

HENRY KERSHAW BENNETT (ASSIGNEE OF HERBERT JAMES BROWN AND JAMES ANSENNE TRADING AS BROWN AND ANSENNE, HA'APAI) v. SIAOSI MAEAKAFA.

(Civil Appeal. Skeen C. J. Ha'apai, 26th April, 1915).

Actions for debt against Tongans — Validity of Ordinances — Retrospective laws — Publication of Laws — King's signature to Ordinances — S. 20 (1) 1903 Laws English translation not correct — Constitution; Clauses 4. 54 — 1903 Laws ss. 18. 20. 271. 272 — Laws 10 of 1910 and 12 of 1912 — Ordinance 10 of 1910 — Treaty of Friendship 1879 Article 2.

The appellant H. K. Bennett was the assignee of Brown and Ansenne a firm of British traders. The respondent (Siaosi Maeakafa) was a Tongan subject.

The appellant sued for a trading debt of £34/1/3 for goods sold and delivered on credit in the ordinary way of business.

The case was heard in the Police Court (Civil Jurisdiction) at Ha'apai and 3rd September, 1914 and the magistrate dismissed the case on the ground that the plaintiff was debarred by law from recovering a "trading debt" such as sued for from a Tongan.

The Plaintiff appealed. The facts sufficiently appear in judgment.

HELD. Such a debt not recoverable. Appeal dismissed.

C. A. V.

SKEEN C. J. The Plaintiff appealed on the following grounds :

1. That part of the debt claimed against the abovenamed Defendant amounting to £32/0/6 was incurred between the Sixteenth day of September, 1911 and the 21st day of September, 1912.
2. That part of the said debt claimed against the abovenamed Defendant, amounting to £2/0/9 was incurred between the 21st day of September, 1912 and the 21st day of December, 1912.
3. That Section 271 of the Law of Tonga was repealed on the 16th day of July, 1906 vide Gazette VII of 1906 XVII.
4. That from the 16th July, 1906 to the 21st September, 1912 Traders could sue Tongans for debt in the Tongan Courts.
5. That Section 271 of the Law of Tonga was not lawfully re-enacted until published in Gazette No. 17 dated the 21st day of September, 1912.
6. That Ordinance No. 10 1910 published in Gazette No. 13 April 19th, 1910 and did not become Law until passed by the Legislative Assembly and published as No. 12 — 1912 in Gazette No. 17 — 1912 dated 21st September, 1912.
7. That Ordinance No. 10 1910 published in Gazette No. 13 dated 19th April, 1910 is null and void for the following reasons :—
  - (a) The said Ordinance did not receive the assent of the King thereto nor did the King affix his signature thereto in accordance with Section 18 of the Law of Tonga.

- (b) The said Ordinance is inoperative in as much as the said Ordinance is required to be submitted to the next meeting of the Legislative Assembly for approval in accordance with Section 54 of the Constitution of Tonga which provides inter alia "No Ordinance which may be passed by the King and Privy Council shall have any effect until the signature of the Minister to whose department such ordinance relates is affixed thereto — and when the Legislative Assembly shall meet it may confirm such Ordinances and make them Law or rescind them.
8. That clause 54 of the Constitution only confers upon the King and Privy Council the right to pass Ordinances as defined in Section 20 of the Law of Tonga.
  9. That the King and Privy Council have not the power to enact new Laws or to re-enact laws which have previously been repealed by the Legislative Assembly and the power conferred by Section 20 of the Law of Tonga only gives power to the King and Privy Council as follows :—
    1. To pass Ordinances enacting Regulations
    2. To pass Ordinances relating to the control of a Department
    3. To pass Ordinances suspending the action of any laws — the suspension of which has been requested by the Justices of the Supreme Court — in accordance with the powers conferred upon them et. seq.
  10. That in accordance with the Constitution of Tonga Section 20 "It shall not be lawful to enact any retrospective Laws". And it is therefore claimed that if the King and Privy Council have powers to enact Laws relating to debt and effecting the rights, privileges and immunities of Traders or British subjects resident in Tonga, which power is contested such laws cannot come into force until enacted by the Legislative Assembly and published in the Government Gazette and such laws cannot have retrospective operation.
  11. That Ordinance No. 10 — 1910 published in Gazette 12 dated April 19th, 1910 is ultra vires to Section 20 of the Constitution and is therefore null and void.
  12. That Ordinance No. 10 — 1910 is ultra vires Section 4 of the Constitution and is therefore null and void.
  13. That Law No. XI 1912 published in Government Gazette No. 17 dated September 21st, 1912 is ultra vires Section 4 of the Constitution of Tonga and is therefore null and void.
  14. That Law No. XI 1912 published in the Government Gazette No. 17 dated September 21st, 1912 is ultra vires the Rights and Privileges of British Subjects under Article II of the Treaty of 1879 and is therefore null and void.

