

MOLITONI F. FINAU AS TRUSTEE FOR LUPETI
FINAU v. TU'IVAKANO.

(Land Court. Scott J. 'Ahome'e Assessor. Nuku'alofa 1923,
April 1924, 15th August, 1925 and 21st October, 1925).

Law of Succession — Legitimacy — Tongan Custom — The Constitution.

This was a claim on behalf of the Plaintiff to the Tofi'a of Nuku-nuku. It was submitted that the present holder, Siosuia, who is descended from Manuotua who it was alleged was illegitimate, had no right to the title because of this illegitimacy.

HELD: No evidence of illegitimacy of Manuotua and that the present Tu'ivakano (Siosuia) was the rightful holder.

The case is reported as the judgment discusses how a question of inheritance should be interpreted in the light of the Constitution. The facts are sufficiently set out in the judgment.

M. Finau and S. Vaikona for the Plaintiff.

The Defendant appeared in person.

C.A.V.

SCOTT J.: The Plaintiff was appointed by this Court Trustee of his son Lupeti Finau about 9 years of age on 4th March, 1924 and the hearing of this action claiming the "Tofi'a" of Tu'ivakano was commenced on 9th April, 1924.

The Claim is for the Tofi'a of Nukunuku from Tu'ivakano on the grounds that Tu'ivakano (Siosuia the present holder of the title) is not the proper person to hold the Tofi'a but that Lupeti Finau is the proper person to succeed.

The action came before this Court on the 9th and 23rd April, 1924, 12th August, 1925 and on the 21st October, 1925. The delay arose through applications for adjournment by the Plaintiff, Sickness of Defendant and my absence from Tonga for some 8 months at the latter end of 1924 and the beginning of 1925.

M. Finau the Trustee and S. Vaikona appeared for the Plaintiff whilst the Defendant appeared in person.

For the Plaintiff it was stated that the claim was made on the grounds of succession. Commencing from Viliami Tu'ivakano, who held the title previous to the granting of the Constitution until 1871 when he died also previous to the Constitution being granted which was in 1875. On Viliami's death the title went to his son Manuotua who held the nobleship and estates until his death on 11th October, 1888. When Manuotua died it is claimed that being illegitimate, the King had the right to elect another of the family to succeed to Manuotua. In consequence of this Manoa was appointed and he held the title until his death on the 16th March, 1912. After his death Tevita Polutele Kaho succeeded to the title and held it until his death on 4th August, 1923. At the time Tevita Polutele succeeded the Plaintiff Lupeti Finau was not born. Lupeti Finau is the son of Molitoni Finau and his

mother is Kaulamusa a daughter of Fane who was a daughter of Manoa. Manuotua, it is claimed, being illegitimate, and having no heirs on that account was the last of Viliami's descendants to have any claim to the title and estates as Viliami died before the Constitution and Manuotua was appointed before any restrictions on legitimacy were made by the Constitution.

Manoa after Manuotua's death had the title and estates given him by His Majesty. He had no sons, but he had a daughter "Fane". She married Tuapasi and had a daughter called Kaulamusa who is the mother of Lupeti Finau. The 117th Section of the Constitution is relied upon to support the claim the portion applying reads "But should a female be next in succession to the title of a Noble or of a hereditary chief the next male heir shall inherit the title and estates but should such female afterwards have a legitimate male issue the title and estates shall revert to the male issue upon the death of the male in possession of the estate. A family tree was put in evidence showing that Manuotua and Manoa had a common ancestor in one called Mataele Tu'apiko who had a son called Tu'ivakano Lahi. This last named had two sons, one being Mafana from whom the Plaintiff's mother is derived and the other being Hafokame'e from whom the Defendant's family claim descent.

