MORRIS HEDSTROM LTD. v. M. MANU.
MORRIS HEDSTROM LTD. v. T. TAUVELI.

(Injunction : Hunter J. Nuku'alofa, 28th January, 1955).

Supreme Court — Appeal to Privy Council — Civil Action — Right of Appeal — Stay of Proceedings — The Supreme Court Act 1903 (Cap. 4) SS. 4, 5, 6 — The Magistrates' Act 1919 (Cap. 6) S. 69 — The Constitution Clause 50.

In these two cases judgment was given for the Plaintiff at Vava'u on the 10th of November, 1954. On the 16th November, 1954 both the defendants filed notices of appeal to the Privy Council.

Subsequently to filing the notices of appeal the plaintiff applied for and was granted warrants of execution against both the defendants. Counsel for the defendants then applied for and was granted ex parte a rule nisi for an injunction to restrain the execution of the warrants on the ground that the appeal to the Privy Council acted as a stay.

The present application was to make the rule absolute.
HELD. Filing a notice of appeal to the Privy Council does not act as a stay of proceedings.

Kioa appeared for the applicants (Defendants).

Vete appeared for the Respondents (Plaintiffs).

HUNTER J.. This is an application to continue an injunction staying proceedings until the hearing and disposal of an appeal to the Privy Council in each of these cases.

Judgment for the Plaintiff in each case was given by the Court at Vava'u on 10/11/54.

The Defendant in each case filed notice of appeal to the Privy council. After notice of appeal had been duly filed the Plaintiff applied for and was issued warrants of distress in each case as the judgments had not been satisfied.

After the issue of these warrants, but before execution, the defendants by their counsel applied ex parte for injunctions restraining the execution of the warrants on the ground that appeals had been duly lodged.

I granted the exparte injunctions with a direction that the Court should be moved at the earliest possible moment after the return of the Counsel for the Defendants from Ha'apai where he was then proceeding at the direction of the Queen, to continue the injunctions and that the Plaintiff should be given notice.

On this application the counsel for the Defendants (the applicants in the motion) submitted that the injunction should continue because once notice of appeal to the Privy Council has been lodged all proceedings under the judgment are automatically stayed, and in support of this submission he referred to Cap. 6. S. 69 and Cap. 4 S. 6.

Counsel for the Plaintiffs (the Respondents to this application) submitted that the injunction must be dissolved because (1) There

is no appeal to the Privy Council from the Supreme Court sitting in its Civil jurisdiction and (2) In any case notice of appeal to the Privy Council does not act as a stay of proceedings. He referred to Cap. 6 S. 5.

Subject to the Constitution the jurisdiction of the Supreme Court is provided for in the Supreme Court Act 1903; Cap. 4.

Section 4 of the Supreme Court Act provides that "The Supreme Court shall have jurisdiction in all civil cases in which the amount claimed exceeds fifty pounds and in all criminal cases for which the maximum penalty exceeds fifty pounds or two years imprisonment and in all divorce, probate and admiralty matters and in any other matter not specifically allotted to any other tribunal". From this it appears to me competent for the Supreme Court to deal with all matters proper to be dealt with by a supreme court which have not been specifically allotted to any other tribunal; and I have already so held in the case of Frank Cowley v. Halaevalu 'Aholelei — 5th January, 1955.

Section 5 of the Act is in these terms "An appeal shall lie from the Supreme Court by way of petition to the Queen in Council but it shall be lawful for the Supreme Court to rehear civil cases. Petitions shall be presented through the Premier. Provided always that at any meeting of the Privy Council sitting as a Court of Appeal under this section the Chief Justice shall be present and shall advise Her Majesty in Council on any points of law at issue." And Counsel for the Respondents submitted that although the section starts "an appeal shall lie", this does not mean an appeal in the strict sense because it refers to an appeal "by way of petition" presented through the Premier.

What may be termed the fountain of the Law of Tonga (apart from Tongan custom) is the Constitution granted by George Tupou I in 1875. This is the basis on which all the law is founded and any act which is in conflict with the Constitution would clearly be invalid and ultra vires.

The Constitution can be, and since 1875 has frequently been, amended (Clause 79) but until amended is binding. It is not possible "to get round" the Constitution (if I may use this expression) by means of an act which infringes the law there laid down. In interpreting Section 5 of Cap. 4, the meaning of which is far from clear, it is necessary to turn to the provisions of the Constitution regarding appeals from the Supreme Court and it is interesting to trace the various modifications which have been made by amendment since 1875, as in my view they throw light on what must be the correct interpretation of Section 5 of Cap. 4.