And he asked that the Chief Justice suspend the operation of Law (XII of 1912) vide Gazette No. 17 dated 21st September, 1912.

Items 1, 2 & 3. of the grounds of appeal were admitted by the respondent and are correct.

Item 4. The appellant contends that from 1906 when Section 271 of the Law of Tonga 1903 was repealed, up to 1912 when Law XI of 1912 dated 21st September, 1912 was published in Government Gazette XVII — 1912 "Traders could sue Tongans for debt in the Tongan Courts", but this is not correct.

By Section 271 of the Law of Tonga 1903 it was enacted "It shall not be lawful for an European or Asian to sue for a debt from any Pacific Islander if such debt was contracted after 4th May, 1890 etc. etc. "and Section 272 provided that "notwithstanding the provisions of 271 — "It shall be lawful for any person — to sue any person for a breach of any written contract etc. " — but there was no written contract in this case.

In 1906 this Law of Section 271 was repealed vide Gazette VII — 1906 and all persons were allowed to sue for debt. All restrictions were done away with against suing natives of Tonga and other South Sea Islands.

In 1910 the Law re debt was again amended and an Ordinance No. 10 1910 was passed to "restrain the indiscriminate giving of credit to Tongans and other South Sea Islanders by Storekeepers and Traders" and by this Ordinance traders were debarred from the recovery of debts from Tongans or other South Pacific Islanders but they still retained the right to sue under Section three of the ordinance if such goods had been obtained on a written contract entered into according to Chapter XXIII of the Law of 1903. In 1912 when Parliament met this ordinance was submitted to it and it was confirmed (vide public notice in Gazette 15 of 1912 August 17th, 1912), and it was also passed in the form of a Law as a new law (Law XI of 1912 vide Gazette 17 of 1912) and that Law is at present in force. The appellant is therefore wrong when he says "traders could sue Tongans for a debt between 1906 and 1912, he was debarred by the Ordinance.

5. Section 271 was not re-enacted at any time and was not re-enacted and published in Gazette XVII of 1912 as Stated. Section 271 enacts no European or Asian can sue for a debt from any Pacific Islander etc. "and Ordinance X of 1910 (Law XI of 1912) enacts as follows :— Notwithstanding anything in the Law of Tonga 1903 or in the Amending Law of 1906 re Debt it shall not be lawful for any Trader or Storekeeper or Commission Agent or anyone holding a License under Chapters XXIV, XXV and XXVI of the Law of Tonga 1903 to sue for debt any Tongan or South Pacific Islander for goods obtained upon credit." This was not and is not a re-enactment of Section 271.

6. Ordinance No. 10 of 1910 published in Gazette XIII of 19th April, 1910 became Law and had the force of Law between the meetings of the Legislative Assembly and in accordance with Section 18 of the Law of Tonga 1903 "It shall be lawful for the King and the Privy Council to pass Ordinances between meetings of the Legislative Assembly. After the King has given his assent and affixed his signature to such Ordinances they shall become law and have the force of Law between the meetings of the Assembly. Such ordinances shall be submitted to the Legislative Assembly upon its next meeting and the Assembly has power to approve amend or repeal such in accordance with Section 54 of the Constitution."
7. Appellant claims that Ordinance 10 of 1910 is null and void —

- (a) because the said Ordinance did not receive the assent of the King of Tonga nor did the King affix his signature thereto. No proof of or argument in support of, this contention was offered, except that, as published in the Gazette the Ordinance does not purport to be signed by the King, i.e. that it does not have the words "approved J. Tupou" printed at the end of the Ordinance. I cannot support this contention.

