2. That the defendant Jiwirak T. be and he is hereby permanently restrained, prohibited, and enjoined from going upon Mwinmwidre *wato* on Ine Island, Arno Atoll, from interfering in any way with the possession and quiet enjoyment thereof by plaintiff and her mother Klene, or any persons in privity with them, from harvesting any part of the products grown on said premises, and from removing any of such products from said premises.

3. This order shall not affect any rights of way there may be over the land in question.

4. No costs are assessed against either party.

CRESENSIA KEHLER and JULIDA, Plaintiffs

v.

PEDRO KEHLER and SOLIK, Defendants

Civil Action No. 78

Trial Division of the High Court

Ponape District

May 5, 1958

Action to determine ownership of various plots of land on Ponape Island and of personal property in estate of decedent. Widow and adopted daughter of decedent brought suit against son of niece of decedent, who lived with decedent for number of years, for land and personal property. The Trial Division of the High Court, Associate Justice Philip R. Toomin, held that land and personal property were inherited by plaintiff beneficiaries and that defendant had no claim against estate; attempted devisement of Japanese lease to certain plot of land was merged in acquisition of Homestead Permit by plaintiff. The Court further held that attempt to convey German land title to other plots of land by testament was invalid and that land passed to oldest brother of decedent in accordance with provisions of deed.

1. **Ponape Land Law—Japanese Lease—Succession**

   Japanese lease of land on Ponape Island held by decedent cannot be devised without permission of Director of South Seas Bureau or his successor, Trust Territory Government.

2. **Homesteads—Merger with Leasehold Estate**

   Where transferee of rights of Japanese leasehold on Ponape Island, instead of requesting approval of transfer, acquires Homestead Permit, leasehold estate purportedly transferred merges into greater estate when applicant receives deed of fee title upon completion of requirements of Permit for development of land.

3. **Homesteads—Jointly-Held Permit**
   Where required by valid instructions of decedent, title acquired by devisee who applies for Homestead Permit is held jointly with co-beneficiary.

4. **Ponape Land Law—German Land Title—Succession**
   Land on Ponape Island held under German title certificate is subject to rules of inheritance and succession stated in document except as modified by action of subsequent administrations.

5. **Ponape Land Law—German Land Title—Wills**
   Under German land titles, testamentary disposition of land on Ponape Island is prohibited, and attempted oral will in favor of decedent's wife and daughter cannot be given effect.

6. **Ponape Land Law—German Land Title—Women's Rights**
   Although after 1941 Japanese Administration permitted transfers of land on Ponape Island to females, rule was not extended to include right of females to inherit land, and right of inheritance did not inhere in females until 1957. (Ponape District Order No. 8-57)

7. **Ponape Land Law—German Land Title—Succession**
   Where there is no present transfer or valid testamentary disposition, German title to land on Ponape Island passes in succession to heirs designated in document.

8. **Ponape Land Law—German Land Title—Succession**
   Where decedent leaves no sons, his oldest brother will inherit land on Ponape Island which decedent held under German land title.

9. **Ponape Land Law—German Land Title—Use Rights**
   Determination of legal title to land on Ponape Island does not effect enjoyment of *maka* and other use rights in land by extended matrilineal family as granted to them by decedent, and rights of title holder are also subject to rights of all unmarried female relatives to live on and use property.

10. **Ponape Custom—Oral Wills**
    Verbal will is valid testamentary disposition under Ponape customary law, and court must give effect to full intent of testator, not preferring one beneficiary over another.

11. **Personal Property—Contributed Shares**
    Where deceased contributed to fund to purchase outboard motor and motor is later sold, beneficiary of personal property is entitled to share of amount received in sale and is accountable to others for amount they contributed.

12. **Personal Property—Contributed Shares**
Where cost of building boat was borne by decedent, but labor and construction were supplied by extended family in consideration of right to use boat without charge, beneficiaries of decedent's personal property succeed to ownership of boat subject to use rights at reasonable times by extended family.

13. **Ponape Custom—Family Obligations**
Under Ponape custom, in absence of other evidence, services by nephew for his uncle in exchange for room and board creates no legal basis for claim against uncle's estate.

TOOMIN, *Associate Justice*

I. FINDINGS OF FACT

1. Plaintiff Cresensia is the widow of Aluis, who died September 16, 1953, and the plaintiff Julida is his adopted daughter. He had no natural children and no other adopted child than Julida.

2. Defendant Pedro Kehler is the son of Lihter, the daughter of Aluis' oldest brother, the defendant Solik. Pedro was adopted by Aluis' brother Pernel. Later he lived in Aluis' household for many years and was recorded as a member of Aluis' family but was never adopted by Aluis.

