of the Judicature Ordinance 1961 - Such jurisdiction to be exercised as the Court "thinks in each case to be the most consistent with natural justice and convenience":

Hollard v Ollivier (1881) NZLR 1 SC 197 applied, Mayor Etc. of Lower Hutt v Yerex (1904) 24 NZLR 697, 702 referred to.

MOTION for a declaration that the Cabinet decision in granting incentives to Western Samoa Breweries Limited was invalid and ultra vires in terms of the Act and a declaration that the action of the Director in forwarding the application to the Incentives Board without requiring the Company to publish notice calling for objections was invalid and any reports by him to the Board were consequentially invalid.

Southwick and Stevenson for applicant.
Attorney-General Slade and Barlow for respondents.

Cur adv vult

NICHOLSON CJ. This is an action for a declaration in relation to the rights of the applicant under the Enterprises Incentives Act 1965. Before proceeding to the principal issues I pause to consider a matter which was not argued before me, namely, the jurisdiction of the Supreme Court of Western Samoa to make a declaratory judgment in proceedings which do not seek relief of any other kind. In the United Kingdom and in New Zealand, the two countries providing the principal sources of law for Western Samoa, the situation regarding declaratory judgments is governed by statute. Doubtless, this is because there appears to have been doubt in the minds of English judges of the 19th century as to whether a court of equity had the power to make a declaratory judgment without proceeding to provide some other form of equitable relief such as certiorari or injunction. In New Zealand, the situation was first considered by Richmond J. in the case of Hollard v. Ollivier (1881) N.Z.L.R. 1 S.C. 197 at page 211. There, Richmond J. took the view that the Regulae Generales of 1856, Rule 238, clearly gave him authority to make a declaratory decree. He considered the difficulties in which English judges had found themselves in this respect, but concluded that the matter was merely one of procedure, and that the Supreme Court of the Colony of New Zealand ought not, in the matter of procedure, to follow English decisions too closely, since the Supreme Court in New Zealand was vested with jurisdiction in both common law and equity, unlike the courts in England at that time. In a second New Zealand decision of the Mayor Etc. of Lower Hutt v. Yerex (1904) 24 N.Z.L.R. 697 at page 702 Stout C.J., after referring to the decision in Hollard's case, expressed doubt as to whether the New Zealand Supreme Court had a power to pronounce a declaratory decree. The matter was put beyond doubt by the passing of the New Zealand Declaratory Judgments Act 1908. No similar statutory provision is in force in Western Samoa, although section 12 of the Government Proceedings Act 1974 empowers the Court to issue declaratory judgments against Government in lieu of granting an injunction or specific performance or an order for recovery of land. None of those circumstances appear to arise here.

I rely on the view of Richmond J. in Hollard's case that the question is purely a matter of procedure. There is no formal code of civil procedure presently in existence in Western Samoa, and by section 39 of the Judicature Ordinance 1961 the practice and procedure of the Supreme Court in the exercise of its civil jurisdiction "shall be such as the Court thinks in each case to be most consistent with natural justice and convenience." In pursuance of the discretion vested in me by section 39 of the Judicature Ordinance, I conclude that it is in

"NOTICE OF INTENTION TO TAKE LAND FOR WATER CONSERVATION AT AFIAMALU

Notice is hereby given that it is intended under the provisions of the Taking of Land Act, 1964 to take the land described in the schedule hereto for Water Conservation. AND notice is hereby further given that a plan showing such land is deposited in the Office of the Director of Lands is there open for inspection and anyone having any well-grounded objections to the proposed taking and wishes them to be considered should set forth the same in writing and forward such writing so as to reach the Director of Lands within twenty-eight days from the first publication of this notice.

SCHEDULE

All that piece or parcel of land containing an area of one hundred and thirty-eight acres three roods and twenty-eight perches, (138a. 3r. 28p.) more or less, situated at Afiamalu, Tuamasaga District, described as Parcel 528 Flur XII, Upolu, being more particularly delineated on Plan 31 U/XII L, deposited in the Office of the Director of Lands and thereon coloured yellow.

Toomata L.T.
MINISTER OF LANDS".

Publication of notice was also made in the "Bulletin" a newspaper which was published and circulated in Samoa.