The Government Gazette is published by authority and is the recognised and legal way of publication of an Ordinance I assume, therefore, that the Ordinance received both the consent and signature of the King before publication the same way as I must assume the repealing Law of 1906 under which appellant claims he has his right to recover did also. If the one is null and void so is the other that is if Ordinance No. 10 is void for the reasons under 7(a) then so also is the repealing Law and the appellant has no right to recover.

- (b) and further because the Ordinance required to be submitted to the next meeting of Parliament. Appellant does not submit it was not submitted to Parliament, nor does he offer any proof or evidence that such was not done. In Gazette No. 15 of 1912 I find a public notice that the Ordinance was submitted to the next Parliament and that the Parliament confirmed same and later in Gazette No. 17 of 1912 the Ordinance appears in the form of a Law (No. XI of 1912). It appears clear, therefore, that the Ordinance was submitted to Parliament, confirmed as required by Section 54 of the Constitution and was afterward passed as Law No. 12 of 1912.

8. Clause 54 of the Constitution does not confer upon the King and Privy Council the right to pass Ordinances as defined in Section 20 of the Law as the appellant states.

Section 54 of the Constitution does not define what nature of Ordinances may be passed, nor is any mention made of Section 20 of the Law.

Section 20 was not passed for years after the Constitution containing clause 54 was enacted and therefore could not define the nature of the Ordinances set out in clause 54 within the scope of the Privy Council. Changes in the Constitution can only be made in a specific and a particular way by Legislation passed not only by the Parliament, but also by the Cabinet, the Privy Council and the King. But this appears never to have been done, and, therefore, original powers of the Privy Council as set out in Section 18 of the Law of Tonga 1903 and Section 15 of the Law of 1891, which sections agree with one another, remain unimpaired. Section 20 of the Law of 1903 having been passed subsequently to 1891. By Section 15 of 1891 and 18 of 1903 it is enacted — "It shall be lawful for the King and the Privy Council to pass Ordinances between the meetings of the Legislative Assembly. After the King has given his assent and affixed his signature to such Ordinances they shall become law and have the force of Law between the meetings of the Assembly. Such Ordinances shall be submitted to the Legislative Assembly upon its next meeting and the Assembly has the power to approve amend or repeal such in accordance with Section 54 of the Constitution." There is no restriction in either 15 of 1891 or in Section 18 of 1903 or in Section 54 of the Constitution upon the passing of Ordinances by the King and Privy Council and the restrictions of Section 20 of 1903 seem to be at variance with the Constitution. The appellant contends that they can only exercise the powers given to them by Section 20 of the law of 1903, but this is not according to the Constitution. Under the Constitution any alteration in the Constitution had to be first passed by the Parliament and then had to be unanimously agreed to by every member of the Cabinet and then it had to be also confirmed by every member of the Privy Council. But in the year 1912 this was altered and now the confirmation required both by the Cabinet and the Privy Council is one of majority of votes. I may point out that the English translation of Section 20 (1) is not correct. It should read not as printed in the translation (to pass ordinances enacting regulations & c) but should read "to pass ordinances". The law was originally passed and published in the Tongan language in 1903 and it was not until 1907 that the English translation was published. In the original Tongan it says "It shall be lawful for the King and the Privy Council to pass "g. lao" i.e. ordinances, and after "such tu'utu'uni" (ordinances) and they shall become "koe lao" (the law) and have the force of "lao" (Law) between the meetings of the Assembly.

The words "g. lao" and g. tu'utu'uni " in Section 18 are interchangeable and mean exactly the same thing, i.e. Ordinances. The word "tu'utu'uni " is an exceedingly general word and means not only a regulation but also an enactment a decision, a ruling an order, and from the context of Section 18 it is plain that the words "g. tu'utu'uni" in that section mean Ordinances or enactments and the correct rendering into English of the Tongan original in Section 20 (a) is "ordinances which may be required" etc. There are no words in the original corresponding to the words "enacting regulations" contained in the English translation. The Section, therefore, is not to be construed in the limited sense sought to be put upon it by the appellant who in his appeal has not quoted the English translation in full, no doubt, inadvertently, he has omitted to insert the words "which may be required in consequence of circumstances arising in the recess of the meetings of Parliament.

