that the legal position be determined by the then highest judicial authority. Of his own motion, he stated a case as follows:-

> "The question of law for determination by the Supreme Court of New Zealand is:
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> Is a marriage performed in accordance with Samoan customs previously to any civilized 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".
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> HELD, affirming the judgment of Luxford C.J., that the marriage between Joseph Collins and Sina in or about the year 1870 in accordance with Samoan custom was a valid marriage and their children were legitimate.

CASE STATED by the High Court of Western Samoa for the opinion of the Supreme Court of New Zealand.

Barton and Mrs Schellevis (of the New Zealand Bar), for plaintiff:
Eichelbaum and Dent (of the New Zealand Bar), for the first group of defendants:
Shires (of the New Zealand Bar), for the second group of defendants:

Cur. adv. vult.

HUTCHISON J. This is a Case Stated under s. 82 of the Samoa Act 1921 by the High Court of Western Samoa. Joseph Collins, the son of an American citizen and a Samoan woman, himself an American citizen, was born

lived there

in Samoa, was domiciled there, lived all his life there as a Samoan, and died there on the 21st February 1920. In 1933 an action to ascertain those entitled to his estate was commenced by the Samoan Public Trustee as administrator of his estate against two groups of defendants, first his next of kin on the basis of his not having been legally married, and secondly the descendants of a Samoan woman Sina, he having been the father of her children.

The case came before the learned Chief Judge, and he, after hearing the evidence, found as a fact that Joseph Collins and Sina were married in Samoa according to the customs of the Samoan people about the year 1870, when Samoa was not within the jurisdiction of any civilized Government. He went on to express the opinion that the marriage of Joseph Collins and Sina by Samoan custom was a legal marriage. He held that the status of their descendants was a legitimate status and that they were entitled to succeed to the estate. He concluded his judgment, however, by saying -

> "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.
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> I propose therefore to state a case to the Supreme Court of New Zealand . . . . . "

It is unnecessary to set out paragraphs 1 to 15 of the Case so stated, but paragraph 16 reads:-

> "The question of law for determination by the Supreme Court of New Zealand is:
>
> Is a marriage performed in accordance with Samoan customs previously to any civilized 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".

There was a great deal of delay in the presentation of the case to this Court for decision. The case was stated, as already appears, by the Chief Judge on his own motion. The property involved was very small, a piece of land in Samoa at one time said to be worth £400 and possibly worth less, and the two groups of defendants were quite unable financially to prosecute the case. Mr Barton informed the Court that, owing to the importance of the question, the Executive Government of Western Samoa has now made an ex gratia grant for legal expenses to enable the case to be presented. The case involved also a great deal of research as to what the law of Western Samoa was in the period when it was a German Protectorate from 1st March 1900, which law remained the law of Western Samoa, notwithstanding the occupation of the territory by New Zealand troops from 1914, until the Samoa Constitution Order (New Zealand) which came into force on the 1st May 1920. In this research counsel had much assistance from the New Zealand Legation of the Federal Republic of Germany and the New Zealand Embassy of the United States of America, and, in the result, a great deal more is known by this Court of the Samoan law at the time of the German Protectorate and of the law of the United States of America, than was

known when the action was originally tried before the Chief Judge.

Before the learned Chief Judge it was common ground that, if the off-spring of the union between Joseph Collins and Sina were legitimate, the second group of defendants took Joseph Collins' small estate, while, if they were illegitimate, the first group of defendants, the sisters and descendants of sisters of Joseph Collins, took the estate. That was not altogether accepted in this Court, and argument was presented on the question of succession to this particular estate along with the argument on the question asked by the case. I propose, however, to keep the question of succession, as far as that is possible, separate from the question propounded by the case, for it is the latter question which is of wide importance while the former question is of importance only to the parties concerned, and even to them, of small importance; though I will make some reference to that question also. I should add that it was obvious, when the case came before this Court, that some of the defendants must have died since the action commenced, though which of them may have died and who would be the personal representatives of those who have died is entirely unknown. However, in view of the urgency of the matter, in which not only had the argument to be heard but judgment had to be delivered before the 1st January 1962, Independence Day for Western Samoa, the Court had to content itself with pointing out the position of parties.

When the case came before the High Court, the starting point of the enquiry was s. 372 of the Samoa Act 1921, of which subsections (1), (2) and (3) read as follows:-

> "(1) Notwithstanding the repeal of the former laws of Samoa by the Samoa Constitution Order, all rights, obligations, and liabilities existing under those laws at the commencement of this Act shall continue to exist, and shall be recognised, exercised, and enforced accordingly, but subject to the provisions of this section.
>
> (2) In respect of the recognition, exercise, and enforcement of such rights, obligations, and liabilities as aforesaid, and in respect of all matters wherein any doubt, difficulty, or injustice arises or may arise by reason of the transition from the legal system hitherto in force in Samoa to the system established by the said Order and this Act, the High Court and all other Courts in Samoa or in New Zealand are hereby empowered and directed to exercise their jurisdiction in accordance with equity and good conscience and not otherwise.
>
> (3) All marriages which at the commencement of the said Order were valid under the Laws theretofore in force in Samoa shall be deemed to be valid marriages for all purposes hereunder, including that of legitimation of any child of the parties to any such marriage born before such marriage".

The learned Chief Judge, in expressing his own view that the marriage in question was a valid marriage, founded himself mainly on subsection (3) of this section, and that was supported in argument by Mr Shires in this Court. With all respect, however, I do not think that that subsection assists to any substantial degree. It declares valid all marriages which at the commencement of the Samoa Constitution Order 1920 were valid under the laws theretofore in force. The words "at the commencement of the Samoa Constitution Order" fix a point of time, being the time at which that order came into force, and it is, therefore, in my opinion, a prerequisite of the application of this subsection that the marriage under consideration should have been valid at that time under the laws then in force in Samoa; and the subsection therefore refers the Court back to the law in force at that point of time. Further, I think that the subsection applies only to marriages that were subsisting at the

commencement of the Samoan Constitution Order. The word "were" in the expression "were valid" in subsection (3) is used because the time to which the subsection was referring was the time of the commencement of the Order, and the subsection will have the same meaning as the original corresponding section of the Order in which the expression is "are valid". I think that, the case of marriages which were not subsisting at the commencement of the Order, it is subsection (1) with which we are concerned, for it is then not the pre-existing marriage with which one is concerned but the "rights, obligations and liabilities" that may have arisen under such pre-existing marriage.