Seumanutafa Moepogai wrote to the Director of Lands on the 14th March 1967 claiming the pule of the said land. The only other objection filed was by Tapusalaia Toomata Filifilitoga but it appears that this objection was never prosecuted further and presumably abandoned.

On the 24th April 1967 notice of the proclamation (under the Taking of Land Act 1964) taking the lands in dispute for water conservation was duly given in the Western Samoa Gazette p. 266. Negotiations as to the value of the land were conducted between the Government and Seumanutafa and the figure finally agreed upon was $70 per acre which calculated on an area of 127 acres 15 perches amounts to $8,896.56. The sum of only $8,890 was paid by Government to the Public Trustee for the land taken pursuant to the said Act and there is therefore the sum of $6.56 short paid.

Seumanutafa Moepogai duly filed his petition under section 47 of the said Act seeking the orders mentioned above and public notice thereof was duly given in the Savali that the said petition would be heard on the 9th December 1968 at Mulinu'u. Objection was filed by the Sooalo family claiming that land in dispute was appurtenant to the title Sooalo but at the hearing on the 9th December 1968 the Court was informed that there was no current holder of the title Sooalo. Accordingly an adjournment was given to enable a holder to be appointed to the Sooalo title. The Land and Titles Court subsequently appointed 2 persons to hold the Sooalo title as agreement thereon could not be reached by the family. The case came before the Land and Titles Court next on the 19th May 1969 when a claim was made by Savealii Ioane Malietoa claiming that the said lands in dispute were appurtenant to the title Malietoa although no objection had been filed by him or by the holder of the title Malietoa to the notice published on 7th March 1967. There were two other additional parties before the Court, one consisting of the Heirs of Seumanutafa Loligi and Lima Osasa and the other Tuala Tanilo Fonoti. Both of these parties supported the claim of Seumanutafa Moepogai as to the pule of the title but sought to be heard on the question of the disposal of the compensation moneys.

The Court heard the matter on the 19th May 1969 and continued on the 16th June 1969 when the evidence was completed. The first question to be decided is - to which title is the land containing 127 acres 15 perches appurtenant.

The Court has considered the order of the Supreme Court of Samoa dated

11th July 1899 and particulars thereof have appeared in the Samoan Land Registry from the date of the order down to the present time.

The Court has also considered the decision in L.C. 748 which dealt with a large block of land, closely adjoining the eastern boundary of the land in dispute, which was also taken for water conservation purposes. L.C. 748 was decided in October 1933.

In the Order of the Supreme Court of Samoa dated 11 July 1899 it is stated (inter alia) as follows:

> "That all other lands rejected in above numbered claims shall be the property of Seumanutafa of Apia to be held by him in fee, and the boundaries of the said land of Seumanutafa shall be the land of Malietoa, hereinbefore described, on the north, the land of Tofaeono, hereinbefore described, on the east, the boundary of the land of Su'atele, hereinbefore described on the south, and the land of Wellman Meyland & Hobbs contained in Court Grant No. 970 and inland thereof the Main Road from Apia to Siumu as far as Tauteulagaaitu shall be the boundary on the west."

We take the view that the land in claims which were rejected by the Supreme Court in accordance with Article IV of the Berlin Treaty 1889 at once reverted to their former status, that is, they became Samoan family or village land. The words "in fee" mean that Seumanutafa was given full ownership of the land but it does not mean that Seumanutafa Moepogai (the grandfather of the present Seumanutafa Moepogai) was given the land alone, it means it was given to him as holder of the title 'Seumanutafa' for the time being.

In any event section 1 of Article IV of the Berlin Treaty precludes the contention that the land ceased to be Samoan family land. We are satisfied therefore that the lands in dispute are Samoan customary lands.

Evidence was given that the present Seumanutafa Moepogai had been in occupation of the said land for many years - had built a house thereon - planted taros over a small area of the said land and generally dealt with the land as land appurtenant to the title Seumanutafa without any complaint or objection from Malietoa or Soealo.

We have also examined the records in the Lands and Survey Office and it is apparent therefrom that part of the land in dispute and taken for water conservation purposes, was included in a lease from Seumanutafa to one Kelsham for a period of 40 years from 18th December 1899. At no time was any objection ever raised to the said lease by the holders of the titles Malietoa or Soealo. The records in the Lands and Survey Office clearly show that the land in dispute is land appurtenant to the title Seumanutafa and it is apparent that it was the decision of the Supreme Court of Samoa dated the 11th July 1899 which was relied upon in this regard. In our view this Court must support and uphold the decision of the Supreme Court of Samoa as being one of a Court of competent jurisdiction.

