

SETALEKI MANU AND ORS. (Appellants, Defendant).

v.

J. B. WATKINS AND ORS. (Respondents, Plaintiffs).

This is an appeal by the Defendants from a decision of the Land Court which is reported at page 8 of this volume. The Privy Council (Stronge C.J.) upheld the appeal and set aside the decision of the lower court, on the 15th September, 1921.

Unfortunately the judgment of the Privy Council can not now be found but the following is an excerpt from the judgment which was published in the Government Gazette.

This Court having thus decided the question of the ownership of the land in favour of the defendant Fakafanua, a decision on the other question raised in the case, namely, whether the plaintiffs or the defendants are the church founded by King George Tupou I, is not strictly necessary for the purposes of this case, but as the question has been raised and argued in this action, and also forms the main question in the action brought by the same plaintiffs in the Supreme Court concerning the Church buildings, ministers' houses, and other personal property of the church, this Court in order to bring this ruinous litigation to an end considers it advisable that it should give its decision on this branch of the case also.

The Australasian Wesleyan Methodist Church established itself in Tonga somewhere about the year 1857. During the argument we have been referred by appellants' counsel to a Blue Book of the United Kingdom which constitutes the Appendix to the report of Sir C. Mitchell, High Commissioner for the Western Pacific, and was presented to both Houses of Parliament in 1887.

From the recitals in the Model Deed which forms part of enclosure 10 in this Blue Book it appears that the Kingdom of Tonga formed a district of the Australasian Wesleyan Methodist Church and was known as or called the Friendly Islands or Tonga District. It further appears that the control and management of the affairs and business of this Tongan district of the Australasian Wesleyan Methodist Church were originally entrusted to the New South Wales and Queensland Conference, which was one of the four conferences of the Wesleyan Church in Australasia. So that it seems clear that so far as the control of her own affairs was concerned the Tongan Wesleyan Church was subordinated to this Conference in Australasia.

In 1885 dissatisfaction which had long been rife in the Tongan district mainly over the very large amount of money collected for the Wesleyan Church and sent away from the country,

came to a head and a large majority of the adherents of the Australasian Wesleyan Church in Tonga broke away and under the leadership of King George Tupou I and the Rev. S. W. Baker formed themselves into a separate religious organisation but retaining the same doctrines, discipline, and form of worship as the Wesleyan Church. The Association or Church thus founded continued its existence as a separate institution down to April of the present year when as the result of negotiations the majority of its members decided to and did in fact amalgamate once more with the Wesleyan Church in Tonga, under the title of the Free Wesleyan Church of Tonga. It is the validity of this amalgamation which is disputed by the respondents, whose case in the Land Court appears to have been argued on the following lines: That freedom from external control was and is an essential and fundamental principle of the church founded in 1885 by King George Tupou I. That the majority of the members of that Church having decided against the will of the minority to amalgamate with the Wesleyan Church in Tonga have acted in contravention of that essential and fundamental principle, and that it is not competent therefore for that majority to carry with them into the new body formed by the fusion, the property given for the benefit of that church as a separate religious organisation and not subject to external control, nor is it competent for such new body to exclude the respondents from possession of that property on account of the respondents' refusal to depart from such essential and fundamental principle.

The Appellants, on the other hand, contend that it was not the King's intention as founder of the Free Church that it should remain for ever entirely severed from the Wesleyan Methodist Church but that in founding the Free Church in 1885 he intended and desired that the church should if it could be so arranged be affiliated with the Wesleyan Methodist Church not as subordinate to or under the control of any Conference of that body, but as itself forming a separate Conference and having the entire management of its own affairs, that the amalgamation, consequently, does not abrogate any fundamental or essential principle of the Church founded by King George Tupou I, and does not, therefore, constitute a Schism. That if the fusion of the two Churches did amount to a Schism the members of the Church founded by the King and the Church Courts unanimously agreed.

Your Majesty and Honourable Members of Privy Council, I understand the decision of the House of Lords in the Free Church case (1904. App. Ca. 515) to amount to this, that where property is given for the purpose of a particular voluntary association having as its bond of union one or more distinctive fundamental religious tenets or principles, the majority of such association cannot, in the absence of express provision, by amalgamating with another body which does not hold such tenets or principles as essential oust from the property belonging to such voluntary association the minority who still adhere to those tenets and principles.