This, then, on the face of it requires the Court to consider what the applicable law was at the time of the death of Joseph Collins, which for all practical purposes was immediately prior to the commencement of the Samoa Constitution Order; but, before I can say with certainty that the Court is so required, I must dispose of a submission made by Mr Eichelbaum, who contended that the Court did not have to consider that law, but should, under s. 372(2) of the Act, refer the matter back to the High Court to be dealt with in accordance with equity and good conscience. There are two branches of subsection (2), the first in respect of the recognition, exercise and enforcement of certain rights, obligations and liabilities, and the second in respect of matters wherein any doubt, difficulty or injustice arises by reason of the transition from the legal system earlier in force in Samoa to that established by the Order and the Act. I set aside for the time being the second branch of that, for it cannot at this stage be postulated that any doubt, difficulty or injustice will arise in respect or as a result of the decision of this Court. As far as the first branch of it is concerned, that, in my opinion, has no application at the present juncture. Subsection (1) provides that all rights, obligations and liabilities existing under the former laws at the commencement of the Act shall continue to exist. It goes on to say, however, that they shall be recognised, exercised and enforced "accordingly but subject to the provisions of this section". That means, in my opinion, that a Court must first ascertain what the rights, obligations and liabilities were under the previous system of law, but in the second step, that of recognising, exercising and enforcing them, there then comes in the equity and good conscience provision of subsection (2). What this Court has to give its opinion on are the rights of the parties. After that opinion has been given, the equity and good conscience jurisdiction may be exercisable, but it is not a relevant subject for enquiry at this point.

What then was the law in force in Western Samoa at the material time and in relation to the marriage of Joseph Collins entered into in or about 1870?

The introduction of German law into Samoa came about thus. From at the latest the year 1879, Great Britain, Germany and the United States of America by agreement exercised extra-territorial rights in and in the vicinity of Apia. Great Britain and the United States had established consulates there prior to that. On the 10th July 1879 the Emperor of Germany, after having received the consent of the Federal Council and the Imperial Diet, enacted the "Act concerning consular jurisdiction". That provided that -

> "The Imperial subjects and fellow protegees (schutzgenossen) who reside or are present in the Consular Court District are subject to the Consular jurisdiction".

The Act contained no definition of fellow protegee, but it is proper to read it as including at least British subjects and American citizens. Paragraph 3 of the Act provided that, as concerned the civil law, the Imperial Acts, the Prussian statutes and General civil law provisions of those Prussian districts in which the Prussian Statutes were in force were

to be applied in the Consular Court districts. Whether this would be applicable at that time to nationals of the United States or Britain, which had their own Consulates there, need not be considered; it is the application of this Act after the 1st March 1900 with which we are concerned. The islands of the Samoan group constituting Western Samoa became a German Protectorate on the 1st March 1900, following the London Convention of the 14th November 1899. On the 17th February 1900, the Imperial Ordinance No. 2659, concerning the legal position in Samoa, was made pursuant to the provisions of a previous Act known as the Protectorates Act of 19th March 1888, with the details of which I think we need not be concerned. The Act and the Ordinance read together had the effect that the Consular Jurisdiction Act of 1879 applied as from the 1st March 1900 to all persons who resided or were present in Samoa except natives. The Government of Samoa was empowered to determine who was a native and to what extent natives were to be made subject to the jurisdiction granted by the Consular Jurisdiction Act.

On 1st July 1900 the Imperial Governor of Samoa issued a notice, interpreting and explaining the term "native". It read, in part, as follows:

> "Those persons who reside or are present in the protectorate and who are not natives are called "non-indigenous persons" (Fromde).
>
> In the case of a legitimate marriage between a non-indigenous person and a native the wife has the status of her husband.
>
> 'Half-castes' who are the children of a legitimate marriage between a non-indigenous person and a native woman have the status of their father.
>
> In respect of half-castes who are the children of an illegitimate union of a non-indigenous person and a native woman, the Imperial Governor or the Imperial Judge respectively, shall determine from case to case whether the half-castes, taking into account their mode of life, are, as concerns their status, to be considered non-indigenous persons or natives".
>
> (Note: 'Status' as used in this notice, means 'subject to the jurisdiction of the Courts in the protectorate').

Joseph Collins being, as the case states, the child of a legitimate marriage between a non-indigenous person, an American national, and a native woman, was a half-caste within the meaning of that notice, and accordingly as from the 1st July 1900 had the status of his father and was subject to German law as set out in paragraph 3 of the Consular Jurisdiction Act of July 1879.

In the meantime, that is prior to the passing of the Imperial Ordinance No. 2659 of the 17th February 1900, the German Civil Code came into force on the 18th August 1896. Mr Eichelbaum challenged whether this had become part of the law of Western Samoa. However, I accept Mrs Schellevis' submission that it had. It may have come within "Imperial Acts" in the Consular Act of 1879, but, even if it did not, I am satisfied to accept the view that it was brought in by Article 2 of the Protectorates Amendment Act of 25th July 1900, which in part read as follows:-

> "....The reference in the former (Protectorates) Act to provisions of Acts which have been repealed or amended by later Acts are to be changed to references to the new provisions which have taken the place of the repealed provisions".

It cannot, I think be doubted that the Civil Code repealed or amended Imperial Acts or Prussian Acts expressly referred to in the Consular Juris-

diction Act of 1870.

Before looking at the law relating to marriage introduced by the German Acts or Ordinances, I should mention what was referred to as the Malietoa law. Malietoa was recognised by Great Britain, the United States and Germany as King of Samoa on the 12th July 1881, and his position as such was again recognised in the Treaty of Berlin 1889, which in the second paragraph of Article 1 says:

> "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....."

Malietoa himself assented to the treaty on the 19th April 1890, but, prior thereto, on the 10th February 1890, he issued the law with which we are concerned. This law provided in Subject I (Instructions to Judges of the Government as to marriages) sub-paragraph 5 -

> "It is absolutely forbidden for a Judge of the Government to perform a marriage between a Samoan and a subject of the Great Powers who have Consuls in Samoa. It is at the discretion of the Chief Judge of the Government of Samoa and the Consul of the Great Power whose subject desires to marry a Samoan whether such a marriage takes place or not and no other Judge nor any other persons has a right to interfere in a marriage of a Samoan to a subject of the Government of England, or the Government of the United States or the Government of Germany".

and Subject III read -

> "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 any marriages between a Samoan and a European which have not been performed by the Consul of the Government of the European.
>
> (3) The Government of Samoa or a Judge of that Government cannot dissolve any marriage performed by a Consul.
>
> (4) If a religious consecration is required of any marriage performed by a Consul then the Consul to write authorising such ceremony".

