SANUALIO TU'IPULOTU (Respondent)

v.

'ISILELI KAVAONUKU (Trustee for noble Niukapu) (Appellant)

This is an appeal from a decision of the Land Court judge (Ragnar Hyne J.) at Ha'apai in 1937.

In the Land Court the plaintiff claimed the estate and title of Niukapu. The judge found a verdict for the defendant — the respondent to this Appeal. The plaintiff was a direct descendant of a man named 'Uli'uli who was in possession of the title and the estate in 1875.

The appeal was heard by the Privy Council (Stuart C. J.) in 1938, and the appeal was upheld.

Tafolo appeared for the Appellant.

Funaki appeared for the Respondent.

After referring to Clause 124 and 125 of the Constitution as published in 1877 and Clause 107 of the Constitution as published in the 1928 edition of the Laws the Privy Council said :

"In this case Mr. Ragnar Hyne having found as a fact that 'Uli'uli was in undisturbed possession in 1875 of the title and estates in dispute was wrong in going back beyond the Constitution.

"This simple mistake resulted in his giving judgment for the respondent. This judgment was incorrect. Judgment must be altered to judgment for the appellant with costs."

In February 1939 the Privy Council heard a petition from the trustee of Niukapu alleging that the decision quoted above was ultra vires the Privy Council on the ground that the Privy Council had granted leave to appeal exercising their powers under S. 145 of Cap. 27 (The Land Act) as it then read.

The submission was that the Privy Council had no power to grant permission to proceed after the ten years because the amending Act of 1934 which purported to give them this power was ultra vires it not having been passed in comformity with clause 67 of the Constitution.

On the 23rd February 1939 the Privy Council (Stuart C. J.) refused the application. The judgment prepared by the Chief Justice is as follows :

In this case, Counsel for the Petitioner has requested us to declare that an application granted at the suit of respondent No. 173/37 (undated) was wrongly granted as being ultra vires. Why he should ask us to do so puzzles me. We are not a Court of first instance. We are asked to say that our original act in this matter was ultra vires. If is was, who are we to say so?

Our saying so would be ultra vires also. This Petition should be to the Supreme Court, as normal Court of First Instance in Tonga (see 6. 27, Street) (Cp. section 50, and sections 84 and 88 of the Constitutions) and on that ground alone must be dismissed with costs.

However lest the petitioner be encouraged to waste more time and money in fruitless litigation, let me consider this case as if we had jurisdiction: as indeed we may have if Petitioner's case is entirely misfounded

In terms of section 145 of Chapter 27 (The Land Act), actions are limited if not brought within ten years, and amendments to this section give the Privy Council a discretion to waive this limitation.

These amendments (Apparently general in their character) were not passed other than in a general manner, and Counsel argues that as they were not especially approved by the nobles of the Legislature - under section 67 of the Constitution as printed in the 1928 Law of Tonga – they do not and cannot apply to disputes between nobles.

If he is correct, not only the amended clause, but the whole Land Chapter falls: the very Schedule that defines the rights and holdings and titles of Nobles falls; and we are thrown back on the original Constitution, "Granted on the fourth day of November, 1875".

In terms of section 70 thereof, laws in connection with the nobles of the Legislative Assembly must be passed in a certain special way. In 1903 section 70 (altered in phrase) stood in meaning as in 1875, and only in 1914 was it superseded by section 67. In terms of section 67 of the Constitution as now current only "Nobles of the Legislative Assembly" may vote on "Laws relating to" ... "the titles and inheritances of the nobles."

Now, in view of section 4 of the Constitution which has remained unvaried throughout, a reservation such as this must be conservatively interpreted, as it is clearly an invasion by a privilege upon a general right, vide Hezekiah Kaas Ndobe v. Government of the Union of South Africa, A.D. 1929 or 1930, (I think 1930 p. 1.).

In quoting Craes at p. 423 it is to be regretted that Counsel did not read one paragraph further.

I quote: "In dealing with colonial constitutions, the judicial Committee declines to lay down any hard and fast rules of construction and the tendency of its decisions is to extend and not to limit the authority of colonial legislatures, which are recognised as supreme within their own domain."

It is noteworthy that in 1905 the King accepted the 12th Treaty point, "Rights of succession and inheritance not to be interferred with," and the phrasing of section 67 might well be criticized in light of that treaty.

If we accept Counsel's argument then an interference in the Niukapu succession by the signatory King, (found by us and by Mr. Hyne, in our respective judgments last year, to have been as a fact an interference) cannot be upset, because, says he, we lifted an encumbrance, i.e., a "Limitation of Actions", by virtue of an ultra vires amendment. But the "Limitation" itself passed in ordinary course in the Land Act is also Ultra Vires", if the amendment is. So whether we lifted it or not is immaterial.

Counsel has not argued that nobles' disputes are not amenable to the Land Court: he can hardly do so as every single noble holds and has taken under Schedule "A" of the Land Act and is estopped from raising the point. The "acquiescence" of share-holders does not raise a presumption of legality – Street p. 2, but active participation by all concerned, (i.e., the taking of the 30 odd estates under Schedule "A" of the land Act) must raise an estoppel not by record but in pais of an absolute character.

