

TUITA v. MINISTER OF LANDS.

(Land Court : Scott J. 'Ahome'e Assessor. Nuku'alofa, 10th March, 1924, Ha'apai, 22nd September, 1925, Nuku'alofa, 21st January, and 4th February, 1926).

Land vested in King does not mean King personally — Grant of land by the King without approval of Privy Council — the Constitution Clauses 109, 116, 117 and 126 — 1903 Laws S. 33 — Tupou II's agreement of 1905.

This was a claim by the Plaintiff (a noble) for portion of the island of Lifuka called Hihifo, as being part of his Tofi'a. He based his claim on a grant signed by King Tupou II on 20th October, 1907.

The facts sufficiently appear in the judgment.

HELD: The King has no personal power to make a grant of land; it must be done by the King in Council and that the grant by Tupou II was invalid.

Verdict for the Defendant.

M. Finau for the Plaintiff.

Minister of Lands (Tupouto'a) in person.

C.A.V.

SCOTT J.: This action is a claim by Tuita the Noble of 'Utungake, Ha'afakahenga and Futu, who resides in Ha'apai against the Minister of Lands for the district of portion of the island of Lifuka in Ha'apai called Tongoleleka or Hihifo as being part of his Tofi'a. The action first came before the Court at Nuku'alofa on the 10th day of March, 1924 when the evidence of Sione Tongilava was taken before the Court, and the next hearing was at Ha'apai on the 22nd day of September, 1925, and it was by consent of the parties then adjourned to Nuku'alofa for completion, and on the 21st day of January, 1926 and the 4th day of February, 1926 the hearing was completed, and the Court adjourned until to day for the decision of the Court to be given.

The Plaintiff claims the land from the Government who are in possession, on a letter of grant signed by King George Tupou II on the 20th day of October, 1907, claiming that such grant was made under powers conferred upon and possessed by the Monarch under Section 109 of the Constitution of Tonga and under Section 555 of the law of Tonga 1903, and that this Court should give effect to a grant of this nature.

The Minister of Lands has asked the Court to state that the grant of the 20th October, 1907 is not a proper legal grant because it has not been gazetted and because the ordinary formalities of a grant of this nature have not been observed and he also urged the Court to consider Article 12 of the Supplementary Agreement made by His Majesty King George Tupou II (the grantee in this case) and the British Government which he claims prevents the King from exercising such rights as were conferred upon him by the Constitution and laws of Tonga and also because the evidence of Sione Tongilava, the Secretary to the King, at the time of the grant stated that owing to certain correspondence be-

tween His Majesty and the High Commissioner of the Western Pacific this grant and others made at that time were withdrawn.

The case therefore of the Plaintiff relies solely on this document of the 20th October, 1907 purporting to be a grant from His Majesty King George Tupou II to the then Noble Tuita, because there is evidence of all the witnesses called by the Plaintiff and who were asked the question, that no rents of this particular piece of land were ever paid to Siasoi Tuita the Noble, or to the Plaintiff who succeeded him.

This letter of grant was obtained by the Plaintiff from one Sami Mafile'o, but what his connection to the Plaintiff is does not appear in the evidence, and how long Mafile'o has had this and where he obtained it from has not been disclosed to the Court. The secretary to his Majesty says that he remembers His Majesty making out the letter in question, but no record of it was ever kept in the Palace records of Tofias granted by the King, and no entry of the grant was made in the Register of Tofias or notification ever sent to be printed in the Gazette. All that was done in the matter was that the letter was given to Polutele Kaho on behalf of Tuita, and correspondence took place between His Majesty and the High Commissioner, and His Majesty in consequence, reduced his scheme of dealing with the lands, and among such scheme was Tuita's grant. He remarks that he considered this proceeding as being peculiar. This is all the evidence we can get regarding this document.

