succinctly put by the parties as follows:

"By Chief Puseletso Sekonyela (plaintiff):
I claim rights of succession to chieftainship of Likomeng."

"By Chief Mothinya Sekonyela (defendant):
I have been rightly placed at Likomeng."

The facts in this case are common cause: The father of the plaintiff, Nkhaolise Sekonyela, was the headman of Likomeng. Nkhaolise Sekonyela had been a headman of the same area, having inherited it from his father Sefabatho Sekonyela. The succession was therefore hereditary. These headmen were under the chief of Semenanyana. However, during or about 1942 Nkhaolise Sekonyela was sentenced to undergo imprisonment for a period of two years. Whether this sentence was imposed on him because he refused to join the army or because "he fought when he was ordered to attend 'lipitso'" does not now matter as the decision in this case does not turn on it. What is of importance is that he was subsequently deprived of his headmanship. Thereafter Thotofeane Sekonyela became the headman of Likomeng. He was then followed by his son Qaqailane who was the headman of the said area from 1959 to 1973 when he died.

If the position had been as it had always existed prior to 1938 (that is purely in accordance with customary law) then there would have been no problem at all. The customary law was known and it could have been followed albeit with some modifications. But in 1938 there occured in this Kingdom a single legislative enactment which shook the constitutional structure of the country to its marrow. In that year, by Proclamation No. 61 of 1938 henceforth Chiefs, Sub-Chiefs and Headmen were declared as such by the High Commissioner by Notice in a Gazette. The High Commissioner decided who was to be Chief, Sub-Chief or Headman. Any of these persons whose name did not appear in the gazette had no powers at all. This Proclamation put the High Commissioner on the same par as the Government of the then Union of South Africa which in terms of the Statute of 1927

> "in making an appointment is not bound to appoint the man who would be chief according to ..... custom"

per Watermeyer, C.J. in Sigcau v Sigcau, 1944 A.D. 67 at 75. Pursuant then to Proclamation No.61 of 1938 a High Commissioner's Notice No.171 of 1939 was published in a gazette and the name of Headman Nkhaolise Sekonyela of Likomeng under Sub-Chief of Semenanyana appeared on page 15. He had been appointed a headman by a competent authority. He was made the legal headman of the area of Likomeng. Later the High Commissioner's Notice No.167 of 1950 was published which cancelled the High Commissioner's Notice No.171 of 1939. In the 1950 gazette the name of Headman Thotofeane Sekonyela appears instead of that of Nkhaolise Sekonyela. He was, therefore, in terms of Proclamation 61 of 1938 a headman. He was now the new legal headman of the area of Likomeng in the place of Nkhaolise. He was the son of Mosuoe Sekonyela. According to custom he could not be a headman of Likomeng as this position was hereditary. As far as custom was concerned the headmanship had not disappeared in the house of Nkhaolise Sekonyela. (Hence the use of the appellation "chief" by the plaintiff). However, the administration had decreed otherwise and the legal position was that Thotofeane Sekonyela was now the headman of Likomeng. In 1959 High Commissioner's Notice No.23 of 1959 was published in a gazette. This listed the names of recognised Principal, Ward, Sub-Chiefs and Headmen and the relevant portion, for our purposes, reads:

> "For Thotofeane Sekonyela substitute Qaqailane Sekonyela."

Qaqailane Sekonyela was now the new headman of Likomeng. His appointment was again repeated in 1964 because his name appears in the gazetted list of Principal, Ward and Sub-Chiefs and Headmen. He remained in that position until his death during 1973. It was soon thereafter that this action was to begin. He, therefore, died in office. (cf Khofu Nakeli v Petlane Lerotholi and Others, (unreported) CIV/A/15/79 at 5).

The position was simply as follows then: The High Commissioner who had the power to make anybody a

headman had decided that from 1950 Thotofeane would be the headman of Likomeng. From that moment Nkhaolise Sekonyela ceased forthwith to have any powers of a headman.

When Nkhaolise Sekonyela died, subsequently, he had been deprived of his headmanship. Unless there had been no changes, by custom headmanship is hereditary. However, an heir cannot inherit what his predecessor did not have at his death. Nkhaolise Sekonyela was not a headman when he died and therefore his son could not inherit a non-existing headmanship. (cf Khofu Nakeli v Petlane Lerotholi (supra) page 6). During argument, both in the Court below and this Court, it was stated that there have been chiefs who were convicted of more serious crimes than that allegedly committed by the late Nkhaolise Sekonyela. (Some were in fact hung for having committed murder). Yet their sons inherited their chieftainship. The answer to that argument is that those chiefs died in office and at their death retained their chieftainship which, as I have said, is hereditary. In the instant case there is no headmanship remaining at the death of the father of the plaintiff. That headmanship ceased a long time ago and was given to Thotofeane, then to Qaqailane by the ~~law~~ lawful authority. The first born son to Qaqailane by his only wife is Mothinya Sekonyela. As stated earlier, Qaqailane died in office.

It seems to me that this present case is yet a classical example of what has been brought about by Proclamation 61 of 1938, namely that there was

> "no necessary connexion between the estate and chieftainship, since in the Union (of South Africa) and in Basutoland the government might appoint anyone to the chieftainship, whether in accordance with the old African Law or not."

per Duncan in SOTHO LAWS AND CUSTOMS (1960 Ed.) p. 54. With respect I believe this is where the learned president of Salang Central Court failed to appreciate this important distinction. The learned Judicial Commissioner has appreciated the problem admirably, in my view, when he says;

> "This Court first of all wishes to point out that since 1938 the chieftainship has not strictly been customary as chiefs and headman were those recognised by the High Commissioner as such."

The legal position in 1950 was that Thotofeane Sekonyela was recognised by the High Commissioner as the Headman of Likomeng. This position continued until 1959 when Qaqailane was recognised by the High Commissioner as the headman of Likomeng. In the words of Mapetla, C.J. in the case of Chief 'Meli Ntsoele v. Chieftainess 'Mamolomong Ramokhele, ~~CIV/A/13/74~~ (unreported) at page ~~R~~ 135E 1974-75 LLR 130 it is:

> "a fact which the appellant cannot now, in my view, challenge."

and p 136A

> "..... having been duly and lawfully recongnised as headman this Court cannot now as indeed it could not have done during his lifetime, adjudicate upon a rival claim - See also Mampa Nkhasi v. Shopane Nkhasi, 1955 H.C.T.L.R. 39."

These remarks (with which I entirely agree) are apposite to this matter before me. Chief Puseletso Sekonyela (plaintiff) could not have challenged the High Commissioner's appointments of both Thotofeane and Qaqailane then nor now.

The question asked by the learned Judicial Commissioner must be answered simply by repeating the words of Harragin C.J. in Molapo v. Molapo, 1926 - 53 H.C.T.L.R. 210:

> "This is entirely an admisistrative matter. Under the Proclamation no person has any inherent right to be declared a chief ..... "

The conclusion the Court has arrived at is that the appeal ought to be dismissed with costs and it so ordered.

M. P. MOFOKENG
J U D G E
26th September, 1980

For Appellant: Mr. C. Maqutu
For Respondent: Mr. G. Kolisang