There is abundant authority, I think, for stating that in order to ascertain what are the essential or fundamental tenets or principles held by a particular association the Court will look carefully at the opinions and doctrines entertained and professed by its founders. In the Free Church case (1904 App. Ca. at p. 613) Halsbury L.C. said — "The question is what were in fact the views held and what the founders of the trust thought important." Lord Davey at p. 644 of the same case, quoting from Lord Eldon's judgment in the Attorney General v. Pearson says — "The nature of the original institution must alone be looked to as a guide for the decision of the Court" and again at page 645 the same noble Lord says — "The question in each case is what were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created."

It, therefore, becomes necessary at this stage that I should try and ascertain as exactly as possible what were the opinions and principles entertained and professed by King George Tupou I and what was the nature of the original institution founded by him in 1885. The first mention by King George Tupou I of his intentions appears to be contained in his speech at the opening of the Legislative Assembly in July, 1880 (Tongan Government Gazette of November 10th, 1880). His Majesty is stated to have said —

"There was also a letter I wrote to the Ministers in Sydney who govern the church to which most of us belong for our church here to become an Independent church like the church in Sydney. I have just received a reply to it and in the said reply it appears it is referred to the Great Conference which will meet next year in Adelaide. But my mind is still the same for the Church of Tonga to be an independent Church; and the words I uttered I still utter — I and my family will not again contribute to the foreign missions until Tonga is a Church."

The next reference to the King's intentions is contained in the Blue Book of the United Kingdom which I have already mentioned as having been referred to by the Appellants' counsel (Tonga No. 2, 1887) — and which I wish to state here was not before the judge of the Land Court. Inclosure 11 at page 96 of this Book is as follows:—

Abstract of Proclamation by King George of Tonga respecting Establishment of Independent Church. December, 1880.

"I, George Tupou, being still possessed of sufficient power
"(or ability) to govern my people, and having made up my
"mind that my people and country shall be entirely free and
"independent, and having thoroughly resolved that Tonga
"shall be an independent church, I take this opportunity of
"publishing my intention so that the elders of the church in
"Sydney, the Missionaries, and the whole world shall see
"that I am determined to have the separation.

"You, Chiefs and people, who hold any position, even to the lowest in the Government, or you who are in any way related to me are to abstain from subscribing at Mission collections, paying ticket money, building or repairing churches or teachers houses or cooking food to feed the preachers.

"Other people are to please themselves.

If this Proclamation does not have the desired effect, I shall take other measures."

(sgd.) George Tupou,

Nuku'alofa,

December, 1880.

There is an interval of nearly five years before the next reference to the matter which is also by the King and appears in his speech at the opening of the Legislative Assembly in November, 1885 about three months after the founding of the Free Church. Unfortunately, however, this utterance does not advance the matter much as His Majesty confines himself to saying :—

"You are all aware that since we last assembled the Free Church of Tonga has been established. You are all acquainted with the reasons of my doing so. I need not repeat them now."

If these were the sole documents extant to evidence the founder's intentions in establishing the new church I think it would be difficult to avoid coming to the conclusion that the intention of the founder was to establish a church free from any control or association with any other religious body, and although as stated by Lord Davey in the Free Church case (1904 App. Cas. at p. 661) — "It is a difficult matter to define any positive standard between an essential and a non-essential principle". I should be prepared to hold that this principle of a church spiritually independent, free from control or connection with any religious body, or association and constituting as it did the only difference between the new church and the Wesleyan Church from which it had seceded was both the intention of the founder and also an essential principle of the church which he founded.

The documents which I have just referred to do not, however, stand alone, they must be read and construed together with other documents to which I shall now refer.

Inclosure 18 of the United Kingdom Blue Book to which I have already referred consists of two documents each headed —

"Memorandum of Difference between so-called Wesleyan Church and so-called Wesleyan Free Church of Tonga."

One of these Memoranda is dated April 5th, 1887 and signed by Mr. Moulton, the other to which I wish more particularly to refer is dated April 7th, 1887, and is signed by Mr. Baker. In the first paragraph under Head 2 he states —

"There is no difference whatever between the discipline of the two churches. It having also been determined at the first conference of the Wesleyan Free Church that the same discipline and church courts and form of Conference as is now adopted and carried out by the Wesleyan Methodist Conference of Australia, be carried out and maintained by the Wesleyan Free Church, and also that the book of discipline now in use by the Australian Wesleyan Methodist Church be the book of discipline of the Wesleyan Free Church. Mr. Baker also states under Head 3 that it was determined by the first Annual Conference that the same mode of worship as is used by the Wesleyan Methodist Church of Australia should be used and adopted by the Wesleyan Free Church, and that no change whatever be made in the mode of holding and conducting the public services of the church."

