

District Clerk of Courts, said lots containing 2.517 *hectares*.

3. That this judgment shall not affect any rights-of-way there may be across the above-described land.

4. That no costs are assessed.

ROMAN SOUWELIAN, a minor, by OKIN SARAPIO, Plaintiff

v.

KADARINA, Defendant, and
EHLA KLEMEDE, Intervenor

Civil Action No. 360

Trial Division of the High Court

Ponape District

January 29, 1970

Action to determine inheritance to land in Kitti Municipality, Ponape District. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where neither a written instrument nor an attempted oral disposition of land were effective as wills, the deceased died intestate and pursuant to Ponape District Public Law 3-17-59, as between adopted children the adopted son takes ahead of any adopted daughter.

1. Civil Procedure—Witnesses

Where a witness' testimony was contradicted by so much of the testimony from both sides, it was not credible.

2. Wills—Revocation—Destruction

Where a will which cannot be found following the death of the testator is shown to have been in his possession when last seen, the presumption is, in the absence of other evidence, that he destroyed it *animo revocandi*.

3. Wills—Revocation—By Will

An attempted oral testamentary disposition, in the form of a nuncupative or oral will, cannot revoke a prior written instrument.

4. Wills—Oral—Requirements

Under the Code, an oral testamentary gift is only effective when made in the presence of impending death. (T.T.C., Sec. 349)

5. Wills—Oral—Realty

The Code provision relating to oral testamentary gifts does not permit transfer of land by oral will unless authorized by local custom or written statute. (T.T.C., Sec. 349)

SOUWELIAN v. KADARINA

6. Ponape Land Law—German Land Title—Wills

Testamentary transfer of land in Ponape District were governed from 1912 until 1957 by the provisions of the German title document.

7. Ponape Land Law—Inheritance

Ponape District Order No. 9-57 does not permit oral wills transferring land. (Ponape District Order No. 9-57)

8. Wills—Oral—Personalty

Under the Code provisions relating to oral testamentary gifts, an oral will was limited to disposition of personal property only unless authorized locally.

9. Ponape Land Law—German Land Title—Presumption of Ownership

A person's possession of German deed after titleholder's death only gives rise to a presumption of ownership under Ponape District Order No. 3-61, and such evidence of ownership is rebuttable. (Ponape District Order No. 3-61)

10. Ponape Land Law—German Land Title—Succession

Possession of German deed did not imply inheritance of the land contrary to Ponapean or Trust Territory law.

11. Ponape Land Law—Inheritance

Pursuant to Ponape District Public Law 3-17-59, which specifies the order of inheritance, as between adopted children, the eldest son takes ahead of any adopted daughter.

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| <i>Assessor:</i> | JUDGE ANTONIO E. RAIDONG |
| <i>Interpreter:</i> | JOANES EDMUND |
| <i>Reporter:</i> | SAM K. SASLAW |
| <i>Counsel for Plaintiff:</i> | EDWEL SANTOS |
| <i>Counsel for Defendant:</i> | YOSTER CARL |
| <i>Counsel for Intervenor:</i> | YASUWO JOHNSON |

TURNER, *Associate Justice*

FINDINGS OF FACT

1. Plaintiff, Ramon Souwelian, was adopted at the time of his birth, August 9, 1957, by Penido Souwelian, *Nanmwarki* of Kitti Municipality.

2. Ehla Klemede, the intervenor, whose younger sister is plaintiff's mother, was adopted during Japanese times by Penido Souwelian before he became *Nanmwarki* of Kitti.

3. The land in question, known as Pahntakai, in Anpein Pah section of Kitti Municipality, was the subject of a writing in the nature of a will made by the *Nanmwarki* in 1964. It provided for distribution of one-half of the land to plaintiff, Roman, and to Defendant Kadarina, wife of the *Nanmwarki*, to be divided equally between them and the other one-half of the land to Adehla, the intervenor's eldest daughter.

4. The year following preparation of the "division of land" document, *Nanmwarki* sold to Antonia part of the land designated for Roman and Kadarina. The sale was by written instrument prepared by Danis Peter who also prepared the land division instrument. Peter, who was referred to by his title of *Daok*, left the land document with the *Nanmwarki* when he drafted it and saw it again in 1965 when he prepared the deed to Antonia. The *Nanmwarki* died July 28, 1968.

5. When the *Nanmwarki* died, the German deed to the land was in his possession, he having obtained its return from Ehma in 1967. Although Kadarina admitted a land division instrument or will had been prepared, she claimed it had been revoked when the *Nanmwarki* sold part of the land to Antonia. Kadarina did not account for the disappearance of the will other than to say it had been "revoked".