3. At the time of his death Aluis was the owner of the following real and personal property:

(a) A leasehold interest arising under lease from the Japanese Government, covering a piece of land approximately 3 chobu in size in the Nanuh Section of Uh, known as Nanpillap. This land is now under Homestead Permit from the Trust Territory of the Pacific Islands issued to plaintiff Cresensia under date of June 23, 1955, which will ripen into title not later than five years from the date thereof. Said land has no improvements on it, but has been planted with coconuts, breadfruit, and hibiscus.

(b) Fee title to a piece of land of approximately 3 chobu, located in the Nanuh Section of Uh, known as Nanpei. This land was improved with a nahs and originally six dwellings, of which one, owned by Aluis, was later destroyed by the typhoon, and the remaining five are owned by his brothers or their descendants. Crops planted on this land consist of coconut, breadfruit, mango, banana, eifel, and yams. The extended matrilineal family of Aluis had been living on Nanpei for many years prior to his death, and taking the production from said land. They had been granted *"maka"* rights by the title holder, being the right of the members of an extended matrilineal family to occupy land and to take the production therefrom, for their sole use.

(c) Rights derived under a revocable permit or lease from the United States Administration to Aluis, covering a combination restaurant and bakery building and two dwellings located on Government land in Kolonia, Ponape. Since the death of Aluis the rental has been paid by Cresensia and accepted by the Government, with knowledge of the change in ownership or operation.

(d) A whaleboat about 18 feet long, acquired by Aluis for the sum of $160.00, all of which was advanced by him, except for the value of two bags of flour contributed by Pedro's stepfather. In addition Aluis' matrilineal family contributed the labor in cutting down the logs and bringing them to the sawmill.

(e) An outboard motor, acquired by Aluis for the sum of $200.00 with funds donated as follows: By Aluis, $90.00; by Rosina, Julida's grandmother, $70.00; and by Pernel, Aluis' brother, $40.00.

(f) Two hills of yams given to Aluis or Cresensia by her relative Pasilio and planted on Nanpei. All of these yams have been consumed.

4. On September 16, 1953, Aluis gave instructions in the presence of Cresensia and two policemen of Kolonia, that both Nanpillap and Nanpei should go, on his death, to

Cresensia and Julida, that Cresensia should own the house which they had used in Kolonia, and that Aluis' other dwelling house in Kolonia should belong to his matrilineal family. These instructions were never consented to by the *Nanmarki* and the Government, or anyone on their behalf. There is no evidence that at the time of giving such instructions for succession to his property, Aluis was unsound of mind, while there is credible evidence to the contrary.

5. Pedro lived for many years as a member of the family of Aluis, and from the time he was 12 years old, rendered services for 7 1/2 years, in the planting and harvesting of crops on the lands on which Aluis and other members of his matrilineal clan were living. Pedro received no compensation for this service, but took his living from the land like other members of the family. Services so rendered were given without expectation of compensation. No evidence has been offered of the value of such services, or whether they had any value in excess of the living received by Pedro, and such pocket money as he may have received.

6. The defendant Solik is the oldest living brother of the deceased Aluis, who left no sons or grandsons surviving him.

II. CONCLUSIONS OF LAW

[1] 1. Among the properties possessed by Aluis upon his death was the leasehold estate in the property known as Nanpillap. This estate arose under the usual form of lease in use by the Japanese Government, running for a term expiring in 1960. Under the terms of this lease no devolution of the lessee's interest upon death, could operate to transfer his rights to a designated grantee, without permission of the Japanese Director of the South Seas Bureau. The privilege formerly possessed by that administrator has now passed to the Government of the Trust

Territory, whose approval is now required before any devise or transfer of such leasehold interest becomes effective. *Mikelina v. Simon*, 1 T.T.R. 153.

[2] Instead of requesting approval for transfer to her and Julida, Cresensia applied for and received a Homestead Permit from the Government of the Trust Territory covering this land, pursuant to which she will receive a deed of conveyance covering the fee title, provided she complies with the requirements for development contained in the Permit. Under these circumstances it is questionable whether the said lease is still in force, or whether there is any property right remaining therein, which could be the subject of transfer. In any event, however, under the equitable doctrine of merger of lesser estates in the greater, the said leasehold estate purportedly transferred by Aluis to Cresensia and Julida merged into the beneficial title acquired by Cresensia upon her entry into Nanpillap pursuant to the Homestead Permit, and if such merger has not yet been completed, it will certainly become effective upon the issuance of deed of conveyance thereunder. See Merger of Estates, 19 Am. Jur. 588, § 135 and ffg. Also Public Lands, 42 Am. Jur. 802, § 24.

