FULIVAI (Noble) Appellant v. KAIANUANU (Respondent).

This is an appeal by the Noble Fulivai from a decision of the Land Court which held that Kaianuanu (the respondent) was the rightful holder of the estates of Fulivai. The facts are fully set forth in the judgment. The Privy Council reversed the decision of the Land Court (Hunter J.) and held that the appellant was the rightful holder of the title and the estates of the Fulivai. The decision is an important one as it decided, contrary to previous decisions of the Privy Council, (1) that is deciding who is the rightful holder of a title it is proper to go further back than the person who was appointted to the title by His Majesty Tupou I at the time of the granting of the Constitution in 1880; and (2) (reversing the decision of the Land Court) the the amendment made to Clause 107 of the Constitution in 1953 applies to all adoptions whether arising before or after the amendment.

On the 18th August 1961 the Privy Council (Hammett C. J.) delivered the following judgment :

This is an appeal against the decision of the Land Court sitting at Vava'u dated 1st April, 1960. The plaintiff-respondent was held by the Land Court to be entitled to the hereditary title of nobility of Fulivai and all the estates appertaining to that title in the place of the present holder, the defendant-appellant, who was appointed in 1957 on the death of his father.

The grounds of appeal are, briefly, that the learned Judge of the Land Court did not correctly apply the law of succession relating to hereditary titles and estates.

The facts are not in dispute. In order to follow the lines of descent on the family tree admitted in evidence in the Court below as Exhibit 5, we have for convenience only, used the number of the title holder shown on that tree against the names of successive holders of the title "Fulivai".

The chiefly title of "Fulivai" was in existence long before the grant of the constitution by His Majesty King George Tupou I in 1875.

Originally the title Fulivai was not a chiefly title, but was a title of a matāpule or toutai. The history of this line was briefly referred to in the family tree admitted in evidence in this case. We consider it useful to record that the title of Fulivai was elevated to chiefly status because its holders were notable in History as men who rendered loyal service towards the general welfare of the state.

They are distinguished warriors in their respective generations. Three successive Fulivais gave meritorious service for the cause of the Monarchy in the civil wars.

Fulivai Tomoefusi (Holder No. 2) was among the Vava'u warriors who built the fortress of Feletoa after the murder of Tupouniua. He was one of the chiefs drowned near Lekeleka island on the instigation of Ulukalala (of Feletoa). His son was Fulivai Kemoe'atu (Holder No. 3) who was killed in the Tongan wars in Fiji and was buried on the island of 'Oneata. Fulivai Kaianuanu (Holder No. 4) was among the followers of Taufa'ahau

in the wars at Pea. The promotion of the title to the Nobility was attributable to the loyal service of several Fulivais and not to that of one Fulivai alone.

In 1880 His Majesty, King George Tupou I, in the course of his speech at the prorogation of the Legislative Assembly appointed ten chiefs to be Nobles of the land in accordance with the Constitution and among these was the chieftaincy already known as "Fulivai" (See Gazette No. 6 Volume 2).

On 2nd August, 1880, by his Proclamation of that date published in Gazette No. 1 Volume 2, His Majesty appointed Chief Tiofilusi Fulivai (Holder No. 4) to be an hereditary Noble under the Constitution.

Tiofilusi Fulivai (Holder No. 4) otherwise Siofilisi or Tiofilusi Kaianuanu was the adopted son of Kemoe'atu (Holder No. 3) the former chief who held the title "Fulivai" and who traced his descent by blood from the original Fulivai.

According to chiefly Tongan custom, when a chief adopted a child to his family, the adopted child was given the title of that family – a mark of recognition equivalent of the modern registration of adoption. It was also a sign of the acceptance of the adoption by the family. The adopted person held the title until his demise when the title reverted to those entitled to it by blood relationship.

Tiofilusi Kaianuanu (Holder No. 4) died in 1887. He left surviving him a son, named Tevita Ului (Holder No. 8). However, in recognition of the chiefly Tongan custom concerning the children of adopted person, who have been appointed a Noble to which we have referred, His Majesty King George I – (who had himself appointed Tiofilusi) – did not appoint Tiofilusi's son Tevita Ului to be the next Fulivai. Instead, in 1888, he appointed Siosifa Lulu Hala'api'api (Holder No. 5) to be Fulivai in succession to Tiofilusi (Holder No. 4). At that time Siosifa Lulu Hala'api'api was the eldest surviving son of Kemoe'atu (Holder No. 3) the adoptive father of Tiofilusi Kaianuanu (Holder No. 4 who was eligible for appointment.