It appears in the judgment of the Chief Judge that the Malietoa law continued in force after the commencement of the German Protectorate but that the Imperial Governor had very grave doubts about the validity of marriages between Europeans and Samoans. After the commencement of the Samoa Constitution Order, by an amending Order dated the 29th November 1920, it was provided -

> "4. Notwithstanding anything in the Samoa Constitution Order 1920, the Malietoa law of the tenth day of February, eighteen hundred and ninety (concerning marriages in the Islands of Samoa and decree of divorce certificate), shall be and 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".

Mr Barton advised the Court that no record is available of the reasons for the making of this amendment, and the learned Chief Judge said of it -

"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 difficulty of knowing why this provision was made in the amending Order is not made any the less by the fact that the law was repealed by an Ordinance issued by the Administrator under the power given him by paragraph 4 of the Order, to take effect as from the 1st July 1921, nearly a year before the Samoa Act 1921 was to come into force. However, I do not think that this law, which, be it observed, applied only to subjects of the three Great Powers who had Consuls in Samoa and not generally to all Europeans, need be considered to have a bearing on the case of Joseph Collins, for I take the same view as that taken by the learned Chief Judge, that the references in the law to the Government of Samoa show that it cannot be read retrospectively before 1881, when the first Government of Samoa was recognised under the kingship of Malietoa.

I accept the view of counsel, appearing in paragraph 2 of the agreed Memorandum as to applicable German law, that the provisions of the German legislation referred to in that paragraph, which relate to the form of marriages, do not determine the validity of the marriage of Joseph Collins and Sina. I think, too, that Article 11 of the Introductory Law to the Civil Code refers to form only. However, Article 198 of the Introductory Law reads:-

"The validity of a marriage entered into before the coming into force of the Civil Code is determined in accordance with the former Acts".

Article 2 defines "Act" -

"Every legal norm (Rechtsnorm) is an Act within the meaning of the Civil Code and this Act (i.e., the Introductory Law)."

In Varneyer's Commentary (1928) the footnotes to Article 2 refer briefly to decisions of the German Courts interpreting the Article. The footnotes read, in part:

"It is not necessary for the coming into existence of a custom that its binding force, as law, is made apparent by expressions of recognition on the part of all persons concerned; it is sufficient if it may be deduced from the opinions expressed in the circumstances of the case that the custom is generally accepted".

"Custom creates substantive law. It may be deprived of force by statute or by ordinance if the statute or ordinance contains an express repeal; or a provision inconsistent therewith; or by practice".

On the statement made by the learned commentator, the question will still remain whether the custom to which he refers includes native custom.

Here I should mention a submission made by Mr Dent, junior counsel for the first group of defendants. He introduced his submission by referring to Rangboss v. Daniel 1955 A.C. 107 and Coleman v. Shang

1961 A.C. 481. He said that the system of law or custom in the jurisdictions with which those cases were concerned, Nigeria and Ghana respectively, was fixed, stable and readily ascertainable. He contended that the position as regards custom in Samoa was not so fixed and certain as to afford a basis upon which in English law a judgment could be founded similar to those of the Judicial Committee in the cases mentioned. He referred to the statement by a Full Court in Wi Parata v. Bishop of Wellington 3 N.Z. Jur. (N.S.) S.C. 72 that there was no customary law of the Maoris at the time of the advent of Europeans of which Courts could take cognizance. That was in essence a statement of fact, and, of course, not related to Samoa; it was later said of an argument based on it, in the judgment of the Privy Council in Hiresha Tamaki v. Baker N.Z.P.C.C. 371 at 382 -

> "Their Lordships think that this argument goes too far and that it is rather late in the day for such an argument to be addressed to a New Zealand Court".

I do not accept the view for which he contended. An acceptance of that view would involve rejecting the finding of the learned Chief Judge that Sina became the wife of Joseph Collins according to the customs of the Samoan people, and the view is contrary to the statement of the Chief Judge, who was in a position to know, appearing in his judgment at p. 33 of the case -

"The marriage customs of the Samoan people are well known". Also it is contrary to at least the assumption underlying s. 368 of the Samoa Act, which refers to the determination of the succession to property "in accordance with Samoan custom". I am of the opinion that a Court applying English law would recognise the Samoan custom, just as it recognised the customs of Nigeria and Ghana in the cases referred to.

It appears from the judgment of the learned Chief Judge that there was in Samoa under the German administration very grave doubt in the minds of the authorities about the validity of marriages between Europeans and Samoans, but it was probably so, as Mr Eichelbaum said, that that was mainly caused by the restrictive provisions of the Malietoa law. As regards such marriages prior to 1881, to which the Malietoa law would not apply, we may obtain, I think, much assistance from the answer to a question submitted to the Federal German Ministry of Justice. The reply of the Ministry is summarized in the agreed memorandum as to applicable German law -

> "The Ministry regret that their files and other documentation do not allow to ascertain with any degree of certainty whether the German authorities did in fact recognise Samoan customary law prior to 1890. It is felt - however, that - at least for the purpose of interpreting the rules of conflict of laws - the union according to Samoan customary law would have been regarded as sufficient to form a valid marriage. At the period in question the local inhabitants of Samoa were not in a position to adopt a form of marriage other than a union according to the law of the land. It would not be reasonable to deprive these marriages of legal effect and to consider the entire population of the land to be of illegitimate birth. The same consideration should hold good for a marriage between an American citizen and a Samoan native".

As to this, there are two comments to be made, first that the reference to conflict of laws is a natural reference, for the question put to the Ministry would have related to the succession to Joseph Collins' estate which, as will appear, does raise a question of conflict of laws. I do not take the reference as restricting the generality of the opinion. Secondly, where the opinion turns from the marriages of "local inhabitants of Samoa" to that of

an American citizen with a Samoan woman, there was, in fact, another possible form of marriage, that before the American Consul; but that, I think, is unimportant, for the customary marriage adopted in this case was a usual one. This reply comes from a source much more authoritative than the local administration in Samoa, and it seems to me to be fully consistent with Article 198, read with the definition of "Act" in Article 2, and I am prepared to hold and do hold, subject to a point to which I will now turn, that the law of Western Samoa under the German administration would recognise Samoan custom as law at a time prior to the coming of any civilized form of law.

The point to which I have just referred rises on Article 30 of the Introductory Law which reads:-

> "The application of a foreign law is excluded if such application would be contra bonos mores or against the purpose of a German law".