The Court is satisfied therefore that the land in dispute viz. 127 acres 15 perches taken by Government as aforesaid is appurtenant to the title Seumanutafa of which the current holder is Seumanutafa Moepogai.

Having determined the question of the pule of the land in dispute we pass now to the further prayer in the petition viz. that the compensation moneys be paid to Seumanutafa Moepogai.

The Taking of Land Act 1964 provides in section 46 thereof:

> "If any doubt or dispute arises as to the right or title of any person to receive any compensation awarded under this Act, or any compensation agreed to be paid by the Minister under this Act -
>
> (a) In the case of compensation awarded by the Court the Minister may within the period of sixty days after the award has been filed in the Court cause the moneys

awarded to be paid into the Public Trust Office;

(b) In the case of compensation agreed to be paid the Minister may pay the same into the Public Trust Office;

(c) In the case of compensation arising from customary land paid to the Public Trustee under paragraph (a) or paragraph (b) of this section, the Land and Titles Court, on the application of any party interested, may make such order in relation thereto as it thinks just and proper."

We are as stated above satisfied that the lands taken by the Government are customary lands.

The Constitution of Western Samoa - Article 101(2) - states:

"Customary land means land held from Western Samoa in accordance with Samoan custom and usage and with the law relating to Samoan custom and usage."

Seumanutafa Moepogai holds the said lands as the matai of the Seumanutafa title but he has no power to sell or otherwise dispose of customary land: vide Article 102 of the Constitution of Western Samoa, which provides:

"102. It shall not be lawful or competent for any person to make any alienation or disposition of customary land or of any interest in customary land, whether by way of sale, mortgage or otherwise howsoever, nor shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his decease or insolvency:

Provided that an Act of Parliament may authorise -

(a) the granting of a lease or licence of any customary land or of any interest therein;

(b) the taking of any customary land or any interest therein for public purposes."

Section 47 of the Taking of Land Act 1964 states -

"(1) If compensation is awarded or has been agreed to be paid as last aforesaid in respect of lands or any interest therein taken from any person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same, or in respect of any permanent injury done to such lands, such compensation shall be dealt with as follows, that is to say:

(a) If the compensation amounts to one thousand pounds or upwards it shall be paid into the Public Trust Office, and the Public Trustee shall apply the same, upon an order of the Land and Titles Court as to compensation arising from customary land, and upon an order of the Supreme Court as to compensation arising from freehold land or public land made in either Court on the petition of any person claiming any estate or interest in the same to one or more of the following purposes, that is to say:

(i) To the discharge of any debt or encumbrance affecting the said lands, or affecting any of the lands settled therewith, or to the same or like uses, trusts, or purposes:

(ii) In the purchase of other lands to be conveyed, limited, and settled upon the like uses, trusts, or purposes:

(iii) In removing any buildings on the said land, or substituting others in their stead:

(iv) In the purchase of such securities as the Court having jurisdiction may direct, to be settled in the same manner as the said lands:

(v) In payment to any party becoming absolutely entitled thereto.

(b) If the compensation is more than fifty pounds but less than one thousand pounds it shall be paid into the Public Trust Office, and the Public Trustee may apply the same to any one or more of the abovementioned purposes without an order of any Court:

Provided that in any such case thePublic Trustee may, if he thinks fit, apply to the Land and Titles Court or the Supreme Court as the case may be for directions as to the purposes for which the compensation shall be applied:

(c) If the compensation is not more than fifty pounds it shall be paid to the parties entitled to the rents and profits of the said lands; or, in case of the disability or incapacity of such parties, to their respective husbands, guardians, committees, or trustees, as the case may be.

(2) The provisions of this section shall not be deemed to prevent any person who has a partial or other qualified interest in land to which interest he is solely entitled, and which he may absolutely sell or dispose of, from receiving any compensation in respect of such interest to which he may be declared entitled under any award, or which has been agreed to be paid to him as aforesaid." (By virtue of the Decimal Currency Act 1966 a pound is equivalent to two tālā and section 47 is to be read accordingly).