Even if Section 20 (1) could alter the Constitution (which has no restrictions) which I do not think it can it appears from the preamble to the Ordinance (No. 10 of 1910) that owing to the "indiscriminate giving of credit" the King and Privy Council were of the opinion that "circumstances had arisen in the recess of the meetings of Parliament" which made it desirable to amend the Law of debt in order to prevent this giving of credit to Tongans and other South Sea Islanders by Storekeepers and Traders, — not only by European Traders but also by Tongan Traders, the words used are "any Trader" and this is a matter which it might be fairly argued came within the scope of Section 20 (1).

Section 20 does not, except by implication, repeal any of the powers hitherto conferred upon the King and Privy Council who had unrestricted powers under Section 18 of the Law and Section 54 of the Constitution and I am of opinion that it was within the power of the King and the Privy Council to pass the Ordinance and this is the way the Legislature has looked at the matter, as it not only confirmed the Ordinance but passed it as a new Law.

- 10 & 11. The Ordinance has no retrospective operation and it became law and had the force of Law according to Section 18 of 1903 which is the same as Section 15 of 1891, after the King had given his assent and affixed his signature. It lay with Parliament to either confirm it or repeal it. It did not repeal it and the Ordinance had force up to the time of confirmation from which time it became law by virtue of the enactment of Law XI of 1912 and has consequently had force continuously since it was published in ordinance form in 1910 consequently neither the Law nor the Ordinance are ultra vires to Section 20 of the Constitution as they have no retrospective operation.

12 & 13. The appellant claims that the Ordinance and the Law are both *ultra vires* to Section 4 of the Constitution, but I cannot hold that this is class legislation within the meaning of Section 4. It is restrictive legislation and is applied to all classes of the community, to Chiefs and commoners, to Europeans and all other foreigners and to Tongans alike.

14. The appellant further claims that the law of 1912 is *ultra vires* to the provisions of Articles of the Treaty of 1897:—

"The subjects of Her Britannic Majesty shall always enjoy in Tonga and Tongans shall always enjoy in the territories of Her Britannic Majesty whatever rights, privileges and immunities they now possess or which are now accorded to subjects of the most favoured nation and no rights, privileges or immunities shall be granted hereafter in Tonga to the subjects of any Foreign State which shall not equally and unconditionally be granted to the subjects of Her Britannic Majesty."

And claims that all rights privileges and immunities then possessed or enjoyed by Britishers in Tonga should be enjoyed always by them, and consequently that if they were under no disability to sue Tongans for debt in 1879 that right still remain to Britishers and cannot be taken away from them; and he argues that if there had been no Customs duties imposed in Tonga in 1879 Britishers would retain at the present time the privilege and right to import goods free of duty. If Article II of the Treaty is to be so construed then no imposition of duties or taxation whatever, which was not imposed in 1879, no enacting of useful or needful Legislation concerning quarantine or customs duties etc. no restrictions as to trading, such as trading or Coasting Licenses could be imposed upon the Britishers; this is a view that I cannot uphold.

That useful and remedial and necessary Legislation could not be passed in Tonga since 1879 which could reach or affect Britishers, if there were no controlling legislation then in force would be inconvenient, unreasonable and absurd. To decide otherwise would be to consign Tonga to stagnation and practically close the way to any improvement since the time of the Treaty, and debar Parliament from the passage of useful and necessary laws and practically deprive it of the powers of legislation. The Tongan Government has never held this view as it proved by many of its laws since 1879 and the British Government, the other contracting party to the Treaty does not uphold such a contention, e.g. Tongans and South Pacific Islanders are not allowed now to reside in Australia (British Territory) although they had that privilege in 1879 by the Treaty, according to the appellant, they still have that privilege

For these reasons I therefore, cannot grant the application of the appellant to suspend the operation of the Law of 1912, published in Gazette No. 17 dated the 21st of September, 1912, and his application is refused, neither can I for the above reasons reverse the judgment given by the Magistrate. The judgment of the Lower Court must be upheld and the appeal dismissed.

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