Footnote d. appearing in Planck's commentary is as follows:-

> "Similar questions arise in cases of family relations which are recognised by the foreign law, but which are contrary to German ideas of morality. This refers especially to polygamy . . .
>
> Such marriages are prohibited in Germany and are at the same time contrary to German ideas of morality. Undoubtedly a claim to put the relationship grounded on such marriage into effect is not admissible in Germany. A second marriage solemnised in Turkey by Turkish subjects in the first wife's lifetime, is valid. But in Germany no claim for restitution of conjugal rights can be successful against the spouse of the second marriage as long as the first marriage is in existence. Nor will a claim for maintenance based on such a marriage have any success if lodged in Germany. But also in such cases we should distinguish between the effects (of the marriage) which would have arisen in Turkey and such effects which arise while either of the spouses is staying in Germany. Children of the second polygamous marriage who are born in Turkey are to be treated as legitimate children, and the relations between them and their parents, especially also the rights of succession, have to be regarded accordingly. It is different if the spouses have taken their domicile in Germany and if there a child is born to them before the first marriage is dissolved. To treat such a child as legitimate would not be in accordance with German moral sense".

In 1870 the polygamous marriage of Joseph Collins and Sina was in accordance with the custom of Samoa. Samoan custom was at that time a foreign system of law to a German Court. Both Joseph Collins and Sina were foreigners and domiciled in Samoa. Their children were born in Samoa. I see no reason to doubt that their marriage in Samoa would have been considered by a German Court as it would have considered a polygamous marriage between Turkish subjects entered into in Turkey. There is no reason to believe that, after the commencement of the Protectorate, the Court sitting in Samoa would take any different view. It would, in my opinion, not hold the marriage contra bonos mores.

The only other point, I think, to be noticed here is that it has not been suggested, referring back to the second-quoted footnote in Varneyer's Commentary on Article 2, that the custom was during the German administration deprived of force by statute or by ordinance or by practice.

My conclusion, then is that a Samoan Court, and for present purposes we must treat this as a Samoan Court, applying the law of Samoa as it was at the 21st February 1920, would hold the marriage of Joseph Collins and

Sina to be, for certain purposes at any rate, a valid marriage. Counsel for both sets of defendants thought the question to be a difficult one, and so it has been, but that does not absolve the Court from answering it. It must answer it, whatever doubts there may have been among German lawyers as to what the answer should be.

The opinion which I have so given takes the matter a certain distance, but, under German law, it does not necessarily deal with the question of the legitimacy of the children of the union, a matter that the question put to this Court was undoubtedly meant to cover. The Legation of the Federal Republic of Germany in its letter of the 19th April 1960 to the solicitors for the first set of defendants, which letter was written after the matters raised had been referred to the appropriate authorities in Germany, said -

> "According to the Introductory Law to the German Civil Code questions of legitimacy are governed by the law of the country of which the father is a national at the time of the child's birth or, if he should die before that time, at his death (Article 18). The validity of the parents' marriage is, of course, a preliminary question".

Article 18 provides -

> "The legitimate descent of a child is decided by German law if the husband of the child's mother is a German subject at the time of the birth of the child".

Footnote 1 of Planck's Commentary on the Article reads:

> "Article 18 is restricted to cases for which the German laws are to be applied. But the principle which is (set) at the base of this rule should mutatis mutandis be applicable to those cases for which Article 18 does not make provision. Consequently if the husband of the child's mother at the time of the birth of the child was the subject of a foreign State, the legitimate descent of the child should be decided according to the laws of that State".

That is to say the legitimacy of the children of Joseph Collins and Sina is to be decided according to the law of Joseph Collins' nationality.

All that is known of Joseph Collins' nationality is that he was an American, and that is not enough, for the Embassy of the United States of America advises -

> "There is no uniform law in the United States relating to the matters of marriage and legitimation. In the United States such matters are governed exclusively by the laws of the individual States.
>
> As the laws of each State vary concerning marriage and legitimation it would not be possible, under the circumstances of this case, to determine what law would be applicable".

By the agreed Memorandum as to applicable German law, we are informed that, if the law of the husband's nationality refers the question back to the law of the domicile, German Courts will accept the reference back; but here, of course, there is a complete absence of evidence on the point of whether the State to which Joseph Collins belonged would have so referred the matter back. Under those circumstances, English law would apply its own rule to it, as is set out in the second paragraph of Rule 205 in Dicey's Conflict of Laws 7th Edition at p. 1107 -

> "(1) In any case to which, in accordance with this Digest, foreign

law applies, that law must be pleaded and proved as a fact to the satisfaction of the Judge by expert evidence or sometimes by certain other means.

(2) In the absence of satisfactory evidence of foreign law, the Court will apply English law to such a case".

The learned editor deals with the second branch of the rule at p. 1116 -

"The burden of proving foreign law lies on the party who bases his claim or defence on it. If that party adduces no evidence, or insufficient evidence, of the foreign law, the Court applies English law. This principle is sometimes expressed in the form that foreign law is presumed to be the same as English law until the contrary is proved. But this mode of expression has given rise to uneasiness in certain cases. Thus in one case the Court refused to apply the presumption of similarity where the foreign law was not based on the common law, and in others it has been doubted whether the Court was entitled to presume that the foreign law was the same as the statute law of the forum. In view of these difficulties it is better to abandon the terminology of presumption, and simply to say that where foreign law is not proved, the Court applies English law".

It was questioned in the course of the argument whether it would here be permissible to apply this rule of English law, or whether one would not have to seek the German rule as it would have applied in Samoa as at the date of Joseph Collins' death. In my opinion Mr Shires was right in saying that it is for the Court to apply the English rule, for the reason that the question is one of evidence, that is procedure, and not one of substantive law, and that the procedure applicable to this case, which was commenced in 1933, has throughout been the procedure of a Court under English law. Indeed, even if the case had been started prior to the commencement of the Samoa Constitution Order, it would still under s. 372(4) of the Samoa Act have been continued thereafter in accordance with English procedure. There was no dispute between the parties as to the English law applicable in such a case, as set out in Halsbury's Laws of England 3 Ed. Vol. 7, first at p. 91 paragraph 165 -

"The essential validity of a marriage is governed by the lex domicilii of the parties....."

and secondly at p. 128 paragraph 229 -

"All persons born in lawful wedlock, no matter where, are prima facie legitimate in England".

The English rule, therefore, refers the question of the legitimacy of the children of the marriage back to the law of the domicil, Samoa.

I can find nothing in the German law put before the Court to suggest that the legitimacy of a child is challengeable in that law if it were the offspring of a valid marriage of its parents. I would not expect to find anything to that effect. It is, I think, implicit in what has been put before us that German law would recognise the legitimacy of such child. I refer to the reference to Turkish marriages in footnote (d) quoted above to Article 30 in Planck's commentary, and to Article 207, which reads -

"The question as to how far children of a void or invalid marriage, celebrated before the date when the Civil Code comes into force, are deemed to be legitimate children, and the question as to how far the father and the mother have the duties and rights of parents of legitimate children, are determined in accordance with the

former Acts".

