Privy Council Appeal No. 9 of 1972.

MELE M. FIFITA (Plaintiff/Appellant

-v-

(1) MINISTER OF LANDS ) Defendants/Respondents
(2) NOBLE FAKAFANUA )

This is an appeal from a decision of the Land Court (Roberts, J.) at Nuku'alofa in 1972.
In the Land Court the plaintiff claimed that the Minister of Lands had unlawfully cancelled the registration of her life estate in a town allotment pursuant to s. 49 on the grounds that the allotment exceeded the statutory area. The Land Court ruled that the cancellation was lawful and found for the defendants.
(see p. of these Reports.)
The appeal was heard by the Privy Council (Marsack J) on 12th February, 1974 and the appeal was upheld.

Tevita Siale Taufa appeared for the Appellant.

The Crown Solicitor (Mr J. Fraser) for the Respondents.

On 12th February, 1974 the Privy Council delivered the following judgment:—

This is an appeal against a decision of the Land Court holding that the grant of a town allotment known as Haesilakolo on the estate of the second respondent, registered originally in the name of Soane Matekihehau and on his death transferred to the appellant, is null and void under Section 49 of the Land Act as covering an area in excess of that laid down in Section 7 of the Act. The maximum area for a town allotment under Section 7 is 1r. 24p., plus a further half perch permitted under the proviso to Section 49. The area of the town allotment in issue is1r. 26p. There is no dispute as to the facts, which are set out in the judgment of the Land Court and need not be repeated in detail. The whole question requiring determination by this Council is the construction of Section 49.

There are two classes of cases which may well arise under Section 49:—

1. where the original grant is expressed to be for an area not exceeding the maximum permitted, but subsequent survey shows that the area of the named allotment, or that being used by the grantee, exceeds that limit;
2. where the original grant specifically covers an area greater than that permitted under Section 49.

The first class is referred to at some length by the learned Judge in his judgment, and he properly and forcefully points out the great injustice which would be caused to an innocent grantee if he were evicted, after years of occupation, because a later survey showed that the original estimate of the area was too low. But in our view the section can be and should be construed in such a way as to avoid any such result.

Under Section 99 of the Land Act all deeds of grants of allotments shall be in the form prescribed in Schedule V. The description of the land is set out in the form in these words:

> "All that parcel of land known as . . . and situate at . . . (insert description of boundaries) being . . . acres more or less, coloured green on the plan drawn hereon."

It is clear that the area stated forms a definite part of the description. The phrase "more or less" is not intended to cover more than very small variations; certainly not so much as would convert a legal grant into an illegal one as being beyond the difference permitted in the proviso to Section 49.

In the result we hold that, where in the original grant the area is expressed to be one within the permitted limit, the grant is of an allotment of the stated area and therefore not liable to be held null and void under Section 49. If a subsequent survey shows the area of the named allotment, or of the ground actually occupied by the grantee, to be greater than that stated, then the latter is not entitled to remain in possession of the excess, which must revert to the owner. Where a grant is made of a section of 1r. 24p., that and no more is what the grantee is entitled to; and even if a later survey shows that the area of the named allotment is 1r. 16p., it cannot be said that a grant was made of an area greater than that specified in Section 7 of the Act and that the grant was therefore null and void.

The second class referred to above raises a question of considerable difficulty, that of the correct interpretation of Section 49. The learned trial Judge has held that the only possible meaning which can be given to the section is that if a grant, on the fact of it, is made of an area exceeding the permitted maximum then the grant is void in toto; and a grantee who has worked the land for many years relying on a duly registered deed executed by the Minister responsible, has no right to the land or its occupation unless it is found possible to grant him some form of equitable relief. It is hard to understand in what circumstances the Minister charged with the duty of carrying out the provisions of the Land Act could sign a document making a grant directly in violation of those provisions. If such should be the case, there would undoubtedly be a strong moral obligation on the Minister concerned—which, we were informed, has normally been acknowledged and acted upon—to cancel the invalid grant and immediately issue to the same person a grant which would be valid within the wording of the statute itself. If no such action were taken in favour of the grantee, it is clear that the latter might well suffer grave injustice.