6. There was no evidence, other than the erroneous legal conclusion of the *Nanmwarki's* wife, that the will had been revoked by the *Nanmwarki*. The intervenor's principal witness asserted the *Nanmwarki* told him one week before he died that he would divide his land. Prior to that time, according to intervenor's witness, *Nanmwarki* had told the intervenor to get the German deed for the land after his death from his wife, Kadarina.

7. The *Nanmwarki's* wife, Kadarina, renounced all claim to the land in question in favor of the intervenor and as-

serted the *Nanmwarki* had instructed her to give the "land document"—the German deed—to Ehla, the intervenor.

8. Ehla produced the German Deed No. 187, for the land Pahntakai and asserted ownership by virtue of possession of the deed and also because she was *Nanmwarki's* eldest adopted child.

OPINION

This case was the outgrowth of a family dispute over inheritance of land. The plaintiff, a minor represented in the action by his natural father, Okin Sarapio, claimed the land in question as joint inheritor under the *Nanmwarki's* will with Adehla, intervenor's eldest daughter, and with Kadarina, the widow of the decedent. Kadarina remarried and left Kitti after the *Nanmwarki's* death.

[1] By her disavowal of any interest in the land in question, Kadarina is entitled to have the action against her dismissed, but her testimony against plaintiff and in behalf of the intervenor demonstrated she was far from being a disinterested party. However, her testimony was contradicted by so much of the testimony from both plaintiff's and intervenor's sides, it was not credible. 58 Am. Jur., Witnesses, § 863.

The main thrust of defendant's testimony was that the plaintiff had not been adopted; that of the parties in interest only Ehla, the intervenor, had been adopted. The overwhelming weight of the evidence was to the contrary. Even the intervenor declined to say plaintiff had not been adopted, but only said that she didn't know. Because the *Nanmwarki* did not have any natural children of his own, the question of adoption is of particular importance because of the provisions of Ponape District Public Law 3-17-59 governing inheritance of property.

In support of the argument plaintiff had not been adopted, the intervenor cited *Hawley v. Tipin*, Ponape Civil Action No. 342, not yet reported, in which it was held the evidence was not sufficient to show an adoption. The evidence in that case showed the alleged son, being related to the wife of the adopting father "rather than having been adopted . . . grew up in the household."

The defendant, Kadarina, testified somewhat similarly that she took the plaintiff into the household at the time of his birth "to have the child as help in the family." She didn't explain what help an infant could give and the record shows the plaintiff was only eleven years old when the *Nanmwarki* died and his family was disbanded. Such tainted testimony from one in a position to know whether there was an adoption, compels the Court to give very little weight to all of her testimony.

The intervenor did not contradict the plaintiff's evidence by denying the adoption. Ehla merely said she did not know whether plaintiff was adopted. Thus his testimony remains virtually uncontested.

Because the court has held both the plaintiff and the intervenor were adopted, Ponape Public Law 3-17-59 is determinative of the result to be reached unless it is concluded the property in question was transferred by will. There are two alleged testamentary transfers involved, one to plaintiff and others, and the other to the intervenor.

[2] The evidence shows there was a written instrument purporting to divide the land into three parcels for the plaintiff, the defendant and the intervenor's daughter, Adehla, who was not made a party to the action. This instrument was not produced at the trial. That this instrument was in the *Nanmwarki's* possession prior to his death is clear. There even was testimony the *Nanmwarki* referred to the intended division of land expressed in the instrument only a week before his death. But what hap-

pened to the document before or after the *Nanmwarki's* death was not disclosed. We may not presume that it was in existence on the day of his death.

It is said in 57 Am. Jur., Wills, § 549:—

“Where a will which cannot be found following the death of the testator is shown to have been in his possession when last seen, the presumption is, in the absence of other evidence, that he destroyed it *animo revocandi*.” 38 A.L.R. 1304 “*Establishment of Lost Will*,” Sec. 1309.

If the 1964 document, even though we know its content, is not effective because it was not produced in court, then we must determine whether the purported oral gift to Ebla of the land evidenced by German Deed No. 187, can be the basis for holding that the land in question was effectively transferred to her. There are several strong reasons why this determination may not be made.

The only support to the theory of a testamentary gift by delivery of the German deed is (1) Ebla obtained the deed from Kadarina after *Nanmwarki's* death; and (2) Ebla, Kadarina and Ebla's principal witness, Wasai, all said that the *Nanmwarki* told Ebla to get “her land document” from Kadarina after his death and that by “land document” he was referring to the German deed to Pahn-takai.

