

## A. 'AHOKAVA v. MALUPO.

(Land Court. Richardson J. Ha'apai and Nuku'alofa, 15th March, 20th April, 1948).

Constitution 1875 — Tongan Custom — Full blood preferred to half blood — Tracing an inheritance — 1875 the starting point.

This was a claim to the title and Tofi'a of Malupo. The Court decided that the Constitution of 1875 crystallised the position regarding land and title matters and that a start must be made from there, the full blood being preferred to the half blood.

HELD: The defendant was the rightful holder. Claim dismissed.

S. Havili appeared for the Plaintiff.

M. Finau and V. Latu appeared for the Defendant.

C.A.V.

RICHARDSON J.: Plaintiff is claiming from the Defendant, the present holder of the title, the title of "Malupo" and all the lands belonging thereto. Defendant is the present holder, duly appointed in 1928, and is defending the case. Special permission of Privy Council has been granted under Section 10 of Act No. 19 of 1943 (since repealed) for this action to be brought out of time.

The first and original Malupo was one Sefanaia Malupo: Sefanaia Malupo married twice. By his first wife, Sisifa, he had two sons Talaiasi Saulala and Havea Pava: by his second wife, Mele Lilo, he had several children the eldest of whom was one, a son, KALIOPASI and the youngest another son SIMOTE FILIAKI. On his death Sefanaia was succeeded by his eldest son by the first wife, TALAIASI SAULALA, who in his turn was succeeded by his half-brother KALIOPASI, his full brother HAVEA PAVA having predeceased him. KALIOPASI was the actual holder of the title at the time of the grant of the Constitution in 1875, and on his death he was succeeded by a son of his younger brother of the full blood, FOLAUMOELOA.

Defendant is a direct descendant of FOLAUMOELOA. Plaintiff on the other hand is a direct descendant of HAVEA PAVA. Attached hereto is a genealogical tree showing the descent and relationship of the disputing parties.

It has been proved by the Defence beyond doubt that KALIOPASI was the holder of the title Malupo at the time of the grant of the Constitution in 1875. Of this there is no doubt. Doubts have been cast upon the legality of this appointment, and it is argued that the legitimate successor to TALAIASI SAULALA was not KALIOPASI but the eldest son of Havea Pava, and that KALIOPASI was an interloper at this stage. I find it difficult to accept the suggestion however that the legality of title of KALIOPASI can be queried at this late date for the following reasons.

It is argued by Plaintiff that if the law of succession had been followed at the time of TALAIASI SAULALA'S death the title would have passed to his next youngest brother Havea Pava, or in the case of his earlier death to the eldest son of Havea Pava, Samuela, and that consequently Samuela had a prior claim over KALIOPASI. Evidence has been given however that it was only with the Constitution that the law of strict succession from father to son was introduced, and that prior to the grant of the Constitution in 1875 it was customary for titles to descend from elder brother to younger brother until all brothers, whether of the full blood or the half blood, were exhausted and that only then did the title pass to the next generation, reverting then to the eldest son of the eldest brother. That this was so I accept as true, and accordingly the appointment of KALIOPASI appears to have been lawful: on the death of TALAIASI SAULALA without legitimate issue the title would have passed to his full brother Havea Pava, but as he had died and there were no further brothers of the full blood the title passed to the half brother KALIOPASI. Quite apart from this however I think one must regard the grant of the Constitution as crystalising the position regarding land and title matters: Kaliopasi was confirmed in his appointment as Malupo by King George Tupou I, and there is no doubt whatsoever in my mind that it is from Kaliopasi that the descent of the title must now be traced.

KALIOPASI died without legitimate issue, and the title then passed to the only surviving son of his younger brother of the full blood, i.e. FOLAUMOELOA the son of SIMOTE FOLIAKI, and on his death without issue it again passed to SUNIA, the eldest son of the eldest son of Simote Foliaki, and from him to his brother TAKAPAUTOLO the present Defendant. Plaintiff submits however that it was wrong in law for the title to have passed from KALIOPASI to Simote Foliaki's line of the family and that it should have passed to Havea Pava's line as being that of the elder brother on the death of Kaliopasi. Defendant gives as the reason for the title not passing to Havea Pava's descendants the fact that Havea Pava, although an elder brother of KALIOPASI, was only of the half blood and therefore not of prior title to Simote Foliaki who was of the full blood. There has been much play in the course of the evidence on the meaning and interpretation of the word "Tokoua" (brother): the law prescribes that the inheritance shall pass in default of legitimate issue to the next eldest brother (Tokoua). Plaintiff alleges that "Tokoua" includes brothers of the half blood on an equal footing with brothers of the full blood, and that age only takes precedence. Defendant however maintains that blood relationship is all important and that a younger brother of the full blood takes precedence over an elder brother of the half blood.

I have examined many of the witnesses in the course of the evidence in an attempt to determine the all important question of what is the accepted Tongan custom on this point, and as a result

of the evidence that has been placed before me I am satisfied that the correct and established custom is that described by the Defendant, namely that when a man dies leaving no children but a brother of the full blood and a brother of the half blood, both of which are referred to in the Tongan language as "Tokoua", the brother of the full blood succeeds in preference to the brother of the half blood and that the fact that the half-brother may be senior in age to the full brother makes no difference. With this view both my Assessor at Ha'apai and my Assessor at Nuku'alofa are in agreement. I therefore accept Defendant's deposition as being the true and correct interpretation of Tongan custom.

Applying this to the case at issue therefore I find that on the death of KALIOPASI the line of Simote Foliaki, his brother of the full blood, was entitled to take precedence over the line of Havea Pava, and that the title correctly passed to FOLAUMOELOA who inherited through Simote Foliaki, and thence in due course by direct descent to TAKAPAUTOLO the present Defendant. I therefore dismiss the claim of Plaintiff and give judgment in favour of Defendant, confirming his right to the title of "Malupo", and award costs to Defendant, (£5).

**EDITOR'S NOTE:** The Plaintiff appealed to the Privy Council. On 21.6.48 the Privy Council (Carew C.J.) dismissed the appeal and confirmed the decision. (See page 150).