This case appears to me to touch on the Constitutional law and the interpretation of portion of the 109th Section of the Constitution. The Constitution of Tonga is not very clear on many points and Section 109 does not express clearly what was intended. In the 1875 Constitution this Section is in different form and it was not until 1883 that the whole lands of the Kingdom were vested in the King and as the Section then and now reads "All the land is the property of the King and he may at pleasure grant to the Nobles and titular chiefs and matapules one or more estates to become their hereditary estates". That is the land was vested in the King as the head of the Nation and of the Government and not to himself personally, and this is borne out by the marginal note to this Section which reads "Land vested in the Crown". No one doubts that the Monarch is virtually the holder of all the lands in the Kingdom, but he holds such lands for and on behalf of the Government. In 1875 Constitution clause 126 it is stated that all inheritances not owned by any one the land shall revert to the Government and Section 118 of the present Constitution states that in case any estate granted to any Noble or Chief or Matapule shall fail the land shall revert to the King, that is I take it, to the Government. It was only in 1883, by the amended constitution of that date that land was vested in the head of the nation. It must vest in someone. No one actually owns the land, all that one can hold is an interest in land of different values, but ultimately on the failure of proper heirs the land so granted must

return to the person or body in whom it is vested. In English law, where the idea originated, all the land is vested in the Crown, as in the Tonga Constitution, and all any one can hold is an interest in the land, such interest being of various values, but on failure of heirs to maintain that particular interest the land again reverts to the Crown or Government. The Government of Tonga is a Constitutional Government and is in accordance with paragraph 1 of the laws of Tonga 1903 and Section 33 of the Constitution divided into three sections, viz.

1. The King the Privy Council and the Cabinet.
2. The Legislative Assembly.
3. The Judiciary.

These Sections should be considered wherever any power is conferred upon the Monarch either by the Law or the Constitution. In my opinion this means that wherever the word King or Queen appears in the laws or Constitution it means not the King or Queen personally but the King or Queen with the Privy Council or the Cabinet. Another matter that must be taken into account is the Conventions, that is the accepted method or usage of the practices in force and which has become the custom of the Country. So far as I am aware it is wherever the word King has been used in the Law or Constitution the same has been interpreted to mean the King in Council, and not the King personally or alone. Sir Everard im Thurn, in his address to the late King George Tupou II in 1905 uses these words which were published by the Government "Pea 'oku ha mai 'i ho'o Konisitutone ko e Tu'i mo e Fakataha Tokoni ka 'oku 'ikai ko e Tu'i tokotaha pē 'oku 'i ai 'a e mafai lahi". That is the King personally has no powers, but the King and the Privy Council, or the Cabinet have.

There is also no evidence that Siasī Tuita or any Tuita ever owned the land now claimed. On the contrary there is evidence that from as far back as the witnesses could remember they (the lands) paid rent to the Government, and are doing so until this day. The Government received its lands in the old days from the King himself, and also under the Constitution which I have already quoted. It is quite plain to the Court that the land now claimed was Government land, the rent of which went to the Government. Now has the King any right or power under the Constitution or Laws to make a grant of land which was already in possession of the Government? I consider for the reasons above stated that His Majesty could not grant any such land, unless the Privy Council also agreed to the same being done. After this grant was issued nothing was done under it. The Minister of Lands was never notified. The Grant was not published in the Gazette as it should have been in accordance with Section 116 of the Constitution which declares that estates are to be published. It was shown to this Court that every grant made by King George Tupou II and also the 1st, had been published in the Gazette and from a glance at these Gazettes I find that in the Gazette of the

18th May, 1903 the granting of Tofi'a to Veikunc was published and that all grants of Tofi'as and enlargements since then have been published (the last being in 1918) except the present one now being claimed. The grant is in my opinion irregular and of no legal consequence. No protest was made by Tuita of the list of Tofi'as published in 1918 which does not include this land. The grant has never since its issue been acted upon or claimed either by the Tuita to whom it purports to have been made or by the present holder of the title. Some seventeen years elapse from the making of this grant before it is brought to light, and during all this time there has been a Minister of Lands, a Land Court, and a Privy Council where a claim could have been made, but nothing appears to have been done until 1924, when this action is brought in this Court on this document.

Regarding Article 12 of the Supplementary Agreement this does not, so far as I can see apply to this case at all. This Article is a declaration made by the King that the estates and inheritances will be given to those entitled to them or to succeed to them and the rights of the persons concerned will not be interfered with. This is really that Section 117 of the Constitution will be binding on His Majesty and his successors.

The land was Government or Crown Land, and as the Grant was not made by the King in Council but by His Majesty personally, this Court must hold that the grant relied upon is for the reasons appearing in this Judgment of no legal status or consequence and cannot convey the lands mentioned in it. This claim is therefore dismissed.

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