

S. MATAELE & H. MAFILE'O v. THE PREMIER.

(Civil Action. Thomson C. J. Nuku'alofa, 5th December, 1947).

Distress Warrants — Issuing Execution — Judgments more than five years old — Limitation of Action — Action against the Government — Liability of Magistrates — Interpretation of Statutes — English principles when applied — Cap. 4. S. 16.

This was an application by the Plaintiffs for (1) a declaration that a distress warrant may be issued on a judgment obtained more than five years before the application for the warrant and (2) for damages against the Government arising out of the loss they had suffered owing to the Magistrates refusal to issue warrants on judgments more than five years old. The defence submitted that S. 16 of Cap. 4 only applies to initiating proceedings and does not limit the time within which a judgment may be enforced, and further with regard to the claim for damages judgment must be for the defendant for in Tonga no action in tort lies against the Government.

HELD. That the Plaintiffs were entitled to the declaration sought but were not entitled to damages because the Magistrate had acted in good faith on a mistaken view of the law.

EDITOR'S NOTE: The Chief Justice does not specifically refer to the submission that no action lies in tort against the Government, deciding the issue of damages on the general immunity of Magistrates when acting in good faith within their jurisdiction, but it is submitted that his judgment is an indication of his view that such an action does lie, otherwise he would have disposed of the matter on the broader ground that the Government could not be sued.

The facts are sufficiently set out in the judgment.

The Plaintiffs in person.

Richardson (Legal adviser to the Government) for the Defendant.

C. A. V.

THOMSON C. J.: The facts in this case are not in dispute as regards their general nature although they have not been ascertained in detail.

More than five years prior to November, 1942 the present plaintiffs had obtained judgments in the Magistrate's Courts against certain persons and in November, 1942 the judgments were unsatisfied. In that month the Legal Adviser to the Government issued an instruction to all Magistrates that the effect of Section 16 of the Supreme Court Act 1903 (Cap. 4) was to bar all proceedings to enforce judgments when no steps had been taken for five years after judgment. Not unnaturally, when one considers their respective standards of professional qualification, the Magistrates accepted this instruction, though of course they were not bound to do so, and when the present plaintiffs applied for the issue of distress warrants on the judgments which were more than five years old they were refused.

On the refusal the Plaintiff's remedy was undoubtedly clear. It was to come to the Supreme Court on appeal and have the question of law decided. They did not, however, take this course but awaited till September, 1947, a period of almost five years and then issued the writ in the present proceedings. They now in effect claim two things :

- (1) A Declaration that their right to enforce their judgments is not barred by the fact that in any one case more than five years have elapsed since the date of the judgment without any steps being taken; and
- (a) Damages for the loss they allege they have sustained by reason of their being unable to enforce their judgments since 1942.

As regards the first barrel of their claim the question turns on the interpretation which should be put upon Section 16 of the Supreme Court Act, the material portion of which reads as follows:

"16 (1) It shall not be lawful to sue any person for debt or damages after the expiration of five years from the date on which such liability was incurred

There is in the section no reference in terms to proceedings by way of execution and what I have to decide is whether or not such proceedings are included in the word "sue".

To my mind little or no assistance is to be obtained from outside the wording of the section itself. Prior to 1942 it was apparently the practice of the Tongan Courts to act on the basis that the period of limitation did not apply to execution proceedings but I can find no trace of the practice having previously received any judicial consideration. Nor is any assistance to be derived from a consideration of the English law. When a section of a Tongan statute is in identical terms with a section of an English statute the Tongan Courts will be extremely reluctant to disregard the interpretation put upon the English section by the English Courts. But they will be equally reluctant to read non-existent words into a Tongan statute simply because such words are to be found in an English statute dealing with the same subject.

I am not concerned with what I myself think the Legislative ought to have done. Nor am I entitled to assume unless such assumption is clearly justified by the words of the Act itself, that when the Legislature applied the English principles of limitation of action in Tonga it intended to apply it to exactly the same extent as it applies in England. I can only infer the intention of the Legislature from the words it has used and I am satisfied that when it used the words "sue for debt or damages" and those words only, its intention was that those words should be interpreted in their every day sense of commencing a legal action. I am reinforced in this opinion by a consideration of the Tongan Language version of the Act where the word used is "faka'ilo", for the ordinary usage of the Tongan language "faka'ilo" means to take legal action in the sense of making a complaint to a Court and so commencing proceedings to establish a right to some remedy and I am satisfied that had the intention been to include the enforcement of the remedy then some such expression as "faka-malohi" or "fakatautuki" would have been used in addition to the expression "faka'ilo".

The Plaintiffs then are entitled to a declaration that the period of limitation of five years mentioned in Section 16 of the Supreme Court Act does not apply to proceedings by way of execution. And I would emphasise that decision is binding on all the lower courts of the Kingdom who are not at liberty to disregard it. As far as the Government are concerned, if they consider the position unsatisfactory they have their remedy which is to persuade Parliament to amend the statute.

As regards the Plaintiffs' claim for damages, that must clearly fail. If a Magistrate in good faith acts on a mistaken view of the law neither he nor anyone who has given him advice in good faith can be sued for damages. If the Plaintiffs have suffered loss it is entirely their own fault in not appealing against the decisions when they were made but waiting for five years to commence the present proceedings. "The law helps wakeful people, not those who sleep".

As regards costs the Plaintiffs have succeeded in one portion of their claim but have failed in the other. It is accordingly ordered that each side do pay its own costs.