This Article appears to me to allow for the possible legitimacy of children even of a void or invalid marriage, a principle which was admitted by canon law - see the judgment of the Judicial Committee delivered by Lord Phillimore in Khoo Hooi Leong v. Khoo Hean Kwee 1926 A.C. 529, 543. I am therefore of the opinion that the children of the marriage of Joseph Collins and Sina were under the law in force in Samoa at the date of Joseph Collins' death legitimate.

I think that I may take at least some degree of support for my conclusions from some of the matters mentioned by Mr Shires. I do not accept his submission that these matters enabled an answer to be given to the question put to us, but I do think that, having arrived at my conclusion on my view of the German law of Samoa, I am justified in treating them as in some degree confirmatory. First, while I have expressed my disagreement with the weight placed by the learned Chief Judge on s. 372 subsection (3) of the Samoa Act and its predecessor, subclause (4) of clause 376 of the Samoa Constitution Order 1920, I think that that provision does evidence an intention as far as possible to preserve the status of marriages, for it declares valid marriages which at the commencement of the Order were valid, without making a corresponding declaration of invalidity of marriages which were at that point of time invalid. Likewise, too, paragraph 4 of the Samoa Constitution Amendment Order 1920 is concerned with declaring the validity of marriages under the Malietoa law but not concerned with declaring the invalidity of marriages in which the law had not been complied with. Secondly, having regard to the general similarity of all civilized systems of law, I am fortified by the recognition by the Privy Council of the status of wives of polygamous marriages and of the legitimacy of their children where the local law permits polygamy. This appears in a number of cases, of which it is sufficient to mention Bangboze v. Daniel 1955 A.C. 107, where earlier cases are referred to at p. 117, 118 in the judgment of the Board delivered by Lord Keith of Avonholm.

What I have said takes me, I think as far as we can go with the answer to the question put by the case. My answer would be:

> "The marriage between Joseph Collins and Sina in or about the year 1870 in accordance with Samoan custom was a valid marriage and their children were legitimate".

I do not think that the question put by the Case may be answered on any broader basis than that, for the following reasons. First, if the date of a marriage were after the 12th July 1881 the possible effect of the Malietoa law would have to be considered. Secondly, if a Court were dealing with a matrimonial matter between living parties to a union, other considerations might come in, though it may well be that, after all this lapse of time, such a matter is unlikely to rise. Thirdly, if the State to which the American national belonged were known, the legitimacy of his children under the law of Samoa prior to the commencement of the Samoa Constitution Order 1920 would require a reference to the law of that State.

It remains I think, only to say something on the question of succession to the estate of Joseph Collins. Intestate succession under German law is determined according to the law of the nationality of the deceased. The nationality of Joseph Collins being unknown, in so far as it is not known to what State of the United States he belonged, there is no evidence before the Court as to what his State would say as to intestate succession. We must, therefore, again apply the principle of English law. In Halsbury's Laws of England 3 Edition Vol. 7 the principle applicable to immovables is set out at p. 50 paragraph 101 -

> "The persons entitled to succeed beneficially to immovable property

belonging to an intestate are determined by the lex loci rei sitae".

and that as to movables at p. 53 paragraph 103 -

"Succession to the movables of a deceased person is, subject to certain exceptions" (which do not here apply), "governed by the law of his domicile as it existed at the date of his death".

As I understand the position, the property left by the deceased was wholly immovable, but that does not matter for the lex loci rei sitae and the lex domicilii are the same, both Samoan. The German law accepts the reference back. Under that law, heirs of the first degree take to the exclusion of heirs of the second degree and so forth down the scale. The legitimate children of an intestate are regarded as heirs of the first degree. It would seem therefore that, if the matter were to be decided solely on the law as it existed in Samoa at the 21st February 1920, the second defendants, the children and descendants of children of Joseph Collins, would take, and the first defendants, the sisters and descendants of sisters, would be excluded. That, however, as it seems to me, may not be decisive, for here may come in, in the recognition, exercise and enforcement of the rights of the descendants, the equity and good conscience provision of s. 372(2) of the Samoa Act 1921. When Mr Eichelbaum first drew attention to this provision, in the submission with the breadth of which I did not agree, he suggested that the matter should be sent back to the High Court of Samoa to exercise that jurisdiction. In the view which I expressed, that that jurisdiction might still be exercisable after this Court gave its opinion as to the rights of the parties, the alternatives for this Court are to exercise that jurisdiction itself now or to leave it open to the High Court to exercise it if it thinks fit. This Court has no material at all before it on which it could exercise it, and of course, it has not been asked by the Case Stated to exercise it. Accordingly, in my opinion, the former alternative is not open, and all that the Court can do is to make it clear that the High Court of Samoa is not, by the judgment in this case, prevented from exercising it, if it still has jurisdiction to do so after Western Samoa's Independence Day.

McGREGOR J. I have had the opportunity of reading in advance the judgment of Hutchison J. herein. The facts relating to this litigation and the history thereof are fully set out in the judgment of my brother, and I do not require to repeat or elaborate on such matters.

As the matter comes before this Court by way of case stated by the High Court of Samoa, pursuant to the provisions of s. 82 of the Samoa Act 1921, the question before the Court must be considered, at least in the first instance, according to the law of Samoa. It is therefore of assistance to outline historically the systems of law in force in Samoa at relevant times. Prior to 1879 Samoa comprised various tribal communities which regulated their ways of life according to various rules and customs binding on the inhabitants of the particular communities. Although there was no constitutional government as understood in civilized countries, the rules of law and custom were recognised and accepted by the constituent tribes. During this early period both Great Britain and the U.S.A. had established consulates in Samoa, probably at least by the year 1853, and Great Britain exercised criminal jurisdiction in the Pacific Islands in respect of British subjects. In 1877 by Order-in-Council Great Britain took to herself certain powers and jurisdiction in the Western Pacific Islands including Samoa in respect of British subjects and foreigners, that is, subjects or citizens of a State in amity with Her Majesty in the cases specified in the order. This order has, however, no relevance in the present proceedings. The independence of the State of Samoa was formally recognised by Great Britain in a Treaty of Friendship entered into between Great Britain and the King and Government of Samoa on the 28th August 1879. On the 14th June 1889 the

Treaty of Berlin was executed by signatories on behalf of Great Britain, Germany and the United States of America, recognising the independence of the Samoan Government and the free right of the natives to elect their Chief or King and choose their form of government according to their own laws and customs. The assent of King Malietoa of Samoa to the Treaty of Berlin and the provisions thereof was given on the 19th April 1890.

Until 1890 it seems that the rule of law in Samoa, except in so far as jurisdiction over their own subjects was exercised by outside powers, was regulated by the usages and customs of the Samoan people. On the 10th February 1890 certain laws (hereinafter referred to as "the Malietoa Laws") were promulgated by Malietoa, the King of Samoa recognised as such by the Treaty of Berlin.