[3] Defendants make no claim to Nanpillap, having expressly waived the same during the trial. However, any title acquired by Cresensia is to be received and held by her as the joint property of herself and Julida, in accordance with the instructions left by Aluis.

[4] 2. Respecting the property known as Nanpei in which title appeared to be in Aluis under the standard form of German Land Title Certificate issued in 1912, the rights to the succession of this land, and the method of transfer of interests therein, are controlled by the language of this document, save as modified by action of the Japanese Administration, or by the Government of the

Trust Territory, during the periods of their respective administration of Ponape. *Ladore v. Pisenda,* 1 T.T.R. 18.

[5, 6] Under paragraph 2 of this certificate, testamentary disposition is forbidden. Construing the testimony of plaintiffs' witnesses most favorably to them, the most that can be said is that it has made out a case of testamentary disposition only, and not of present transfer. Accordingly, the intention of Aluis to make an oral will in favor of his wife and adopted daughter cannot be given effect as to this property, unless the strict provisions of the German land law have been alleviated by either the Japanese or American Administrations. So far as the court has been able to ascertain, the only change made by the Japanese Administration, was to permit transfers of land to females after December 1941 to take effect, which transfers were invalid before that time. However, at no time was this relaxation of the rule extended to include the right of females to *inherit* lands, and this right of inheritance did not inhere in females as a matter of right, until the adoption of Ponape District Order No. 8-57, issued February 1, 1957. See third conclusion of law in *Luisa Eneriko v. Marina, et al.,* 1 T.T.R. 334.

[7] Since, as we have seen above, there was no present transfer intended by Aluis in the instructions given by him, and since testamentary provisions in favor of female heirs prior to February 1, 1957, cannot be given effect as violative of the provisions of the German Land Title Certificate, and land law, the land Nanpei must pass, if at all, in succession to the heirs designated in that document.

[8] As found in the findings of fact hereinbefore, Aluis left no son or grandson surviving him. The defendant Solik is admittedly Aluis' oldest brother. He is therefore the next in line to inherit Nanpei under paragraph 2 of

the title document, and is entitled to be confirmed in his rights thereto by this court in this proceeding. Such confirmation has the added advantage that no approval is required by the *Nanmarki* and the Administration, where the devolution is in accordance with the line of succession established by the title document.

[9] It should be recognized, however, that *"maka"* rights have been enjoyed in Nanpei by members of Aluis' extended matrilineal family and their descendants for many years. Of the six houses on Nanpei, five have been occupied by Aluis' brothers and their descendants and relatives. All of them have been sharing in the production from the land. Since these persons, other than Solik, are not parties to this cause, it is not intended by the conclusion herein reached to affect any equities which may be outstanding in members of Aluis' and Solik's extended matrilineal family, to continue to enjoy *"maka"* or other rights in the production from said land heretofore granted them by Aluis or his predecessors in title. In addition, the rights found in Solik, as title holder, are expressly subject to the reservation in paragraph 3 of the German Title Certificate that "all unmarried female relatives have the right to live on and use the property along with the owner". Since the defendants have recognized this as their obligation to Cresensia and Julida, both in the pretrial order and in answer to interrogation from the court, it is not anticipated that any problem will result from this conclusion.

3. There is no contest between the parties as to the transfer of Aluis' Kolonia property, consisting of the combination restaurant and bakery, and the dwelling house occupied by Aluis and his immediate family. There is a possible conflict between plaintiffs as to whether title should be confirmed in Cresensia alone, or in both plain-

tiffs jointly. In his opening statement, plaintiff's counsel requested confirmation of title to these properties in both plaintiffs. In his closing statement, he requested a finding of ownership in Cresensia alone, as to the Kolonia property. This was probably because of the risks entailed in operation of a speculative business, which ought not to be incurred by a minor.

However, the basis of succession to Cresensia is found in the instructions given by Aluis shortly before his death. As reported by plaintiffs' witness Permin, the Kolonia property was to go to both wife and adopted daughter. This coincides with the testimony of the witness Neliona.

[10] In accepting these instructions as tantamount to a verbal will, which is considered to be a valid testamentary disposition under Ponapean custom, the court cannot eliminate one of the beneficiaries from the bequest and prefer the other, but must give effect to the full intent of the testator. The court therefore holds that title to the Kolonia leasehold and to the improvements erected by Aluis thereon is in both plaintiffs jointly, and that they are jointly entitled to the rents, issues, and profits from this property, and from the restaurant and bakery business conducted on the premises. As to whether Julida should be relieved against the risk of losses from the business operation, or whether Cresensia is entitled to compensation for personal services in connection therewith, are matters to be decided in some other proceeding, if the questions should arise.