Siosifa Lulu (Holder No. 5) died in 1894 leaving no issue. There survived him, however, two nephews – the sons of his deceased elder brother Siokatame Vahavaha'i, namely Siofilisi and Iki Tupou. It is not clear why Siosifa Lulu Hala'api'api was appointed Fulivai Holder No. 5 instead of the eldest son of Siokatame Vahavaha'i.

In accordance with the Laws of Succession set out in the Constitution, section 107, King George Tupou II appointed the elder of these two sons, Siofilisi, to be Fulivai (Holder No. 6) in 1895. Siofilisi (Holder No. 6) died in 1918 without issue.

It is of interest to note that both H. M. King George Tupou I and H. M. King George Tupou II recognised the chiefly Tongan custom, to which we have referred, concerning the adopted sons

of chiefs, by continuing to appoint the descendants by blood of the original holder of the title Fulivai, in preference to the descendants of the adopted son, Tiofilusi Kaianuanu (Holder No. 4) who was appointed to hold the title in 1880.

It is also of interest to note that Tevita Ului (Holder No. 8), the son of Tiofilusi Kaianuanu (Holder No. 4) claimed the title Fulivai from Siofilisi (Holder No. 6) in the Land Court in an attempt to ensure it descended to the descendants of Siofilisi Kaianuanu (Holder No. 4), the adopted son of a holder, instead of to the descendants by blood from the original holder of the title. In this attempt Tevita Ului was unsuccessful.

After the death of Siofilisi (Holder No. 6) in 1918, Her Majesty Queen Salote in 1919 appointed his younger brother Iki Tupou (Holder No. 7) to be Fulivai. This appointment in accordance with chiefly Tongan custom again preferred the descendants by blood from the original holder of the title to the claim of Tevita Ului the descendant on the adoptive line.

After Iki Tupou (Holder No. 7) had held this title for a number of years, Tevita Ului (Holder No. 8) the son of Tiofilusi Kaianuanu (Holder No. 4) made a further attempt to regain the title and to change its descent to the adopted line. He brought his claim in the Land Court which upheld it.

The Court then held, (and its decision was upheld by the Privy Council) that since the Law of Succession contained in section 107 of the Constitution was quite explicit, the title must descend to the descendants by blood of the holder of the title at the time of or immediately after the grant of the Constitution in 1875 whether he be a son or adopted son of the previous holder. This decision made it clear that the Law of Succession contained in the Constitution was contrary to, but nevertheless must take precedence over the chiefly Tongan custom relating to adopted sons who had been appointed to hold a chiefly title and the right of their descendants to inherit their titles.

This decision affected other titles besides that of Fulivai.

The matter was thereupon raised in Legislative Assembly and in 1953 the Law of Succession set out in section 107 of the Constitution was amended to ensure that the law of succession to the titles of nobles should take cognisance of the old and well-known chiefly custom concerning adopted children.

This amendment added the following paragraph to the end of section 107 of the Constitution in 1953 :

Whereas by Tongan custom provision has always been made that an adopted child might succeed to the estates and titles of his adoptive father now therefore it is decreed that upon the death of the holder of an estate or title who has inherited such estate or title by viture of his blood descent from such adopted child the estate and title shall revert to the descendant by blood of the

original holder of the estate and title in accordance with the provisions of this clause and should there be alive no such descendant by blood the provisions of the next succeeding clause shall apply."

In 1954 Tevita Ului (Holder No. 8) the holder of the title of Fulivai on what may perhaps be termed the adopted line of descent, died. His elder son was Tevita Kaianuanu, the plaintiff-respondent in this action.

In 1957 Her Majesty Queen Salote appointed Talo Lakepa (Holder No. 9) the grandson of Iki Tupou (Holder No. 7) – the person who, it is not disputed, was then entitled on what may perhaps be termed "the line of blood descent" – to be the holder of the title of Fulivai. In so appointing the heir on the line of blood descent in 1957 in preference to the descendant on the adopted line of descent, affect was given to the amendment to section 107 of the Constitution made in 1953.