The interest of Seumanutafa Moepogai in the said lands is in our view not only a qualified one but also a partial one.

It is a qualified interest in the sense that as the matai he held the land but without power to sell. We respectfully adopt and apply the reasoning given by Fair J. In re Auckland Grammar School Board and in re Auckland City Corporation /1941/ N.Z.L.R. 646 at p. 653 where the learned Judge says:

> "The word "qualified" is not a term of art. But its ordinary meaning would appear to be an interest that is something less than an absolute estate in fee-simple, or less than an absolute owner would have in a more limited estate in the land. It means less in quality and degree than that of an absolute estate. The first definition given in 8 Oxford English Dictionary, Pt. 1, p. 16, of the alternative meaning of the verb "qualify" is "To modify" in some respect - to modify (a statement, opinion, etc.) by any limitation or reservation: to make less strong or positive. The estate of the Board in this land was less than an estate in fee-simple in several respects, inasmuch as it did not have power to sell the land nor to mortgage it except for certain limited purposes, and it could not lease it except on special terms. I think, therefore, that the limitations upon the right of the Board to deal with the land may be described as making the interest a qualified one, which resembles an estate in fee-simple but with restrictions foreign to the estate of the owner of an absolute estate."

As we take the view that Seumanutafa Moepogai has a qualified interest in the said lands any order that the Land and Titles Court may make regarding the compensation moneys is restricted to the purposes set forth in the said section 47.

It was argued that Seumanutafa Moepogai was a person "absolutely entitled thereto". In one sense the matai is entitled to exercise absolute rights of ownership over the land but he is not in our view and having regard to the provisions of the said Act entitled to deal with the compensation moneys paid for land taken compulsorily in his unfettered discretion. The interest he, as the matai of the family, has in the compensation moneys is in our view qualified in the same way as the ownership of the land was qualified. In re Johnsonville Town Board (1908) N.Z.L.R. 36 at p. 42 Mr Justice Williams in delivering the judgment of the Full Court said:

> "Notwithstanding the power to alienate for the particular purpose, the restriction on alienation remains attached to the money in the same way as it did to the land. We are satisfied that the taking of the land under the statutory power was not equivalent to a removal of the general restriction on alienation. The restriction on alienation of Native land is imposed not only for the benefit of the original grantee, but to preserve the land for his successors in title and prevent their impoverishment. We do not see on what principle the owner, subject to the restriction, could claim the whole of the compensation money any more than any other person with a limited interest in settled land would be entitled to the whole compensation if the land were taken compulsorily. Section 79 of The Public Works Act, 1905 , provides for the case of compensation being awarded in respect of land taken from any person having a qualified interest therein and not entitled to sell and convey the same. The fact of the person, as in the present case, having only a qualified interest and not being entitled to sell does not affect the sum to be paid for the land, but under that section it does prevent his appropriating the whole of the compensation money. There is provision for the money being applied in the purchase of other lands to be settled for the like purposes as the land taken, or in the purchase of securities to be settled in a similar way. If, as we hold, the general restriction on alienation attaches to the compensation money, the Native owner is entitled only to the income to be derived from it. He has a limited interest in what is equivalent to a settled estate, and the duty of any Court dealing with the matter is to preserve the corpus of the estate intact for the benefit of the successors in title."

There was the suggestion by the heirs of Seumanutafa Laligi and Lima Osasa that the moneys should be utilised in the purchase of other lands. Seumanutafa Moepogai resisted this suggestion and on the evidence we conclude that for the present, the Seumanutafa family have sufficient lands for the welfare of the family.

Seumanutafa Moepogai asked that portion of the compensation moneys be utilised in the payment of a debt owing to Burns Philp & Co Ltd amounting to $1,400 or thereabouts incurred in the erection of a new guest house on land appurtenant to the title Seumanutafa but situated in Apia.

It is necessary to consider whether the Court is entitled to make such an order having regard to section 47(1)(a)(i) above, which reads -

> "(i) to the discharge of any debt or encumbrance affecting the said lands, or affecting any of the lands settled therewith, or to the same or like uses, trusts, or purposes:"

The land on which the guest house is erected is land appurtenant to the same title Seumanutafa as the area of 127 acres 15 perches taken for water conservation purposes. There is no mortgage or charge in favour of Burns Philp & Co Ltd over the said lands securing the said debt as it is not possible to mortgage customary land nor is it possible for customary land or any interest therein to be taken in execution: vide Article 102 of the Constitution of Western Samoa.