On the 17th February 1900, pursuant to the Convention of London entered into by Great Britain, Germany and the United States of America, Western Samoa became a German Imperial Protectorate. So it continued until August 1914, when Great Britain commenced its Military Occupation, but during the period of occupation the Military Occupation authorities in respect of civilians in civil matters administered the law of the German Protectorate. By the Versailles Treaty of Peace in 1919 Germany surrendered all right and title in the Islands of Western Samoa, and Western Samoa was assigned to His Majesty the King in right of New Zealand to hold as a mandate responsible to the League of Nations.

From the foregoing historical narrative it emerges that until the Malietoa law of 1890 the rules of law operative in Samoa were the customs and usages of the people. From 1890 to 1900 the Malietoa law was in force in so far as its provisions extended. From 1900 to 1920, including the period of military occupation, the German Law applicable to the Protectorate of Western Samoa applied. On the 1st May 1920 the Government of New Zealand, pursuant to its mandatory powers, enacted a comprehensive code of law known as the Samoan Constitution Order 1920 (N.Z. Gazette 1920/ p. 1623). An amendment to this order was gazetted on the 29th November 1920 (Gazette 1920/ p. 3210) and on the 1st April 1922 the Samoa Act 1921 came into force. From the 1st May 1920 the laws of Samoa were therefore those embodied in the Constitution Orders and the Samoa Act 1921.

The marriage of Joseph Collins to his wife Sina took place in Samoa about the year 1870. At the time of this marriage he was a subject of the United States of America, but domiciled in Samoa. His wife was a native of Samoa. The validity of the marriage must be considered in the first place in the light of the position when the marriage was contracted. According to English law a marriage is formally valid if the marriage is celebrated in accordance with the local form (lex loci celebrationis) (Dicey 7th Edition p. 230), and a marriage is valid as regards capacity when each of the parties has according to the law of his or her respective domicile the capacity to marry the other (Dicey p. 249). In Germany it appears that a marriage is formally valid if the parties comply with the formalities prescribed by either the local law or their personal law. (Dicey p. 232). English law was not applicable in Samoa in 1870, and can be regarded only in one particular respect, which will be mentioned later. But it is clear, and has been so found by the Chief Judge of the High Court, that the marriage was contracted in accordance with the customs and usages of the Samoan people, and would therefore have formal validity in Samoa, and would there be recognised as a valid marriage. At page 41 of his judgment he says:

> "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".

In regard to capacity both the contracting parties were domiciled in Samoa. The marriage was polygamous in that Joseph Collins had earlier taken to himself a first Samoan wife, one Vaitoelai, who still lived with him. But according to Samoan custom and usage at that time polygamy was recognised, and there was no incapacity in Samoa on the part of Joseph Collins to enter into the marriage with Sina.

It is true that Joseph Collins was a subject of the United States of America. His nationality was derived by birth through his father, who had lived in Samoa from the early years of the 18th century. No information can be obtained as to the state of origin of the father of Joseph, of which state Joseph would be a subject. Consequently, whether or not such state would recognise the validity or otherwise of the marriage of Joseph Collins, or the legitimacy of his children, cannot be determined. I do not think that this matter is of importance at this stage, as the Court is concerned with a marriage celebrated in Samoa by persons both domiciled in Samoa, and the question of legitimacy concerns Samoans. In any event, in regard to the extra-territorial validity of the marriage if such question is relevant I would apply the doctrine of presumption of identity (Dicey p. 1116) which has been so much canvassed during the argument, and to which reference will be made later. When foreign law is not proved or is incapable of proof, the English Court applies English law. Here the law of the American State of which Joseph Collins was a subject is incapable of proof. It seems to me a Samoan Court should therefore apply Samoan law, and by the law of Samoa at the time of the celebration of the marriage the marriage was valid in form and was not invalidated by incapacity of either of the parties, and must be recognised by this Court as valid ab initio. The polygamous nature of the marriage was no obstacle to the recognition of its validity in Samoa in 1870. We are not concerned with the recognition of the validity of the marriage elsewhere than in Samoa.

References have been made to the judgment of the Full Court in Wi Parata v. The Bishop of Wellington (1877) 3 N.Z.J.R.N.S. 72. There Prendergast C.J. delivering the judgment of the Court states that on the foundation of the colony (New Zealand) the aboriginies were found without any kind of civil government or any settled system of law. The Maori tribes were incapable of performing the duties, and therefore of assuming the rights of a civilized community. He further quotes with approval Lord Normanby's despatch to Captain Hobson, dated the 14th August 1839, as follows:-

> "We acknowledge New Zealand as a sovereign and independent State, so far at least as it is possible to make such acknowledgment in favour of a people composed of numerous, dispersed, and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate in concert".

This statement amounts in my view to a finding of fact in circumstances which we cannot accept as being the same as the situation in Samoa in 1870. In the present case the Chief Judge has found that there were recognised customs and usages in Samoa in regard to the form of marriage and the capacity to marry, and has found as a fact that the marriage of Joseph and Sina conformed to the then recognised customs and usages. Further, in Wi Parata's Case the Court was dealing with a matter of title to land. While the Court assumed that there existed among Maoris in New Zealand in 1829 no regular system of territorial rights, nor any definite ideas of property in land, I would hesitate to accept that the Court would have assumed that the Maoris in 1839 had no customs or usages regulating the validity or invalidity of a marital union. Still less do I think it follows that the Chief Judge in this matter was not justified in recognising the validity of the union, according to the then customs and usages in Samoa, of

Joseph and Sina in 1870.

Accepting the validity of the marriage in Samoa in 1870, the next matter for consideration is as to whether in view of the intervening changes in Samoa law, such validity is still recognised. The Malietoa Law of 1890 promulgated certain rules in regard to marriages between a Samoan and a European. Subject III Rule 2 provides as follows:-

> "The Government of Samoa has not recognised in the past nor will it recognise any marriages between a Samoan and a European which have not been performed by the Consul of the Government of the European".

I do not consider this rule has a retrospective effect to invalidate earlier marriages in accordance with custom and usage, and recognised as valid ab initio. I agree with the view of the learned Chief Judge that the declaration of non-recognition refers only to marriages subsequent to the 12th. day of July 1881, the date on which Malietoa was formally made and appointed King and was so recognised by the three powers, Great Britain, Germany and the U.S.A. I agree with the Chief Judge when he says:

> "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" page 298). But in my opinion specific words would be necessary to invalidate such a union previously to that time".

