KAPANI FATAI (Appellant) v. THE DEPUTY MINISTER OF LANDS, HA'APAI (Respondent).

In the Land Court (Hunter J.) sitting at Ha'apai the plaintiff (Appellant) claimed to be entitled to allotments formerly held by his uncle. The Land Court dismissed the claim on the ground that as the plaintiff already held an allotment of his own he could not elect as S. 78 of the Land Act applies only to sons and grandsons. The appellant submitted that Section 78 applied only to land first registered after 23rd August, 1927 (the date of the Land Act) and that the provisions of S. 569 of the 1903 Laws applied to the land question.

Privy Council did not agree with this. The facts are fully set out in the judgment of the Privy Council (Hammett C.J.) which was delivered on 5th October, 1960 as follows :

This is an appeal from the decision of the Land Court sitting at Ha'apai dated 9th November, 1959 whereby the Appellant's claim to the Tax Allotment called Sia, and the town allotment called "Feletoa" at Pangai was dismissed.

The facts, which are not in dispute, are as follows :

The original holder of these two allotments was Paula Fuko. On his death he was succeeded, as holder, by his younger brother Malakai Pua, sometime before 1907. On the death of Malakai Pua, his widow 'Utuvai became the holder.

Paula Fuko had three sons, Sateki Palatea, 'Aliki and Faiva.

On the death of 'Utuvai, Sateki Palatea the eldest son of Paula Fuko, became the holder. He died in about 1940, a widower having had no children.

On the death of Sateki Palatea his young brother 'Aliki and 'Aliki's son, the present Appellant, applied to the Deputy Minister of Lands for these allotments. This application was refused. It is agreed that at that time, both 'Aliki and his son each had their own tax and town allotments.

In 1946 'Aliki died. His son, the present Appellant, then claimed in the Land Court these allotments as the heir of 'Aliki.

The present claim is based upon the Rule of Succession to Allotments contained in Section 76 (v) of the Land Act whereby in default of any closer next of kin an allotment shall descend to the deceased holder's next eldest brother and to the eldest male heir of his body.

The learned trial Judge of the Land Court held that whilst under Section 76 (v) of the Land Act the Plaintiff was apparently entitled to succeed to these allotments, he was precluded from doing so because both he and his father 'Aliki each had, at the time, their own tax and town allotments, under the provisions of Section 78 which read as follows :—

"Save and except a son or grandson of the deceased holder no person who already holds a tax or town allotment shall be permitted to succeed as heir to another allotment of the same kind as the allotment he already holds or to choose between an allotment already held by him and one to which he becomes entitled as heir :

Provided always that where a son or a grandson becomes entitled to succeed to an allotment of his deceased father or grandfather and already possess an allotment of the same kind it shall be lawful for such son or grandson to elect between the allotment already held by him and that of his deceased father or grandfather."

The Appellant now appeals on two ground which appear to be as follows :—

Firstly : That the Land Court was wrong in law in holding that the Appellant was not entitled to succeed under Section 76 (V) of the Land Act (Cap. 45).

Secondly : That the Land Court should have held that the provisions of Section 78 applied to land first registered after 23rd August, 1927 and that as far as land previously registered it was ultra vires by virtue of Section 20 of the Constitution and that Section 569 of the 1903 Edition of the Laws of Tonga still continued to apply to that Land.

There are no merits in the first ground of appeal since the Land Court did hold that under the provisions of Section 76 (v) of the Land Act, taken alone, the Appellant was entitled to succeed to these allotments.

As far as the second ground of appeal is concerned it is clear that Section 569 of the 1903 Edition of the Laws of Tonga is to the same effect as Section 76 of the Land Act (Cap. 45) in the 1947 Revised Edition of the Laws of Tonga. It is however apparent that there is a material difference between the present Section 78 of the Land Act (which is set out earlier in this judgment) and Section 572 of the 1903 Edition of the Laws which reads as follows :

"Should any holder of a tax allotment die leaving no widow and his heir already hold a tax allotment the heir shall choose whether he will continue to hold his existing tax allotment or take his father's tax allotment and whichever tax allotment he shall not choose shall revert to the Crown or to the Noble in whose hereditary land it is included for no person may hold two tax allotments. (Compare Section 567)".

The effect of the difference is that whereas under the 1903 Laws — which continued in force until the Land Act of 1927 — any heir to an allotment had the right to elect whether to keep the allotments already held by him or to take those of the deceased

person of whom he was the heir, under the Land Act 1927 (now Cap. 45) Section 78 that right of election is restricted to those heirs who were sons or grandsons of the deceased holder.

It is the contention of the Appellant that since the original holder of these allotments was registered before 1927 the law affecting the devolution of that title could not be changed owing to the provisions of Section 20 of the Constitution which reads:

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

This section only concerns "retrospective laws". A retrospective law is one that is enacted to have effect prior to the date on which it is made. A study of the Land Act 1927 Section 78 makes it quite clear that that Act contained no provisions which were to have effect prior to the date it was enacted. This being so, Section 78 of the Land Act (Cap. 45) was not a retrospective law and was not therefore ultra vires the Constitution.

Section 9 of the Law Consolidation Act 1939 reads as follows:

"From and after the date of such proclamation (13th August, 1957 — see Gazette Supplement 1957 at page 3) the Consolidated Edition shall be deemed to be and shall be without any question whatsoever in all Court of Justice and for all other purposes whatsoever the sole and only book of laws of the Kingdom up to the date of publication (1st January, 1948 – see Act No. 20 of 1957)".

From this it follows that it is not now possible to pray in aid, as was attempted in this case, the provisions of Section 572 of the 1903 Edition of the Laws of Tonga in support of a claim to an allotment.

The Appellant had no right, not claiming to be the son or grandson of the previous holder of these allotments, to elect whether to take those of his deceased uncle instead of those allotments he held at the date of his uncle's death.

The appeal must therefore be dismissed.