[3,4] This self-serving testimony was challenged (in advance) by plaintiff's witnesses, but more importantly, this attempted oral testamentary disposition—in the form of a nuncupative or oral will—cannot revoke a prior written instrument and cannot be operative in this instance in any event. An oral testamentary gift under the Code is only effective when made in the presence of impending death. The common law rules have been partly codified in Section 349, Trust Territory Code. 57 Am. Jur., Wills, § 653.

[5, 6] The Code provision, adopted in 1966, does not permit transfer of land by oral will, unless authorized by local custom or written statute. Testamentary transfer of land in Ponape District has been governed since 1912 until 1957 by the provisions of the German title document. In *Ladore v. Salpatierre*, 1 T.T.R. 18, this Court held that transfer of land by will was not effective without the consent of the *Nanmwarki* and the Governor (German) or Government (Japanese and/or American).

The history of land transfers in Ponape is set forth in *Eneriko v. Marina*, 1 T.T.R. 334. Also see: *Ladore v. Ladore*, 1 T.T.R. 21, *Kehler v. Kehler*, 1 T.T.R. 398, and *Liwi v. Higgins*, 2 T.T.R. 218. In *Eneriko* this Court said at 1 T.T.R. 337:—

“The land law set forth in the standard form of German title document referred to above prohibited transfers by will in the American sense No change in the Ponape Island land law permitting transfers by will in the American sense was made until Ponape District Order No. 9-57, effective April 1, 1957, expressly authorized certain wills, provided they were executed in accordance with the order.”

[7] But Order No. 9-57 does not permit oral wills transferring land. See *Liwi*, paragraphs 1, 2, 2 T.T.R. at 220.

[8] Clearly under custom and law until adoption of the 1966 Code provision, the purported transfer to Ehla would have been invalid. After 1966, an oral will was limited to disposition of personal property only unless authorized locally.

[9,10] The purported oral will transferring the land in question to Ehla was ineffective under both Ponapean and Trust Territory custom and law. Ehla's possession of the German deed after the *Nanmwarki's* death only gave rise to a presumption of ownership under Ponape District Order No. 3-61. This “evidence” of ownership is, of course, rebuttable. Possession of the deed did not imply in-

heritance of the land contrary to Ponapean or Trust Territory law.

[11] It must be concluded that neither the written instrument of 1964 nor the attempted oral disposition to Ehla were effective as wills. The *Nanmwarki* therefore died intestate. The question of inheritance is settled by Ponape District Public Law 3-17-59 which specifies the order of inheritance. As between adopted children, the eldest son takes ahead of any adopted daughter.

The plaintiff was the *Nanmwarki's* only adopted son. Under the statute he inherits all of Pahntakai, except that portion sold to Antonia. This is more than the plaintiff claimed in his complaint where he alleged Adehla and Kadarina were entitled to share in the land.

Kadarina renounced any claim and is precluded from sharing in the land in question. Adehla was not made a party to this litigation and is therefore not prevented from asserting a claim against Roman. This judgment can only settle the rights as between themselves of plaintiff, defendant and intervenor and those who may claim under them.

JUDGMENT

It is ordered, adjudged, and decreed:—

1. That as between the parties and all those claiming under them the land Pahntakai in Anpein Pah section, Kitti Municipality, Ponape District, save and except that portion sold pursuant to written instrument executed in 1965 by Penido Souwelian, *Nanmwarki* of Kitti, to Antonia, be and hereby is declared to be the sole and separate property of Roman Souwelian, the plaintiff herein.

2. The defendant Kadarina having disclaimed any interest in the above-described land, the complaint against her be and the same hereby is dismissed and plaintiff is denied any recovery thereon.

3. That the intervenor, Ehla Klemede, is denied her claim in intervention and she is denied any right, title and interest in the above-described land and shall forthwith cease and desist interference with plaintiff's quiet and peaceful enjoyment of said land.

4. This judgment shall not affect any rights-of-way there may be over said land.

5. No costs are assessed.

BENEMANG, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 123

Trial Division of the High Court

Yap District

February 10, 1970

See, also, 5 T.T.R. 32, 42

Appeal from conviction upon a plea of guilty to offenses charged wherein appellant claims he had not been informed adequately of his rights and that court failed to hold a proper hearing on his plea. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that a hearing on a plea of guilty was mandatory and should have been held and that under proper circumstances such a plea may be withdrawn and also that an accused has a right of allocution and the record must show that such right was suggested by the court and was declined or accepted and that the accused addressed the court.

Reversed.

1. Criminal Law—Attempt

If there was a single criminal act involved in the charge, then a second count charging an attempt should be dismissed when a plea of guilty is entered to the commission of the crime.

2. Criminal Law—Attempt

A single criminal act cannot be both committed and attempted.

3. Criminal Law—Attempt

If there are two separate and distinct acts, one involving the commission of the crime and the other amounting only to an attempt to commit