

'ISILELI TU'IVAI v. SEINI MATANGI.

(Probate : Hunter J. Nuku'alofa, July, 1954)

Letters of Administration — Alteration by the Court — "A Family house" — Tongan Custom applied — Limitation of Action — Not applicable to proceedings under S. 6 of Probate Act 1915 — Admissibility of statements by deceased.

This was an application to the Court under the provisions of Section 6 of the Probate Act 1915 asking that Letters of Administration granted to the Defendant be altered by deletion therefrom of all reference to a certain Tongan House. The Plaintiff was the son of one 'Inoke Finau, the defendant was the widow of Viliami who was the son of Matangi the fourth son of 'Inoke. The Plaintiff was a younger brother of Matangi. The house in question was built about 1920 by the sons of 'Inoke Finau. The evidence was not clear as to whether 'Inoke was alive at this time or not.

The Plaintiff alleges that this house was built as a family house.

The house was included as part of the estate of Matangi in the Letters of Administration taken out by G. Viliami on the death of his father in 1944. On Viliami's death in 1952 the Defendant included this house in Letters of Administration of his estate on the ground as she alleged that the house was his.

The Counsel for the Plaintiff argued that the house in question was built as, and had always remained a family house. If the house referred to in the Letters of Administration of Matangi and Viliami was the house in question (and he suggested that the evidence did not support this) then it had been wrongfully included and the Letters of Administration should be altered accordingly.

Counsel for the Defendant alleged that the house had never been a family house: that it had belonged to Matangi who had given it to his son Viliami; and further that even if it were originally a family house since it had been in the Defendants and her husband's possession since 1944 Section 16 of Cap. 4 applied and the Plaintiff's action must therefore fail.

HELD. The house was a family house, and had never been in the possession of the deceased (Defendant's husband) and that therefore the Letters of administration must be altered by deletion of the reference to the house. Semble: Section 16 of Cap. 4 (limitation of action) does not apply to an application under S. 7 of the Probate Act.

Tupou appeared for the Plaintiff.

Folau appeared for the Defendant.

C. A. V.

HUNTER J. In this case 'Isileli Tu'ivai, the Plaintiff is asking that the letters of administration granted to the Defendant Seini Matangi as the administratrix of her husband's estate on 15. 1. 53 be altered in accordance with the provisions of Section 6 Cap. 7 by deleting therefrom the words and figures "The Fale Tonga (Ofa 'e 3) 'ato Kapa, holisi papa £150" on the ground that the said house never belonged to Viliami Matangi, and therefore should not have been included in the letters of administration.

I reserved my decision because I wished to reconsider the evidence and the submissions of Counsel.

The Plaintiff's case was that the house in question was a 'family house' and never belonged to Viliami Matangi the deceased husband of the Defendant.

He gave evidence that the house was built in about 1919 or 1920 by himself and his brothers, the sons of 'Inoke Finau, as a 'family house' and has remained such ever since. One of the brothers was Matangi the father of the Defendant's husband. He was present at the meeting when it was arranged to build the family house. Some years after the house (a Tongan house) was built it was improved by putting in timber walls and roofing iron but it was still a Tongan house (fale Tonga) as distinct from a wooden or European house (fale papa) and always remained the family house. Whether the house is a Fale Tonga or Fale papa (European) was of some importance because the letters of administration of Matangi's estate (Viliami's father) which were put in evidence Exhibit D referred to a Fale papa which the Defendant claimed was the house in question and therefore had been in the undisputed possession of the Defendant's husband since 1944, the date of the letters of administration, until his death. On the evidence called on this point I am satisfied that the house in question could not have been described as a Fale papa and therefore could not have been the house referred to in Exhibit D unless there was some strong evidence to the contrary, which there was not.

The Plaintiff's evidence was supported by Kilimi the widow of Kehe, an elder brother of the plaintiff and by Mele, Kehe's daughter.

Kilimi swore positively that she was present at the meeting of the family when the arrangement to build a family house was made, that she saw the house after it was built and that ever since it has been regarded by herself and other members of the family as the family house. Kilimi impressed me as a truthful witness and although she may not have been quite clear on minor details, due perhaps to her age, in the main I think that the story she told was correct.

The defendant to support her claim to the house relied on the letters of administration and her statement that her husband had told her that he owned a house at 'Eua (where the house in question is situated) and accurately described the house to her. I have grave doubts as to the admissibility of this conversation between the Defendant and her deceased husband but no objection was raised to it so I let it in. But assuming that it was admissible it is no proof (or only the very flimsiest) that Viliami owned the house, and I can not see that the inclusion of this house in the letters of administration of Matangi's estate (assuming that it was the same house) carries the matter any further because it was so included because Viliami told the Registrar to include it.

I was in some doubt at first whether such an arrangement whereby a house could remain in a family in perpetuity was valid.

but after hearing Counsel for both parties I am satisfied that such is the Tongan Custom which I think should be upheld by this Court unless there is some Statute to the contrary. In the present case I know of no such Statute. This was also held to be the custom in two cases decided in 1952 by Mr. Acting Justice Gavin, to which Tupou referred me.

After careful consideration of the evidence and the addresses of Tupou and Folau, to whom I am indebted for the assistance they gave the Court, I am satisfied that the house in question was built as a "family house" and has remained so ever since, and that Viliami Matangi never owned it.

There is another matter to which I should refer. Folau, Counsel for the Defendant, submitted that the Plaintiff must fail because the house has been in the undisputed possession of the defendant (through her husband) since 1944 and that therefore this case, which was not started until 1953, is barred by S. 16 of Cap. 4.

I think that this submission must fail for the following reasons :—

- (i) I doubt whether Viliami could be said to have ever been in possession of the house within the meaning of the section. The house may have been included in the letters of administration of his father's estate, but this was known only to himself and the Registrar of the Court. He never lived in the house, except as a boy and since then very seldom saw it.
- (ii) I am not satisfied that the house in question is the house referred to in Exhibit D.
- (iii) In any case I do not think that Section 16 of Cap. 4 applies to the present case which is an action under Section 6 of Cap. 7.

I therefore give judgment for the Plaintiff and direct that the letters of administration of the estate of Viliami Matangi granted to Seini Matangi on the 15th January, 1953 and being No. 9 of 1953 be altered by deleting therefrom the words and figures "the Fale Tonga (ofa 'e 3) 'ato kapa, holisi papa £150".

I should add that the Defendant through her late husband is entitled to her equal share of this house with the other members of the family.

Tupou does not ask that the Defendant pay the Court fees but submits that she should pay £5/5- towards lawyer's fees.

I order the Defendant to pay £5/5/- lawyer's fees. No order as to Court costs. The £5/5- to be paid on or before 30th September, 1954; I also order that Tupou have authority to withdraw the amount paid.