The Defence relies on the descent from Viliami Tu'ivakano. Viliami had several children and these were Manuotua born to a different woman to the following children whose mother was called Fusi, namely Eke and Moalapeau Ngingingini Hafoka, Lisi Ane. Eke the eldest died without having the title conferred upon him. Ane who married Kaho had children called Tevita Polutele, Siosuia (Defendant) Sioape, Fe'iloakitau and Manase. There is no evidence as to any of the other children of Viliami having any descendants except Hafokame'e who had a son Pulu who says he is illegitimate. The eldest son of Ana, namely T. P. Kaho succeed when Manoa died, and T. P. Tu'ivakano at his death left no issue and therefore under Section 117 of the Constitution his eldest brother the Defendant succeeded to the title and was confirmed in such succession by Her Majesty Queen Salote Tupou Queen of Tonga.

The evidence has been lengthy and if credence had been given by the Court to the statements made re the legitimacy or illegitimacy of the Nobles Manuotua and Manoa the Plaintiff's case could have been decided during the sitting of the case. It has been admitted by the Plaintiff and stated by Defendant that Manoa was illegitimate. Had I believed this at the time I would have dismissed the action at the time because an illegitimate son cannot succeed to inheritances and his children, though born in wedlock cannot succeed through him to any hereditary estate; an illegitimate person can transfer no heritable blood to his legitimate descendants and if Manoa is illegitimate as stated by M. Finau then it seems to me that if the Plaintiff is to succeed he must prove this action fails. I have however not been convinced of this and

that Manuotua was illegitimate and also the other children of Viliami Tu'ivakano and other heirs of Viliami's because if Manuotua was illegitimate and died with or without heirs the land would under Section 117 of the Constitution revert to the Crown. At Manuotua's death the land was given to Manoa by His Majesty. Manoa had a daughter Fane who had a daughter Kaulamusa whose son is the infant plaintiff in this case.

Regarding the illegitimacy of Manuotua the evidence before the Court is as follows :—

Molitonu Finau says he heard he was illegitimate. That's all he knows.

Vaea the Noble says "I cannot say if the children of Viliami were legitimate or illegitimate (he mentions Eke, Ana and Manuotua) he says "The children of Viliami were born before the Constitution and I can't say if they would be considered legitimate or illegitimate. The titles and families of Vaea and Tu'ivakano are related and connected. Fane one of the family says she knew of the children of Viliami and can't say if they were legitimate or illegitimate.

Pauliasi Taumoepeau swears he does not know if Manuotua was illegitimate or not. He admits signing a letter (exhibit No. 7) in which is a statement to the effect that Manuotua is illegitimate, but before this Court he now swears he does not know if the children of Viliami are legitimate or not and he mentions Manuotua, Eke and Ana — Viliami Pulu swears Manuotua is illegitimate because he was born by a different mother to Eke and the others, but gives no reason beyond this as to why Manuotua is illegitimate. He was born many years after Manuotua, he being an illegitimate son of Manuotua's halfbrother and therefore his knowledge could only have been hearsay and he does not say where he heard it from — Tevita Polutele Kaho, in his letter to the King makes the statement that Manuotua was illegitimate and so does his representative Sioape Kaho. Regarding Sioape Kaho he was subpoenaed as a witness by Plaintiff but was not called so this Court cannot take notice of anything which he is reported to have said. He is here he should have been called. Tu'ivakano's (T. P. Kaho's) statement is simply a statement and is not attempted to be explained in any way and cannot be taken by any means other than what it is, an unproven statement of the legitimacy of a long deceased person, and it was made after a controversy arose out of a claim to rents of the estates. It can only be hearsay at the best, and not made from any personal knowledge of the facts. Beyond these witnesses there is no further evidence regarding the illegitimacy of Manuotua. Nor is any evidence tendered to show that from the Customs of Tonga prevailing at the birth of Manuotua he would be considered illegitimate. Summed up then the only evidence before this Court of Manuotua's illegitimacy are the letters and statements of persons who do not support such statements with any material fact, and such statements have been made