Petitioner is also estopped by last year's judgment as by record i.e., by res judicata, from raising this point (or any other point, bar fraud,) as successor to the Niukapu of 1927, save by way of Petition outside the Law. But can we as an appellate body entertain such a Petition. Surely it should be to Parliament.

The facts are thus simple. Petitioner says or rather must say, "I am not a true noble; I am a usurper put in by Tupou II. I claim nobles' privileges and nobles' evasions though not on the facts a noble." Our first answer should be :— "We do not know you on the question of Nobles' privileges." Our second could be: "You should have raised this point last year, at any rate during the appeal in the Privy Council: now it is too late, for two reasons: one the question is decided and two, our Privy Council jurisdiction on special request is at an end." The third answer is the one I prefer: it is this :— "Section 67 or 70 of the Constitutions of various dates only applies –

1. To cases obviously aimed at the nobles;
2. While the amendments now objected to are clearly general;
3. To which the nobles in Parliament never even raised the point of privilege."

In Ndobe's Case, quoted above, the point was whether a particular Bill should have been passed by a ⅔rds. majority of both Houses sitting together in terms of the reserved Native Clauses in the Act of Union 1909. 'Ultra Vires' was allowed to be argued in the Court later, because the affected persons were not in the House and could not have raised the point there.

Here the elected representative nobles were in the House when the Acts in question became Law; another noble was Speaker of the House; certain Cabinet Ministers were also nobles; yet the point was never raised. The procedure was and is well known

to all concerned, and had actually been used to pass Act 15 of 1927, immediately prior to the passing of the Land Act, No. 19 of 1927. And that later Act contains Schedule "A" in which each and every noble is mentioned nominatim.

Under this accumulating weight of undisputed fact and evident law I am of the opinion that section 67 of the Constitution as it now survives, only applies to obviously intentional attacks aimed at the titles and estates of nobles, and for that matter probably only when aimed at individual nobles, e.g., Act 15 of 1927 mentioned above.

If this is not so, then I am further of the opinion that section 67 would have a meaning so contradictory to section 4 of the Constitution that it would defeat the real intention of King George I and that section 67 must therefore be construed as limited to obviously intentional attacks; Maxwell on Statues, Chapter IX, "It shall be lawful" in section 67 would then mean "It shall be lawful, if the nobles in Parliament so desire, and if the Speaker, upon point raised, rules that the Bill warrants such treatment." Here Note Preparatory Note ubi supra.

Counsel's argument that a later clause i.e., 67 must override an early one, to wit 4, is a clear example of the dangers of undue emphasis on a partly misunderstood rule of law. If Counsel was right, then 69 must in its turn override 67 because it in turn is later. In that case no noble could ever pass anything under 67 because under 69 as soon as the commoners had withdrawn there would or at any rate might be less than half of the Legislative Assembly present and an automatic adjournment would at once interrupt the proceedings. And again the 2nd half of section 79 would override the first half, and probably section 67 as well.

Oh no. Through a confused and much amended Constitution we must reach out to fundmental principles and modify them only so far as we are absolutely compelled so to do. We must read it as a whole to find its intent. We must not pick at solitary sections to annihilate legislation and to embarrass the Judiciary.

In construing Statutes the ordinary sense is adhered to unless that would lead to some repugnancy or inconsistency. In such case the grammatical or ordinary sense of the words may be modified, so as to avoid that defect, but no further.

Here says Counsel 4 and 67 are repugnant or inconsistent – obviously so. If my opinion is correct 4 though earlier dominates 67 limiting it to very special cases. If not, then the GOLDEN RULE of page 4 of Maxwell on Statutes applies, and then the wording of 67 must be modified to remove the inconsistencies.

Maxwell at page 132 says "One presumption is that the Legislature does not intend to make any substantial alteration in the Law beyond what it specifically declares" – Section 2 of 1 of 1914 repealed the old clause 70 – that was that – the new 67 was a newcomer – and to make this section work at all we must insert the word 'only' after the word 'relating'. If not, then the whole

clause must be restrictively interpreted as above set out. The test then becomes one of common-sense; Acts 19 of 1934 and 13 of 1936 were passed without anyone raising the point now argued; WHY? Because nobody in reason could have asserted or imagined that the Bills related to or for that matter related only to Nobles' titles or inheritances. Actually the 1934 Act was referred to the "Land Committee", which had 4 nobles and two commoners thereon and Mr. Hyne as a legal adviser. Two of the nobles are Tungi and Ata members of this Court and I expect that either neither imagined that the amendment to section 145 could possibly apply to nobles (save as part of the general public) or if they thought it might, they had their fears stilled. For if this was not the case they and two other nobles failed in their duty.

The Legislation here challanged is matter of procedure not matter of Law, and cannot be fancied to be aimed at any one class. It liberates Justice from a limitation of an arbitrary character. It attacks no right or privilege. True it does incidentally trip up the feet of certain usurping wrongdoers. But it is utterly repugnant to Law, Justice, Common Sense and for that matter Public Policy to wrench special reservations in the Constitution into such wide-reaching propositions as are here contended for.

The Petition, as far as I can effect the issue is rejected with costs:

1. because it does not lie to this Court
2. because the whole matter is res judicata,
3. because section 67 does not apply to general Legislation. and the whole argument thereon is misfounded and ill concieved.