Is this debt one "affecting any of the lands settled therewith or to the same or like uses trusts or purposes?"

In our view the word "affecting" in the said section means "to have

an influence on".

In Re Bluston (deed) [1966] 3 A.E.R. p. 220. Winn L.J. at p. 225 says -

> "As I understand the word "affected" it means "influenced", "altered", "shaped". I find myself unable to share the view expressed by McTiernan, J., in the High Court of Australia in the case of Shanks v. Shanks (1942) 65 C.L.R. at p. 337 that:
>
> > "in its ordinary usage 'affects' is a synonym for touching, or relating to, or concerning.""

In Casey v. Arnott (1877) 35 L.T. 424 and (1877) L.J. Q.B. Vol. 46, Grove J. stated:

> "The words on which the plaintiff relies are, "any act, deed, will or thing affecting such land, stock or property." But I think, on the true construction of those words, such property must be physically affected, and it is not sufficient that it should be affected incidentally."

In "Words and Phrases Judicially Defined" Vol. I it is stated at p. 128 -

> "The expression 'affect land' [in the Judgments Act, 1864, s. 1 (repealed; see now Land Charges Act, 1925, s. 6), which enacted that no judgment to be entered up should affect any land until such land had been delivered in execution] appears to us to be a synonym for the creation of an equitable charge. Re Pope (1886), 17 Q.B.D. 743, per cur., at p. 744."

Having regard to the interpretation that we place on the word "affecting" and the authorities quoted above and in particular bearing in mind the provisions of Article 102 of the Constitution of Western Samoa, we conclude that the debt incurred in the erection of the guest house, whilst admittedly erected on lands of the Seumanutafa title and held no doubt on the same trusts and purposes, is not a debt "affecting" the said lands on which the guest house is erected.

It is unfortunate that we cannot come to a conclusion more favourable to the holder of the title Seumanutafa but we must interpret the legislation as it is enacted. The Court's function is not to make the law, that is the function of the Legislature.

We therefore order that the compensation moneys of $8,890 (less costs hereinafter referred to) paid to the Samoan Public Trustee together with the further sum of $6.56 to be paid to the Samoan Public Trustee by the Government of Western Samoa (within 14 days from the date hereof) be invested by the Samoan Public Trustee in securities authorised by law for the investment of trust moneys in Western Samoa and the annual income therefrom (including any income already accrued) be paid to the holder or holders for the time being of the Seumanutafa title and after his or their deaths to pay the income to his or their successors the capital fund to be held as each holder or holders succeed to the said title Seumanutafa upon the same trusts.

We also order that leave be and the same is hereby reserved to the holder or holders for the time being of the said Seumanutafa title to apply to this Honourable Court at any time for any variation or rescission of the orders hereby made.

Seumanutafa Maepogai is entitled to the costs of and incidental to these proceedings to be paid out of the said compensation moneys. We fix these costs (inclusive of all disbursements) at $150.00 and order that they be paid to the said Seumanutafa Maepogai personally forthwith.

In conclusion it is to be noted that Plan No. 31 U/XII L 2854 shows an area of 2 roods 32.3 perches as having been taken by Government for road widening purposes. It states on the said plan that the proclamation proclaiming the said area of 2 roods 32.3 perches as road was published in the

Western Samoa Gazette on 25th April 1966. An area of 5.1 perches is also shown on the said plan as being required for an access way. These several pieces of land are in our view appurtenant to the Seumanutafa title but we understand no compensation has yet been paid therefor. We would respectfully suggest that the Samoan Public Trustee seek an early finalisation of these matters and obtain from Government the moneys due by way of compensation and we suggest that such moneys be held on the same trusts as the compensation moneys above mentioned.

This Court hereby orders that the hearing fee of $5.00 be paid by the four Respondent parties herein in equal shares viz. $1.25 each within a period of 21 days from the date hereof.

DATED at Mulinu'u this 18th day of July 1969.

B.C. Spring
PRESIDENT

Tagaloa S. Tuala
ASSESSOR

Tuilaepa S.
ASSESSOR

Nanai V.
FA'AMASINO

Tuli'aupupu M.
FA'AMASINO

Tapuai K.
FA'AMASINO