Clause 54 of the Constitution of 1875 after providing for the establishment of the Privy Council provided as follows :

"And if any thing shall arise in the land, or any great dispute because of any debt, or concerning any inheritance, if such has been

judged in the Supreme Court it shall be lawful to appeal to the Privy Council to re-judge the same, and such shall be the final Court. But it shall not be lawful for the Privy Council to re judge any criminal case; only civil cases and the like."

This clearly provides for an appeal, in the ordinary accepted sense of the term, from a decision of the Supreme Court in its civil jurisdiction.

In 1880, 1882, 1885 and 1888 the Constitution was amended and Clause 54 repealed and re-enacted in practically indentical terms; the provision that the Privy Council shall re-judge being retained.

In the copy of the Constitution published in the 1891 Edition of the Statutes the word "re-judge" becomes "re-hear" where first used and "re-try" where next used and this phraseology is retained in the Constitution as published in the 1928 Edition of the Laws, the provision regarding appeals being exactly the same now as it was in 1891.

The alteration from "re-judge" to "re-hear" and "re-try" does not in my opinion affect the nature of the proceedings before the Privy Council which were always intended to be an appeal in the true sense.

I think weight is lent to this view by the alteration made in 1885 to Clause 91, since repealed.

The Clause read " should the Supreme Court be held and the three judges be agreed in any case or any two of them such decision shall be final. And it shall not be lawful to grant a new hearing if such was a trial for crime in accordance with the 25th Clause. But should it be a cause for debt or dispute about any inheritance it shall be lawful to appeal to the Privy Council in accordance with the 54th Clause." It was amended to read as follows . "Should the Supreme Court be held and the three judges be agreed in any case or any two of them such decision shall be final. But in the case of a dispute about any inheritance or other civil cases (sic.) it shall be lawful to appeal to the Privy Council in accordance with the 54th Clause."

The intention of the amendment was evidently to make it clear that an appeal lay to the Privy Council in any civil case.

The history of Clause 54 of the Constitution (now Clause 50) leads me to the conclusion that it was, and has been right up to the present time, the intention of the framers of the Constitution that an appeal should lie to the Privy Council from any decision of the Supreme Court in its civil jurisdiction and that therefor any meaning given to Section 5 of Chapter 4 limiting this right of appeal would be unconstitutional and invalid. However I do not think that Section 5 means anything less than is stated in the first four words viz : "An appeal shall lie." The reference to a Petition is only a matter of machinery for bringing the appeal before the Privy Council, and the words "but it shall be lawful for the Supreme Court to rehear civil cases" can only mean that the Privy Council can, if it see fit, send a case back to the Supreme Court for retrial.

These words are obviously taken from Cap. 4 of the 1891 Code, Section 131 of which provides : "There shall be no appeal from any decision of the Supreme Court except by petition to the King in Council which petition shall be presented to the Premier. In civil cases the King on the advice of his Council may order the case to be tried again before another Justice and in criminal cases the King may remit part or the whole of the sentence."

If this section meant that the Privy Council could not 'rehear' the case on appeal but could only send it back to the Supreme Court for retrial it was invalid as being ultra vires Clause 54 of the Constitution.

The remaining matter for consideration is whether a notice of appeal to the Privy Council stays proceedings until the appeal is disposed of.

I have been able to find nothing in the Tongan laws dealing with this question.

Section 69 of Cap. 6, referred to by Counsel for the applicants certainly stays proceedings on an appeal from the Magistrate to the Supreme Court but I can not agree with his submission that Section 6 of Cap. 4 applies this provision to an appeal from the Supreme Court to the Privy Council; all this section does is to invest the Supreme Court with all the powers of the Magistrate's Court. The stay referred to in Section 69 of Cap. 6 is not a power vested in the Magistrate. It is a stay which operates automatically, irrespective of the Magistrate's view.

The position is dealt with in England by Rule 16 of Order 58 (R.S.C.) which expressly states that an appeal does not operate as a stay of proceedings unless the Court, or the Court of Appeal so orders.

My view is that there is nothing in the law here to provide that an appeal to the Privy Council acts as a stay of proceedings, and even had I the power (which I do not think I have) to order a stay I doubt whether I should do so in the present cases which appear to me to be entirely without merit.

I find (1) that an appeal does lie to the Privy Council from a decision of the Supreme Court in its civil jurisdiction and (2) the institution of such an appeal does not act as a stay of proceedings.

I have dealt with this matter of an appeal to the Privy Council at some length because I believe some judges have held the opposite view although as far as I know it has never been definitely decided.

The order of the Court is that the injunctions granted in these two cases restraining the execution of the distress warrants are dissolved.

Costs of these applications assessed at 5 guineas in each case to be paid by the respective applicants (defendants in the actions) and added to the judgment debt.