Again in that portion of his memorandum which deals with Mr. Moulton's remarks, Mr. Baker says at paragraph 4 —

"What the Free Church wants is to be acknowledged as an independent Conference, to manage its own finances, to unite its own members, to support its own missionary work, but yet to have some organic connection with one of the Methodist Conferences. It was not entire severance from the Methodist Church which His Majesty wanted but the independence of the Church for it was well known there must be a perpetuity of white Ministers in Tonga and that could only be obtained by being acknowledged by some other Church.

"Should ever any one of the Methodist Conferences so acknowledge the Free Church I consider that will end all the present disturbances, for certainly no Christian churches could consistently contribute to the support of a rival church when they are both so similar in doctrine, discipline and mode of worship."

As a statement of the intention of the founder, I attach very great weight to paragraph 4 of this memorandum. It was made just one year and nine months after the foundation of the new church and made by Mr. Baker who was one of the signatories to the Constitution of the New Church, and who not only from his position as Premier, but also as one who assisted the King in founding the new church must have been intimately acquainted with the King's intentions.

The next document to be mentioned is Exhibit D. 18 being a Tongan Blue Book containing a letter dated 23rd April, 1888

from Mr. Baker signed by His Majesty the King's Command, and directed to the President of the General Conference, Melbourne dated 23rd April, 1888.

That letter is as follows :-

"I have been requested by His Majesty in accordance with the promise he made to the Sydney Commissioners when in Tonga to present to the General Conference the following request that the Tongan Free church be acknowledged as an independent Annual Conference in connection with the General Conference of the Wesleyan Church on the same lines as the New Zealand and other Conference bear to the General Conference. I am also requested by His Majesty to request the removal of the Rev. J. E. Moulton as his presence in Tonga is dangerous to the peace and good order of His Majesty's Kingdom. His Majesty also requests the removal of the Rev. E. E. Crosby."

We next come to the speech of King George I at the opening of the Legislative Assembly in November, 1888 (which will be found in Tongan Government Gazette January 9, 1889) in which he says with reference to the matter under consideration :-

"You may perhaps expect that I will refer to the present Church troubles but I will only say my mind is still the same for the Free Church of Tonga to stand for ever, for it never to be governed from abroad. Should there be a time when it can be joined to the Wesleyan Church, in accordance with my request made to the General Conference at Melbourne, I shall be glad, but if not, let it be so. But I do not wish for you to talk over these matters in our Parliament lest greater difficulty should be thrown in the way."

This document also was not before the judge at the trial in the Land Court.

Careful consideration of the foregoing documents taking into account the light thrown by the three last quoted upon the meaning of the earlier ones, leads me to the conclusion that when King George Tupou I left the Wesleyan Methodist Church in Tonga and founded the Free Wesleyan Church his intention was not that the latter body should remain for ever dis severed from the Wesleyan Methodist Church, but that a union or affiliation should, if possible, be effected with that denomination, but only on the basis that the Free Wesleyan Church of Tonga should be a separate Annual Conference of the Wesleyan Church not subjected to the control and management of one of the Annual Conferences as had been the case under the Wesleyan regime, but managing its own affairs. I am of opinion that it is only by adopting such a construction that the meaning of the phrase "For our church to become an independent church like the church in Sydney", can be consonant with the existing facts for Sydney was no more an in-

dependent church than any other Conference of the Wesleyan Methodist church, whereas if the phrase is read in the light of the latter documents evidencing the King's intention it becomes clear that his meaning was that the Church of Tonga was to become an independent conference like the Sydney conference. I purposely refrain from citing any documents of recent date as evidence of King George's intentions in 1885 unless I should lay myself open to the criticism passed by Lord Robertson in the Free Church case (Page 682) on the Lord Justice Clerk that he had quoted as proving the doctrines of the early days which belonged to the latter days (some 30 years subsequently) and must be read in the light of their date. If then, as I think was the case, that was the real intention of King George Tupou I the founder of the Free Wesleyan Church it cannot, I think, be successfully contended that freedom from all association or connection with any other religious body or society was an essential or fundamental principle of the church which he founded.