

IN RE AN APPLICATION UNDER CLAUSE 85 OF THE CONSTITUTION.

**Ex parte President and Trustees of "Tonga Ma'a Tonga
Kautaha".**

(Civil Application. Skeen C. J. Nuku'alofa, 26th August, 1911.)

Suspension of Laws — Clause 85 of Constitution — Powers of Chief Justice — who may apply — Clause 1 of the Constitution — Retrospective Laws — Court bound by the law.

This was an application to the Chief Justice to suspend the operation of certain Ordinances. The facts sufficiently appear in the judgment.

HELD. Ordinances No. 4 of 1911 and No. 17 of 1910 are in contravention of the Constitution and Ordered that they be suspended until the next meeting of the Legislative Assembly.
Scott for the applicants.

C. A. V.

SKEEN C. J. This is an application made to the Chief Justice of Tonga to suspend certain ordinances namely No. 4 of 1911 "An Ordinance to restrict and control the formation of Native Companies commonly known as Kautaha" and No. 17 of 1910 "An Ordinance relative to Native Companies both passed by the Privy Council of Tonga.

Being the first time an application has been made to the Chief Justice to exercise the power vested in him of suspending a law it seems appropriate to review the sections of the Constitution and Law bearing on the matter.

Firstly. As to the powers of the Chief Justice.

Section 60 of the Constitution grants power to the Legislative Assembly to enact Laws.

Section 54 of the Constitution confers no direct power on the Privy Council to pass ordinances but does so by inference and states that when the Legislative Assembly shall meet it may confirm such ordinances and make them law or rescind them.

Section 18 of the Law provides "It shall be lawful for the King and Privy Council to pass ordinances between the meeting of the Legislative Assembly and they shall become law and have the force of law between the meetings of the Legislative Assembly.

Section 20 of the Constitution reads "It shall not be lawful to enact any retrospective law".

Section 322 of the Law enacts "No law shall have any retrospective operation".

Section 85 of the Constitution provides "It shall be lawful for the Chief Justice to suspend the operation of any law which is at variance with the Constitution until the next meeting of the Legislative Assembly."

Section 341 of the Law of 1903 provides "It shall be lawful for the Chief Justice to suspend the operation of any law passed by the Legislative Assembly or the Privy Council which shall be in contravention of the Constitution until the next meeting of the Legislative Assembly."

Section 85 of the Constitution is not limited to the code of law promulgated in 1903 but extends to amendments and alterations of those laws. Its language is any law and the meaning is clear when the language of Section 341 of the Law "any law passed by the Legislative Assembly or Privy Council" is considered.

Secondly. As to who may apply.

Neither the Constitution or the Law make any provision requiring any application to be made before the Chief Justice to exercise his power of suspension, but there is no doubt that any such application may be made by any party claiming to be affected by legislation and that such may be entertained by the Chief Justice. Indeed the Chief Justice might properly, of his own motion, suspend any law which in his opinion is at variance with the Constitution, and, where a new law conflicting with the Constitution imposes penalties upon persons offending against its provisions, it might become the imperative duty of the Chief Justice to interfere, otherwise persons might be punished for breaches of the law which is beyond the legislative capacity of the enacting body.

The Chief Justice may act upon application or upon his own motion, and will in the present case deal with the matter of these ordinances.

It is rather to be regretted that no provision is made for the argument of questions such as those calling for consideration in this present instance, so that the Chief Justice might have the assistance usually afforded to the Court by the argument of Counsel. However, the course to be followed seems to be abundantly clear. The grounds set out in the application are, as regards Ordinance No. 4 of 1911 :—

1. That Sections 5 and 6 of the said ordinances are at variance with clause 1 of the Constitution in that they purport to restrict the right conferred upon all men by said clause 1 to dispose of their labor and the fruit of their hands and to use their own property as they will.

2. That Section four of the said ordinance is at variance with the said clause 1 of the Constitution in that it purports to affect the right conferred by the said clause upon all men to dispose of their labor as they will.

3. That in so far as the said ordinance may be construed to apply to any Non-Native of Tonga who was, at the time of the passing of the said ordinance, acting as agent for, financing, controlling, or receiving any remuneration from the association of Tongans known as "Tonga Ma'a Tonga Kautaha", it is retrospective and void under clause 20 of the Constitution in that it purports to take away from such Non-Native the rights vested in him,

at the time of the passing of the said ordinance, to act as agent for, finance, control, or receive remuneration from the said "Tonga Ma'a Tonga Kautaha".

4. That Section 3 of the said Ordinance No. 4 of 1911 is retrospective and therefore void under clause 20 of the Constitution.

5. That in so far as the said ordinance No. 4 of 1911 may be construed to apply in any particular to "Tonga Ma'a Tonga Kautaha" or any other Kautaha existing at the time of the passing of the said ordinance, or at the time of the passing of the said ordinance No. 17 of 1910, it is retrospective and void under clause 20 of the Constitution.

And as regards Ordinance No. 17 of 1910.

- (a) It is at variance with clause 20 of the Constitution as it purports to take away from an European or Foreigner employed with or connected with any Kautaha existing at the time of the passing of the said ordinance the right to continue in such employment or connection until such time as any such Kautaha should terminate his said employment or connection by reasonable notice.
- (b) It is at variance with clause 1 of the Constitution as it purports to take away the right of any one so employed by or connected with any Kautaha to dispose of his time and labor as he wills.
- (c) It is at variance with said clause 1 of the Constitution as it purports to take away the right of the members of any such Kautaha to dispose of their property and the fruit of their hands as they will.