[11] 4. From the findings of fact, it appears that the contributors to the fund from which the outboard motor was bought were mainly Aluis, his brother Pernel, and Julida's grandmother, the latter two now living with Cresensia. During the trial it developed that the motor, being in need of repairs, was apparently mishandled by the

repairman, and finally sold to him in lieu of further controversy. Whatever was received from the repairman is accountable at most by Cresensia to Pernel and to Julida's grandmother Resina, and no rights therein inhere in either of the defendants. The court therefore confirms title to this item in plaintiffs as against any claims advanced by the defendants.

[12] 5. With relation to the whaleboat, it appears that the cost of making the boat was borne almost entirely by Aluis, but that his extended family, here represented by the defendants, contributed the initial labor of cutting the logs and bringing them to the sawmill. For those services they were permitted the use of the boat by Aluis as desired by them, without charge. It appears that the boat is now in need of repairs to render it seaworthy, and Cresensia has suggested that if the family will make the needed repairs, they may use the boat as was done during Aluis' time. The court therefore confirms title to the whaleboat in plaintiffs, subject to the right on the part of Aluis' extended family to make use of the boat at reasonable times satisfactory to Cresensia.

[13] 6. Though it is not disputed that Pedro rendered services to Aluis in planting and harvesting crops on Nanpei, there is no showing that such services differed from what might be required of a lad by one standing to him in the relation of father, nor that there was any expectation that the services merited any compensation other than bed and board. The fact that no demand appears to have been made on Aluis during his lifetime, and that some years have passed since the last rendition of services without such demand, indicates that there was no intention on the one side to charge, nor on the other to pay, for these services. The court therefore concludes that there is no satisfactory legal basis for the imposition

on the widow and daughter of Aluis, of the obligation to discharge a claim not made against him during his lifetime.

III. JUDGMENT

It is therefore ordered, adjudged, and decreed as follows:—

1. As between the parties hereto and all parties claiming under them, title is hereby confirmed in plaintiffs Cresensia and Julida to the following property:—

(a) Such interest in the leasehold estate as formerly belonged to Aluis in the property known as Nanpillap, now merged in the Homestead Permit issued by the Trust Territory administration to Cresensia.

(b) The combination restaurant and bakery business formerly operated by Aluis, and the building in which said business was operated, located on Government land in Kolonia, Ponape, together with such rights as formerly belonged to Aluis, and still exist under the revocable Government permit or lease, covering said property.

(c) The proceeds received from the sale of the outboard motor purchased by Aluis.

(d) The whaleboat built by Aluis and his extended family, subject to reasonable use thereof by the defendants and Aluis' extended family at times satisfactory to Cresensia.

2. As between the parties hereto and all parties claiming under them, title is hereby confirmed in defendant Solik to the land Nanpei, subject to all the rights, duties, obligations, and privileges contained in German Land Title Certificate 54, and under the system of land tenure evidenced by said title document.

3. Plaintiffs shall assume full responsibility for and shall discharge the debts of Aluis totalling $194.93, and shall have no right to receive contribution from defendants of any portion thereof.

4. This judgment shall not affect any rights of way which may extend over the lands above described.

5. No costs are allowed or taxed in this proceeding.

FALEYOOR NICHIG, Appellant

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Case No. 144

Trial Division of the High Court

Yap District

May 16, 1958

Defendant was convicted in Yap District Court of assault and battery in violation of T.T.C., Sec. 379. On appeal, defendant contended that prosecution failed to prove his guilt beyond reasonable doubt and that trial court erred in denying motion to suppress evidence. The Trial Division of the High Court, Associate Justice Philip R. Toomin, held that item of evidence not taken from defendant's person or premises is not illegally obtained. Court also held that where prosecution fails to prove actual or unequivocal appearance of attempt to do bodily harm, it has not made out case of assault.

Reversed and remanded.

1. **Search and Seizure—Motion to Suppress Evidence**

   Where knife placed in evidence in criminal trial was not taken from defendant's person or premises, defendant has no reasonable ground to move for suppression as knife was not illegally obtained.

2. **Search and Seizure—Generally**

   Defendant is not prejudiced by receipt of knife into evidence in criminal trial where there is no showing of attempt to use it unlawfully.

3. **Assault—Generally**

   Before there can be successful prosecution for crime of assault, it must appear there was attempt by force or violence to strike another or cause him bodily harm. (T.T.C., Sec. 378)

4. **Assault—Generally**

   Where complainant of alleged assault remains in hiding and is not menaced by defendant's knife, and there is no attempt to frighten or hit him with knife or other weapon, facts fail to make out case of assault. (T.T.C., Sec. 378)

5. **Assault—Generally**

   To constitute criminal assault, there must be overt act or attempt, or unequivocal appearance of attempt, with force and violence, to do physical injury to person of another. (T.T.C., Sec. 378)