In my view the fact that both British and American consulates were established in Samoa prior to the marriage of Joseph Collins in 1870 has no bearing. Collins was at liberty if he desired so to choose to contract a marriage in the American consulate, but it seems to me he was equally at liberty as a person having Samoan domicile to enter into a marriage with a Samoan according to the custom of Samoa. The non-recognition in the past referred to in the Malietoa Law can relate only to the period from the recognition of Malietoa's government and the marriages therein referred to would likewise seem to me to embrace only those marriages which had taken place after such date. The preceding edict that a marriage between a Samoan and a European shall be performed by the Consul of the Government of the European likewise operates only from the date of the edict. Likewise the rules contained in Subject I of the law in regard to the requirements that marriages between Samoans shall be performed by Judges and only such marriages shall be binding can refer only to the period from the establishment of Malietoa's government when Judges were first appointed.

The islands of the Samoa Group became a German Protectorate on the 1st March 1900. From the year 1879 Germany along with Great Britain and the United States had exercised certain extra-territorial rights in Samoa, but as neither Joseph Collins nor Sina owed any allegiance to Germany during the intervening years the extra-territorial jurisdiction exercised by Germany can have no effect on the status of the parties.

As from the 1st March 1900 the German Federal Consular Jurisdiction Act of 1879 was made applicable to all persons who resided in Samoa except natives. As from the 1st July 1900 half-castes who are the children of a

legitimate marriage between a non-indigenous person (i.e., a resident of the protectorate other than a native) and a native woman have the status of their father. It is accepted that the father and mother of Joseph Collins were lawfully married. Joseph Collins therefore from the 1st July 1900 became subject to the German Law as set out in the Consular Jurisdiction Act 1879. As from the 25th July 1900 the provisions of the Consular Jurisdiction Act 1900 were substituted for those of the Consular Jurisdiction Act 1879 and the Samoa Ordinance of 1900 extended an act concerning marriages known as the Marriages Act 1870 to all persons within the protectorate other than natives, and by a later ordinance the Imperial Judge at Apia was empowered to solemnise the marriage of all persons who were not natives. Certain subsequent ordinances were enacted, but as those already mentioned and those subsequent thereto deal only with the form of marriage, and do not refer to recognition or validity, they are of no assistance in this matter.

The private international law recognised in Germany is contained in the Introductory Law to the German Civil Code of 1896. There appears to be no statutory recognition of its applicability to Samoa during the period of the protectorate, but as the protectorate during such period was under German jurisdiction, I am prepared to accept its applicability in a Samoan Court during the protectorate.

Article 198 of the Introductory Code reads as follows:-

> "The validity of a marriage entered into before the coming into force of the Civil Code is determined in accordance with the former Acts".

We are instructed that the term which has been translated as "former acts" is a term that includes customary law. This appears to be confirmed by the definition of "Act" in Article 2 as follows:-

> "Every legal norm (Rechtsnorm) is an Act within the meaning of the Civil Code and this Act (i.e., the Introductory Law)".

Every legal norm, i.e., every recognised rule of law, is an act as referred to in Article 198. It would seem to me, therefore, that German law recognises the validity of a marriage celebrated in accordance with earlier custom or usage prior to the adoption of statutory requirements in Samoa. In Warneyer's Commentary (1926) a footnote to Article 2 (supra) refers to a decision of the German Court interpreting the Article, which reads as follows:-

> "It is not necessary for the coming into existence of a custom that its binding force, as law, is made apparent by expressions of recognition on the part of all persons concerned; it is sufficient if it may be deduced from the opinions expressed in the circumstances of the case that the custom is generally accepted".

In my view a Samoan Court during the protectorate would have accepted this principle of giving general recognition to the customs of the Samoan people prior to the enactment of substantive rules of law, and would have recognised with regard to the form of the contract of marriage the principle that the observance of the laws of the State in which the marriage is contracted is sufficient for the validity of the marriage. Further, I cannot find any rule in the German law applicable to Samoa forbidding the recognition of marriages contracted prior to the protectorate or prior to the promulgation of the Malietoa Law or detracting from the validity of earlier marriages according to the custom of the people.

It is true that the Introductory Law to the German Code excludes the

application of a foreign law if such application would be contra bonos mores or against the purpose of a German Law. It is clear that in a German colony a polygamous marriage would be regarded contra bonos mores and against the purpose of German Law. This would be fully applicable from the establishment of the German protectorate in Samoa. But it seems to me that morality cannot regard something done according to recognised local custom and usage and in accordance with the custom and usage of the country of domicile of the parties at the time of the commission of the act as converted into immorality by annexation of the territory, more especially if the result thereof would be to bastardise children previously regarded as offspring of a lawful union. It would seem to me far more contrary to good morals to bastardise children who had acquired according to the earlier law of the territory the status of legitimacy. The status of legitimacy is a personal quality, and when once impressed by the law of the appropriate jurisdiction, in the same jurisdiction such quality would follow and pertain to the person without interference (Qualitas personam sicut umbra sequitur). In a question of bastardising children the law would endeavour to shield them with its protection. In my view one should be at liberty to apply the converse of the maxim "Quod ab initio non valet, in tractu temporis non convalescat" "That which was originally void does not by lapse of time become valid", and say "That which was originally valid cannot by lapse of time become void". I am therefore, in the absence of any rule as to invalidity provided in the German Samoan Law, prepared to regard the marriage of Joseph Collins and Sina as valid ab initio and as continuing as a valid marriage at least until after the birth of the son Teve, when Sina left Joseph, never to return.

Reference should be made also to Article 18 of the Introductory Law to the German Civil Code, which Article provides that the legitimate descent of a child is decided by German Law if the husband of the child's mother is a German subject at the time of the birth of the child. In the present case Joseph Collins was a subject of some unascertained state in the United States of America at the time of the birth of his children. A footnote to Article 18 in Planck's Commentary reads as follows:-

> "Article 18 is restricted to cases for which the German laws are to be applied. But the principle which is (set) at the base of this rule should mutatis mutandis be applicable to those cases for which Article 18 does not make provision. Consequently if the husband of the child's mother at the time of the birth of the child was the subject of a foreign State, the legitimate descent of the child should be decided according to the laws of that State".

It is further stated:

> "If the law of the husband's nationality refers the question (as to the legitimate descent of the children) back to the law of the domicile, the German Courts will accept the reference back, i.e., German law will be applied".

Here we are again faced with difficulty, as the state of origin of Joseph's father, of which Joseph would be a subject, is unknown. Consequently the legitimate descent of the children according to the law of that state cannot be decided, nor do we know whether the law of the husband's nationality refers the question back to the law of the domicile. The only solution to this impasse, in my view, is again to apply the doctrine of presumption of identity, and accept that the law of the husband's nationality is the same as the law of the domicile. I think it should be accepted that a Samoan Court is in such circumstances entitled to apply the lex loci as the only law to which effect can be given in the particular circumstances.

