

[5,6] Under such circumstances, the consent or refusal to give consent of the natural mother, which normally would be required for appointment of a guardian or for an adoption by another, is nullified. The mother's consent may not be withheld when the best interests of the child, which have been demonstrated to be jeopardized by the mother's own conduct, require transfer of custody and control to another.

[7] The natural father is eligible as alternative appointee as guardian, but in this case requested the court to appoint his mother, the child's paternal grandmother, as guardian. The court found this to be appropriate and it follows the District Court's order must be sustained and the relief requested in the appeal denied. Accordingly, it is,

Ordered, adjudged, and decreed that the order of the Palau District Court in its Case No. 1432, wherein Menros Peter, the appellee was appointed guardian with control and custody over the person and estate of the minor, Kieran Vicente Mackenzie, be and the same is affirmed.

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VICTOR L. ROMOLOR, Plaintiff

v.

JOAQUIN S. IGISAIAR, Defendant

Civil Action No. 207

Trial Division of the High Court

Mariana Islands District

August 28, 1968

Action for specific performance. The Trial Division of the High Court, E. P. Furber, Temporary Judge, held that specific performance would not be allowed where contract was illegal, however, public policy and justice would be best served, under the circumstances, by requiring that defendant make restitution to the plaintiff for certain money expended in reliance upon the **contract.**

## 1. Homesteads-Restriction Against Alienation

Where defendant agreed to sell plaintiff land held under an unmatured Agricultural Homestead Permit the agreement to sell was illegal, being in violation of both the terms of the homestead permit and Section 958 of the Trust Territory Code. (T.T.C., Sec. 958)

## 2. Contracts-Specific Performance

Where contract was illegal and thus an unenforceable contract a request for specific performance must be denied.

## 3. Contracts-Void Contracts-Restitution

In many situations a party to an illegal contract which does not involve serious moral turpitude on his part, is allowed to rescind the contract and recover the net amount he has expended under it.

## 4. Contracts-Void Contracts-Restitution

Where the contract in question was not essentially immoral, but was illegal simply because the law prohibited it as against public policy, the court, under all the circumstances, considered that public policy and justice would best be served by requiring restitution by the defendant.

## 5. Contracts-Void Contracts-Restitution

Where plaintiff's labor in maintaining a farm, the subject of an illegal contract between himself and defendant, and his loss of use of money expended, was considered to be roughly offset by the value of the use and occupation of the land which he had enjoyed, he was allowed no allowance in restitution for his years of work on the property.

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FURBER, *Temporary Judge*

## FINDINGS OF FACT

1. **In** 1962 the defendant Joaquin S. Igisaiar agreed to sell to the plaintiff Victor L. Romolor the land now in question with the buildings, trees and other improvements on it, for \$700.00, the plaintiff to be given immediate possession, but title not to be transferred until the defendant's homestead covering the land had matured and the defendant had received his deed of the property from the Government.

2. The plaintiff agreed to the foregoing, paid the \$700.00, took possession, expended at least \$150.00 in cash, labor, and materials in improving the property and maintained

it until 1967, all in reliance on the defendant's agreement set forth above.

3. The defendant has not sustained the burden of proving that any of the destruction he claims was due to the fault of the plaintiff.

#### OPINION

The land in question was admittedly covered in 1962 by an Agricultural Homestead Permit issued to the defendant, which had not matured. When it matured, the defendant failed, and finally refused to convey in accordance with the agreement set forth in the first two findings of fact. The plaintiff seeks specific performance or in the alternative the refund of what he has spent for and on the property.

**[1,2]** The agreement involved here is clearly illegal, being in violation of both the terms of the homestead permit and Section 958 of the Trust Territory Code. It is therefore an unenforceable contract and the plaintiff's request for specific performance must be denied. 42 Am. Jur., Public Lands, § 72, note 5. *Bailey v. Sanders*, 228 U.S. 603, 33 S.Ct. 602 (1913). 12 Am. Jur., Contracts, § 209.

**[3]** This, however, does not mean that the plaintiff may not recover anything. In many situations a party to an illegal contract which does not involve serious moral turpitude on his part, is allowed to rescind the contract and recover the net amount he has expended under it. 12 Am. Jur., Contracts, §§ 213, 214, 216 and 217. Restatement of the Law of Contracts, Vol. II, § 605.

**[4]** Here the contract is not essentially immoral, but is illegal simply because the law prohibits it as against public policy. The crucial question is whether that public policy will best be served "by the court's refusing all relief and allowing the defendant to keep both the land and what he has received from the plaintiff in reliance on the illegal

contract, or by the court's requiring the defendant to restore what he so received or its value. Putting the plaintiff in possession was obviously considered by the Land Advisory Board to be consistent with public policy then in effect since he was "within the family circle" of the defendant. Under all the circumstances, the court considers that public policy and justice will best be served by requiring that the defendant make such restoration.

**[5]** The plaintiff has made a strong plea that this restoration include a substantial allowance for his years of work on the property. In the absence, however, of clearer evidence as to the values involved and in view of the lenient way the parties treated each other until shortly before the bringing of this action, the court believes that the plaintiff's labor in maintaining the farm (beyond that involved in the improvements mentioned in the second finding of fact) and his loss of use of his money expended, must be considered to be roughly offset by the value of the use and occupation of the land which he has enjoyed and that any lack of exact balance there may be between these must be attributed to the "cooperation" regularly expected between relatives under the custom among Carolineans on Saipan—the parties in this action being related and both of Carolinean descent.

#### JUDGMENT

It is ordered, adjudged, and decreed as follows :- .

1. The plaintiff is not entitled to a conveyance of the land formerly covered by Agricultural Homestead Permit No. II, issued by Trust Territory of the Pacific Islands, Saipan District, to the defendant March 14, 1959.

2. The plaintiff Victor L. Romolor, who lives on Saipan, Mariana Islands District, shall recover from the defendant Joaquin S. Igisaiar, who lives in said Saipan, the sum of

eight hundred fifty dollars (\$850.00) and costs as specified in the next paragraph.

3. The plaintiff is awarded such costs as he may have had which are taxable under the first sentence of Section 265 of the Trust Territory Code, provided he files a sworn itemized statement of them within sixty (60) days from the entry of this judgment; otherwise only three dollars and fifty cents (\$3.50) costs will be allowed.

4. Time for appeal from this judgment is extended to and including October 28, 1968.

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KUGUTNAM, Plaintiff

v.

FALOCHA, Defendant

Civil Action No. 39

Trial Division of the High Court

Yap District

August 30, 1968

Action to determine right of control over lands in the Yap Islands. The Trial Division of the High Court, E. P. Furber, Temporary Judge, held that, wishes of deceased male head of extended family group that his wife succeed him in control was subject to the effect the extended family group desired to give to his wishes and the continued control if given would be subject to the wishes of such group.

1. Yap Land Law-Patrilineal Ownership-Succession

Under Yapese customary law the expressed desire of the male head of the extended family group that his wife succeed him in the control of the lands gave her no absolute right of control, rather it is for his extended family to decide whether to give effect to his wishes and whatever control the wife would be allowed to exercise would remain subject to the wishes of the family group.

2. Yap Land Law-Patrilineal Ownership--Supervision

The male head of the extended family group is the one normally expected to speak for the group and control its land rights, but in the exercise of such control he is expected to act in accordance with the wishes of the group and with due regard for its previous commitments.