Tevita Kaianuanu, who it is not disputed would be entitled to the title on the adopted line of descent thereupon, in 1958, began these proceedings in the Land Court, claiming that he, on the adopted line of descent, was entitled to title as the legitimate heir of Tevita Ului (Holder No. 7) who traced his title from Tiofilusi Kaianuanu (Holder No. 4).

In the Land Court it was held firstly that the 1953 amendment to clause 107 of the Constitution does not apply to this case or to cases of adoption which have occurred in the distant past, but only to adoptions made after the date of the passing of the amendment because of clause 20 of the Constitution, which forbids the passing of retrospective laws.

Clause 20 reads as follows:

> "It shall not be lawful to enact any restrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws."

Secondly, it was held that the hereditary title of Nobility of Fulivai was first established in 1880 by H. M. King Tupou I by letters patent. It was conceded that the name Fulivai was in existence before 1880 but it was held that it was not until 1880 that the Chief Fulivai was created an hereditary noble according to the Constitution and it is from this man – whether he was an adopted son or not – that the title of the noble Fulivai must be traced.

For these reasons the Lower Court held that the plaintiff-respondent was entitled to succeed and that the title should descend on what we have called the adoptive line and not on the line of blood descent represented by the defendant-appellant.

The problem which has to be faced in this case is a difficult one and an important one.

We will deal first with the construction and application of Clause 107 of the Constitution as amended by the Constitution Amendment Act 1953.

It is clear from the express words of this amendment that it deals with the position arising from the succession of an adopted child by Tongan custom. The opening words of Clause 107 read :—

"The following is the law of succession :—

Children lawfully born in wedlock only may inherit .....

From the date the Constitution was granted in 1875 until the present time no adopted child has been entitled to inherit under the law of succession and no provision has been made whereby an adopted child may succeed in the future.

In these circumstances, if the provisions of Clause 107 of the Constitution as amended by the Constitution Amendment Act of 1953 did not apply to the future rights of inheritance arising out of past adoptions after but only to those arising out of adoptions after 1953 it would be of no effect, in law. There would have been no point in fact at all in enacting it, because no person who is an adopted child and has not been born in wedlock to the person from whom he claims to inherit, is now entitled to inherit under the law of succession in any event.

We are therefore faced at once with the position that if the construction placed upon this amendment by the learned trial Judge of the Land Court is correct, the amendment made by Legislative Assembly in 1953 is completely nugatory and of no legal effect whatever.

The Courts must of course interpret the Acts of the Legislature according to the words used and are not entitled to do so in accordance with what they consider the intentions of the Legislature may have been. Nevertheless, if an act of the Legislature is properly open to more than one construction and one of these leads to the result that the enactment is devoid of all legal effect, it is the duty of the Court to apply the construction which does not render the enactment completely nugatory and of no effect.

In these circumstances it is necessary to examine with care the opinion of the Court below that if this Amendment is applied in respect of adoptions prior to 1953, when it was enacted, it offends against Clause 20 of the Constitution which makes unconstitutional and unlawful the enactment of any retrospective laws in so far as this may affect rights existing at the time of the passing of such laws.

It is clear that Clause 20 does not forbid the passing of any laws which affect rights existing at the time of their enactment. It would of course be rather unusual if it had done so, because almost all legislation affects the rights of some person or other in the community. If the Legislature was precluded from passing any enactment that affected the rights of anyone, existing at the time, its law making powers would be severely restricted and limited in a most unusual manner.

Clause 20 of the Constitution does not even forbid the passing of retrospective laws. What it does do however is to forbid the enactment of laws which are both (a) retrospective in effect; and (b) affect the rights of persons which exist at the time the laws are enacted.

It is necessary to examine and consider the wording of the amendment to decide whether it is retrospective in effect.