The question of the recognition of Samoan custom was submitted to the Federal German Ministry of Justice, and the answer thereto from such a

source must carry great weight. The answer is as follows, and fortifies my opinion as to the validity of the marriage and the legitimacy of the offspring:

> "The Ministry regret that their files and other documentation do not allow to ascertain with any degree of certainty whether the German authorities did in fact recognise Samoan customary law prior to 1890. It is felt - however, that - at least for the purpose of interpreting the rules of conflict of laws - the union according to Samoan customary law would have been regarded as sufficient to form a valid marriage. At the period in question the local inhabitants of Samoa were not in a position to adopt a form of marriage other than a union according to the law of the land. It would not be reasonable to deprive these marriages of legal effect and to consider the entire population of the land to be of illegitimate birth. The same consideration should hold good for a marriage between an American citizen and a Samoan native".

I therefore agree that the answer to the question propounded in the case stated should be that proposed by Hutchison J. in his judgment, and substantially for the reasons he has so adequately expressed.

I desire to add that I have derived great assistance from the submissions of all counsel in what is a matter of great difficulty. While I have, in view of the necessity of giving an immediate decision, given my opinions in broad outline, I have considered fully all arguments addressed to the Court, and it is not due to lack of appreciation of the research of counsel that I have not found it necessary to make reference to the various submissions seriatim. Nor is the adoption of such method due to lack of appreciation of the importance of the jurisdiction exercised by this Court during the last forty years, which epach now draws to a close.

Submissions have been made to the Court as to the results which should follow if the Court recognises the validity of the marriage and the legitimacy of the progeny, as the ultimate matter at issue is as to the rights of succession to the property of Joseph Collins, who died intestate. In the judgment of the Chief Judge it is stated that:

> "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".

We are informed that the property of the deceased consisted solely of land situated in Samoa. In my opinion rights of succession would vest at the date of death of the intestate. In respect of an alien domiciled at the time of his death in Germany (or in German territory) in regard to intestate succession German substantive law makes no distinction between movable and immovable property, and under German law intestate succession is determined according to the law of the deceased's nationality. If such law refers the question back to German law, the reference back is accepted. As I have said many times heretofore, the law of the deceased's nationality cannot be ascertained, nor can it be ascertained if such law refers the question back to German law. The matter must be determined in the Samoan Court, in which Court in the ordinary event the foreign law applicable to determine succession would have to be proved. In Cheshires Private International Law 4th Edition p. 127 it is said:

> "Unless the foreign law with which a case may be connected is pleaded by the party relying thereon, the presumption

> is that it is the same as English law. The onus of proving that it is different, and of proving what it is, lies upon the party who pleads the difference. If there is no such plea, the Court must give a decision according to English law, even though the case may be connected solely with some foreign country".

This is a rule of evidence applicable in British Courts. This Court is a Samoan Court exercising a British jurisdiction. Consequently it is entitled to apply the rules of evidence acceptable in British Courts. In the absence of proof of the foreign law, the American state law, a decision must be given according to the domestic law applicable at the relevant time, here the date of the death of Joseph Collins, when German law was the domestic law. Legitimate children of an intestate are regarded as heirs of the first degree. Heirs of the first degree take to the exclusion of heirs of the second degree and remoter relatives. It seems therefore that the children of Joseph and Sina and their issue will take per stirpes.

By the Treaty of Peace of the 28th June 1919 the Government of Germany renounced all right and title to the Territory of Western Samoa, and it was agreed that the Territory should be administered by His Majesty in his Government of the Dominion of New Zealand. By the Western Samoa Order-in-Council of the 11th March 1920 in pursuance of the Foreign Jurisdiction Act 1890 the Parliament of New Zealand was empowered to make laws for the peace, order and good government of the territory of Western Samoa. Pursuant to this power the Samoan Constitution Order 1920 was promulgated on the 1st April 1920 to come into operation on the 1st May 1920. Section 375 of the order repeals all laws in force in Samoa at the commencement of the order. Section 376 provides as follows:-

> "(1) Notwithstanding the repeal of the former laws of Samoa by this Order, all rights, obligations, and liabilities already existing under those laws at the commencement of this Order shall continue to exist and shall be recognised, and enforced accordingly, but subject to the provisions of this clause.
>
> (2) In respect of the recognition, exercise, and enforcement of such rights, obligations, and liabilities as aforesaid, and in respect of all matters wherein any doubt, difficulty, or injustice arises, or may arise by reason of the transition from the legal system hitherto in force in Samoa to the system established by this Order, the High Court and all other Courts in Samoa or in New Zealand are hereby empowered and directed to exercise their jurisdiction in accordance with equity and good conscience and not otherwise".

These provisions were re-enacted in s. 372(1) and (2) of the Samoa Act 1921.

In the view I have taken the rights to succession in the property of the deceased intestate were rights existing under the laws of Samoa at the commencement of the Samoan Constitution Order and the Samoa Act. Therefore they continue to exist, but their recognition and enforcement is subject to the provisions of s. 372 of the Samoa Act. In respect of such recognition and enforcement the Court is directed to exercise its jurisdiction in accordance with equity and good conscience, and not otherwise. The rights of the successors to the intestate estate of Joseph Collins are therefore enforceable only to the extent that the Court is of opinion that their enforcement is in accordance with equity and good conscience. This matter in the present circumstances must be a matter for the consideration of the High Court of Western Samoa or its successor. Further, by the Western Samoa Act 1961 on the 1st January next Western Samoa attains independence and is recognised as an independent sovereign State. Her Majesty in right of New

Zealand shall have no jurisdiction over the Independent State. The jurisdiction of this Court likewise comes to an end. All existing rules of law and statutory enactments continue to apply, but subject to express provisions to the contrary made by the authority having power to alter that law. Any opinion expressed by this Court must therefore be regarded as having effect subject to any readjustment or alteration of the existing law hereafter made by recognised authority, and jurisdiction after the 1st January next will be exercised by the new Courts of the Independent State.

By the form of the case stated this Court is not asked to rule on the question of succession. Nor in any event would it be competent for it so to do, as there is before the Court insufficient information as to the present state of the descendants of Joseph and Sina, and what issue still survive. It is, moreover, impossible to decide what matters are of weight or importance for the exercise of the Court's jurisdiction in accordance with equity and good conscience. I have, therefore, limited my consideration to the position in regard to succession which in my view existed at the date of the death of Joseph Collins and the resultant rights which continue to be recognised on the establishment of the New Zealand Mandate. I trust what has been said may be of some assistance to the Courts of the new Independent State.