The question then arises; is it possible so to interpret Section 49 that a grantee in such a case would not forfeit all interest in the Land, but would retain a right to such portion of it as came within the prescribed limit of area? Would such an interpretation be consistent both with the language used, and with the objects of the legislation? It is true, as is said in Maxwell 10 Ed. at p. 260:

> "It is a principle in the English law, that an Act of Parliament, delivered in clear and intelligible terms, cannot be questioned, or its authority controlled, in any Court of Justice."

But the Court have always been ready to give a statute a reasonable construction; so to interpret a provision, if the wording of it makes it possible, but unjust or totally unreasonable consequences will not follows. It cannot be denied that grave injustice might be caused to an innocent party by applying the section literally in the direction of throwing off the land a man who, acting in good faith under the authority of a formal document executed by the Minister in terms of the Act, had lived and worked for many years on the land and brought it into a state of high-class cultivation. The principle to be followed by the Courts in the construction of a statute is well set out by Jervis C.J. in Mattison v. Hart (1854) 23 L.J.C.P. 108 at p. 114:

> "We ought . . . to give an Act of Parliament the plain, fair, literal meaning of its words, where we do not see from its scope that such meaning would be inconsistent, or would lead to manifest injustice."

The interpretation adopted in the Court below could, in our opinion, lead to manifest injustice.

Section 49 enacts that it shall be unlawful to grant an allotment in excess of the area specified in Section 7, in this case 1r. 24p., and any such grant shall be null and void. What is rendered null and void is the grant of an allotment in excess of 1r. 24p., in the circumstances of this case. The word "allotment" is not defined in the Act. Without doing any violence to the wording of the section the Court can, in our opinion, construe it as meaning "it shall be unlawful to allot to any person, under Section 7, an area exceeding 1r. 24p." If this construction is adopted, it can well be held that what becomes null and void under Section 49 would be, not the whole grant, but such part of the grant as applied to the excess over the permitted area. That interpretation would appear consistent with the objects of the Act, which in this respect could be set out as:—

(a) that every male Tongan subject by birth shall, upon making application, be entitled to a grant (interalia) of an area of 1r. 24p. in a town as a town allotment;

(b) that the area of the allotment granted shall not exceed the limits laid down.

It is therefore held that Section 49 must be read as enacting that, where a grant is made of an allotment in excess of the specified area, what is rendered null and void is the grant of the excess and not the whole grant.

Some question may arise as to whether appellant has by her failure to occupy the land forfeited all or some of her rights under

the grant. We are not called upon to determine this question, which was not argued before us and must be left open.

The appeal is allowed, and the case remitted to the Land Court to enter such judgment as may be proper having regard to this decision. If the Judge wishes to hear the parties further he is at liberty to do so. There will be no order as to costs.

Section 81 reads as follows:

> "If no claim to a tax or town allotment has been lodged by or on behalf of the heir or widow with the Minister or his Deputy within twelve months from the death of the last holder such allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder."

It will be seen that the section does not require the claim of a widow or heir to be in writing or to be made in any particular form.

There does not appear to be any legislative provision for the filing of an affidavit in support of the claim and we are informed that the affidavit that is in practice used is one that has been required by the Minister of Lands for administrative purposes. Whilst the use of such an affidavit is clearly desirable and might well be given legislative sanction or be prescribed by regulations made under the Land Act, it does not appear that it is at present essential. All that is required by the provisions of Section 81 is that a claim, whether orally or in writing, be made by or on behalf of a widow within 12 months of the death of her husband.

This point does not appear to have come before the Privy Council for consideration before but it was considered by the Land Court in 1953 in the case of Taulango -v- Minister of Lands 2. T.L.R. 93 when a similar ruling was given.

In our opinion the acts and statements of Sione Hemaloto on behalf of the sick and aged widow were sufficient compliance with the provisions of Section 81 of the Land Act in making a claim on her behalf to her deceased husband's allotment. In these circumstances the allotment should not have been granted to the Defendant—Respondent in 1964 whilst the widow was still alive.

For these reasons we allow the appeal. We order that the registration of the Defendant—Respondent as the holder of this allotment be cancelled. The Minister of Lands will then consider the merits of the application for the allotment made by the Plaintiff—Appellant.

The Respondent must pay the costs of the proceedings in the Land Court and in the Privy Council which we assess at £21 and the Court fees.