after claims for portion of the estate was in issue. One of the witnesses withdraws his written statement on oath and declares she does not and cannot know whether Manuotua is legitimate or otherwise. Taking into consideration also the fact that the father of Manuotua, Viliami Tu'ivakano died in 1871 an old man and his son was old enough to be chosen as his successor he Manuotua must have been born at least many years before 1871, somewhere in the 1830's or 1840 or earlier as he was a very old man himself when he died in 1888. And as religion or any church was not universally established at the time of the birth of Manuotua, and no evidence is brought to say that according to custom of those days he would be termed what is now known as illegitimate I am not satisfied with the evidence before the Court that Manuotua was illegitimate — He was elected by the King of the Country as a Noble and a Chief, he succeeded to his father and he held the title until his death in 1888 some 13 years after the Constitution was granted. Had he been considered illegitimate according to Tongan customs, would King George I have appointed him to so important a post to succeed to a title of a chief whom he had assisted by helping him in his fight against the descendants of Mafana in the war at Hule? I can hardly believe it. The witnesses now stating he is illegitimate have as I said before nothing to support their statements made about the birth of a person who died in 1888 some 37 years ago and who must have been born at least somewhere near 100 years ago. There is not sufficient evidence to upset the presumption that he was legitimate and the evidence of illegitimacy before this Court must be clear and conclusive and not rest on any probabilities such as have been produced before it.

I have looked into the document prepared by the Chief Justice H. C. Stronge. He states on this that the family claim Manuotua was only a representative and illegitimate and has his appointment set down as after the Constitution but this table is only completed from the letter of claims made by Naifotu for the family of Manoa for certain rents which Tu'ivakano (T.P) was making against the Government for lands wrongfully taken from him and from Tu'ivakano's letter Naifotu claims these because the rents, had they been paid punctually to the then Tu'ivakano would have been paid to Manoa as he was Tu'ivakano at the time Naifotu sets out a similar table in his letter, but he distinctly states that he does not claim the title or lands on behalf of the Manoa side of the family — It appears from the evidence that Manuotua's appointment must have been shortly after Viliami's death because Vaea says Manuotua was Tu'ivakano at the time of Constitution. Pauliasi Taumoepeau says that in 1873 he was a preacher at Nukunuku and Manuotua was then Tu'ivakano. It is quite certain that he remained Tu'ivakano until his death. At his death or shortly afterwards the King for some reason or other "appointed" Manoa, a member of a different family to Viliami Tu'ivakano as Tu'ivakano. When he died and Tevita Polutele Kaho, the eldest son of the only child of Viliami's who left heirs and halfsister to Manuotua, was appointed.

From this it appears to me that the line was put into the proper line of descent and that the children of the sister of Tu'ivakano Manuotua's being the only heirs surviving Viliami or Manuotua were entitled to the Nobleship. It has been urged for the Plaintiff's claim that the appointment of Manoa having been made by the King his heirs should succeed. Manoa was appointed since the Constitution and I have held in this Court before that so long as there are heirs to succeed in accordance with the 11th Section of the Constitution as was the case with 'Ane's child no appointment is necessary by the King of the Country. The heirs should inherit immediately. They inherit by descent and not by any appointment. On Manuotua's death Eke was I take it the Tu'ivakano even if he was not appointed because he was the half brother of the deceased Tu'ivakano Manuotua and direct descendant of Viliami Tu'ivakano. He refused the appointment so it is said and the title and estates went by order of the "King" to Manoa. In my opinion this was not correct, evidently the Privy Council took this view of the matter when T. P. Tu'ivakano asked for rents wrongfully taken by the Government and must have considered T. P. Tu'ivakano the rightful person to inherit. There is no need for me to refer to the other exhibits put into Court — In my opinion the illegitimacy of Manuotua or of Viliami's other children has not been proved — and for the reasons given above I dismiss the claim of the Plaintiff.

EDITOR'S NOTE : The Plaintiff appealed to the Privy Council (Horne C. J.). On the 15th December, 1926, the Privy Council dismissed the appeal but gave no reasons.