And the further grounds are set out generally :—

That there has been no Amendment of the Constitution in accordance with clause 82 of the Constitution and clause 17 of the Law to authorise the legislation purported to be passed by the said ordinances.

Now as to Retrospective Legislation.

"It is a general principle of British law that no statute shall be construed so as to have a retrospective operation, unless its language is such as plainly to require that construction : and this involves the subordinate rule that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary except in special cases, a new act ought to be so construed as to interfere as little as possible with vested rights, and where the words admit of another construction they should not be so construed as to impose disabilities not existing at the passing of the Act."

(Brooms Legal Maxims. Ed. 1911 page 25).

Under that general principal of English law, where there is no written constitution and there is no restriction imposed upon legislative power of Parliament, vested rights are jealously guarded, and retrospective operation of laws, unless stated in express terms, is looked upon with extreme disfavour.

Here in Tonga we are governed by and circumscribed by a written Constitution (and laws enacted thereunder), the Constitution is precise and clear in its language and it expressly forbids any retrospective legislation, and guards in a far more determined manner than English law any vested rights. It says "It shall not be lawful to enact any retrospective laws", and thus restricts the legislative power of the Parliament and the Privy Council.

Is Ordinance 17 of 1910 retrospective or in contravention or at variance with the Constitution.

If the ordinance be construed so that it take away or affects rights already existing (as it does) when the ordinance was published then its action is clearly retrospective and is in violation of Section 20 of the Constitution and is null and void.

It is at variance with Section 20 of the Constitution as it purports to take away from any European or Foreigner employed by or connected with any Kautaha existing at the time of passing of the ordinance the right to continue in such employment or connection until such time as his term of service or contract might expire or any such Kautaha should terminate his connection by reasonable notice. It purports to take away the right of any person, so employed or connected, to dispose of his time and labor as he wishes. There is no justification for this under the Constitution, which under clause 1 does not limit the rights thereby conferred upon Tongans alone, but extends such rights to "all men".

The ordinance also purports to take away the right of the members of the Kautaha to dispose of their property and the fruit of their hands as they will, and would therefore appear to be at variance also with Section 1 of the Constitution, by preventing or affecting the use of property in accordance with the owner's will. In the existing state of the Constitution this right cannot be controlled by legislation.

This being so the ordinance could not affect Tonga Ma'a Tonga Kautaha or any existing Kautaha at the time the ordinance was passed, and by parity of reasoning Ordinance 4 of 1911 would not affect any Non-Native of Tonga who, at the time of the passing of the ordinance, was "acting as agent for association of Tongans".

Ordinance 4 of 1911 was apparently intended, judging by its recitals, to apply more particularly to Companies formed after the passing of the ordinance.

The 5th recital states "Whereas it is desirable to prohibit the formation of Companies etc.", this refers to the future not to existing Companies, and Section 5 of the ordinance states "It shall be unlawful for Natives of Tonga to combine etc.", clearly this refers to the future and not to existing Companies.

It might therefore be properly contended that ordinance No. 4 of 1911 could not affect any Kautaha in existence at the date the Ordinance was passed, and that if it were so construed then it was retrospective and void.

The Ordinance (4 of 1911) contains seven clauses :—

Clause 1. is an interpretation clause.

" 2, purports to repeal Ordinance No. 17 of 1910.

" 3, attempts to take away existing rights of action and is clearly retrospective.

Clauses 4, 5 & 6, as above stated violate Section 1 of the Constitution.

Clause 7, provides penalties for breach of the ordinance and the heavy penalties thereby imposed point to the necessity for intervention by the Chief Justice.

The language of the Constitution is precise and clear and expresses without ambiguity the terms upon which King George The First granted such. First he conquered the country and brought Tonga for the first time under one head and control thus giving his people peace, next he lifted from them the curse of slavery, and later on as the crowning act of his reign he voluntarily gave his people a Constitutional Government and a written Constitution. It was no hasty and ill-advised action, he looked upon Tonga united, free and peaceful; he saw the work of his hand and brain was good and he desired it to remain strong and stable. Hence the Constitution, under which provision is made for amending the Constitution as necessity may demand.

It is a matter of regret perhaps that the power of the Legislative Assembly and Privy Council should have been so restricted as not to allow the enacting of laws such as have just been considered.

It is not for the Chief Justice to say that the effect of a law passed at variance with the Constitution is beneficial or otherwise, he can only deal with the Constitution as it is, not as it might have been. He can add nothing to it, he can take nothing away from it, to act otherwise would be to render the Constitution an illusion and a farce.

The Chief Justice must do his duty as set out in Section 85 of the Constitution when called upon by individuals or by necessity for the welfare of the people.

Both the Ordinance No. 17 of 1910 and the Ordinance No. 4 of 1911 are in the opinion of the Chief Justice at variance with or in contravention of the Constitution and must be suspended until the next meeting of the Legislative Assembly.

The order of suspension will issue forthwith, and copies will be forwarded to His Majesty the King, to the Premier and to the Minister of Police for their information. Copies of these reasons will also be forwarded as soon as possible.