It is clear that this amendment alters the law of succession set out in the Constitution in the previous wording of Clause 107 by setting out specifically in the Constitution, and giving statutory effect to, the Tongan Custom relating to the respective rights of children of the adopted line and the blood line of descent from the holder of a chiefly title. The amendment itself states that it shall not become effective in any case until after the death of the existing holder of any title who has inherited the title by virtue of his descent from an adopted son. It does not, therefore, appear to us to have any retrospective effect. On the contrary its effect takes place in the future. If it had effect from the death of the last holder of the title prior to the passing of the amendment who had inherited the title by virtue of his descent from an adopted son it would certainly have been of retrospective effect. The fact that it decreed that at some unspecified date in the future, when the existing holder of a title who traces his descent from an adopted son dies, the identity of the next holder would be determined by his descent by blood from the original holder of the title and not by his descent from an adopted son of a previous holder does not in our opinion make the enactment itself retrospective in effect. In our view it is not the enactment itself that is retrospective in effect. All that has been done is to enact that in future the line of descent shall be altered in certain circumstances, and that new line of descent shall be ascertained by reference to certain events that happened in the past. In our opinion legislation of this character does not fall within the meaning of the term "retrospective legislation".

In view of our opinion on this matter, it is not really necessary for us to decide what meaning should be attached to the words "rights or privileges" in this amendment in the expression "curtail or take away or effect rights or privileges existing at the time of passing" of the enactment. Nevertheless, whilst this point was not argued before us, it would appear that the section only refers to "vested" rights and not to "contingent" rights.

Again, although this point was not argued before us, we have considered whether the provisions of Clause 79 of the Constitution affects the legality of the amendment to Clause 107 which has been under consideration. The material part of Clause 79 reads as follows :

> "It shall be lawful for the Legislative Assembly to discuss amendments to the Constitution provided that such amend-

ments shall not affect the law of liberty the succession to the Throne and the titles and hereditary estates of the Nobles.

In our opinion the three matters on which amendments of the Constitution are forbidden are :—

1. Amendments that affect the law of liberty.
2. Amendments that affect the succession to the Throne.
3. Amendments that affect the titles and hereditary estates of the Nobles.

We do not consider the words "the succession to "immediately preceding the words "the Throne" apply to the words "the titles and hereditary estates of the Nobles". In these circumstances since it is only the law of succession which the amendment to Clause 107 affected and not the actual titles or estates themselves we are not of the opinion that this amendment was ultra vires the Constitution by virtue of Clause 79.

The second main reason for the decision of the Land Court was that it was not until 1880 that the Chief Fulivai was created an hereditary noble according to the Constitution and that it was from that man, Siofilisi Kaianuanu, that the title of the noble Fulivai must be traced whether he was adopted or not.

From this it would appear that the term "the original holder of the estate and title" in the 1953 amendment to Clause 107 of the Constitution was held to be the holder of the title at the time the Constitution was granted. We are not able to accept this interpretation of this term for the following reason.

Under the law of succession set out in Clause 107 of the Constitution, no adopted child has been entitled to succeed to a title since the grant of the Constitution. The references to an adopted child must therefore be to those adopted at or before the time the Constitution was granted. Since the amendment refers to the reversion of the title to the descendant by blood of the original holder of the estate, the "original holder" referred to must have been a person entitled prior to the title being held by the adopted child.

In our opinion therefore the term "the original holder of the estate and title" does not refer to the person appointed to hold the title at the time of the granting of the Constitution and the creation of Nobles at that time by H.M. King George I. It means the original holder of the title in the far distant past — long before the Grant of the Constitution in 1875 — from whom a claimant now must trace his descent before he can succeed to the title.

In these circumstances we have arrived at the following conclusions.

Firstly : That the 1953 Amendment to Clause 107 of the Constitution is not retrospective in effect and is not ultra vires the Constitution.

Secondly : That it applies to all persons whose titles are held by virtue of their descent from an adopted child whatever the date of the adoption.

Thirdly : That the term "original holder of a title" in the Amendment does not refer necessarily to the person granted the title at the time the Constitution was granted in 1875 but to the person who was the original holder in fact, even if it was prior to that date.

For these reasons, the appeal against the decision of the Land Court is allowed. The claim of the plaintiff-respondent, (the claimant on the adopted line of descent) against the defendant-appellant, (the descendant on the blood line of descent) to the title known as Fulivai and all the estates appertaining thereto, must be dismissed.

The appellant is entitled to his costs in the Land Court and of this Appeal which, if they cannot be agreed by the parties, will be assessed.