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May 11.

[CIVIL JURISDICTION.]

TOWN BOARD OF SUVA *v.* SMART AND COMPANY.

Liability to rates—Seaward boundary of town of Suva—Ordinance XVI. of 1883, *s.* 57—*Proclamation of* 26*th November*, 1886, *as to the seaward boundary of the town of Suva—Proclamations of* 5*th December*, 1884, *and* 6*th November*, 1889, *as to the seaward boundary of the town of Levuka—High-water mark.*

The seaward boundary the town of Suva, which was fixed as "along high-water mark" by Proclamation of 26th November, 1886, does not remain fixed at the line of high-water existing at that date, but follows the line of high-water for the time being. And the fact that in the case of the town of Levuka, which had a similar seaward boundary, two Proclamations had brought certain reclamations of land within that boundary forms no precedent to the contrary.

This was an action wherein the Town Board of Suva sued the defendants, Smart & Co., in the Commissioner's Court for the sum of 12*l.* 10*s.*, being rates on the assessed value for rating purposes of certain land in Suva, described as "Reclamation off Thomson-street."

This case which was heard before Hamilton Hunter, Esquire, Commissioner of the Supreme Court, on 30th April, eventually resolved itself into a question as to whether the ground on which the rates in dispute were levied is within the town, so far as the seaward boundary along high-water mark is concerned. The Commissioner reserved his decision, and on May 4th gave his judgment in favour of defendants in the following terms:—

This is a claim for the sum of 12*l.* 10*s.*, being the amount of rates sought to be levied on the assessed annual value of a certain piece of land known as the "Reclamation" situated to seaward of Thomson-street and owned by the defendants, Smart & Co.

The plaintiffs, the Town Board of Suva, have two modes of recovering rates due—

1. Under the principal Ordinance, No. XVI. of 1883, s. 57, by a warrant of distress.

2. Under the amending Ordinance, No. III. of 1885, s. 8, by an action in the Supreme Court.

Section 8 is as follows:—"In addition to any mode or remedy provided by section 57 of the principal Ordinance for the recovery of rates which have been or may hereafter be assessed or imposed by any Town Board and which now or hereafter shall be due payable and recoverable every such rate may be sued for and recovered by such Town Board as a simple contract debt in the Supreme Court under the Summary Procedure of the said Court."

The plaintiffs in this case, having elected to pursue the remedy provided by the amending Ordinance, *i.e.*, by an action in the Supreme Court in its Summary Procedure, are bound by that course, and cannot now seek to deprive the defendants of the rights given to parties defending cases of simple contract debts sued for and sought to be recovered by an action in the Supreme Court.

This deals with the question raised by the learned counsel for the plaintiffs that, the defendants not having appealed against the rating in accordance with the principal Ordinance are now debarred from questioning the validity of the rate.

The defendants plead "not indebted," on the grounds that the reclamation in question is outside the limits of the town of Suva, and, therefore, the rating by the Board is *ultra vires*, they having no authority to levy rates on land outside the boundaries of the town.

The powers of the Town Board to levy rates are conferred on them by the Towns Ordinance, No. XVI. of 1883, and these powers are strictly limited to "all lands, houses, warehouses, counting-houses, shops and other buildings and tenements or hereditaments within the boundaries of Towns." Under the provisions of the Ordinances of 1883 and 1885 the Governor has power to constitute towns and define their boundaries by proclamation. Provision is also made for the extension and alteration of town boundaries by Ordinance X. of 1884, which says:—"The Governor, in accordance with any resolution from time to time passed by the Legislative Council, may by Proclamation under his hand and under the seal of the Colony extend or alter the limits and boundaries of any town which may have been or may hereafter be constituted according to law, and by such proclamation may

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define such extended or altered limits and boundaries, and the town so proclaimed and defined shall be deemed to have been proclaimed within the meaning and for the purposes of Ordinance XVI. of 1883."

The boundaries of the town of Suva were first proclaimed in *Gazette* No. 7, of 2nd July, 1881, in which the words "by the sea" occur in defining the limits of the town.

These were altered by Proclamation contained in *Gazette* No. 58, of 20th November, 1886, curtailing the limits of the town and making "high-water mark" one of the boundaries.

The town of Levuka, proclaimed under the same Ordinances by which the town of Suva is governed, was first proclaimed in *Gazette* No. 1, of 5th January, 1878. In this no mention is made of "high-water mark," the words used being "along the coast."

These boundaries were altered by Proclamation in *Gazette* No. 33, of 10th October, 1884, and in the amended boundaries the words "along high-water mark" are used. Thus the sea boundaries of both Suva and Levuka are defined as along "high-water mark."

The question is, what construction can be placed on these words as defining a boundary.

The commonly accepted meaning of the words "high-water mark," when used in defining a boundary to land, where the owner incurs the risk or benefit of the sea encroaching and taking, or, receding and making land is hardly applicable to lands in Suva or Levuka.

Where grants are not issued to high-water mark and when by special concession foreshores have been granted, those foreshores have been brought within the limits of the towns by proclamation.

It is clearly laid down by Maxwell *(Interpretation of Statutes)* "That the intention of the Legislature is invariably to be accepted and carried into effect, whatever may be the opinion of the judicial interpreter of its wisdom or justice."

Acting upon this principle, I found that after the seaward boundary of Levuka was defined as "along high-water mark," certain lands were reclaimed on the foreshore, and in order to bring the reclamation within the limits of the town a special Proclamation was issued in *Gazette* No. 39, of 5th December, 1884. Again, in *Gazette* No. 37, of 6th November, 1889, a Proclamation was issued bringing certain further portions of the foreshore—for which Crown grants had been issued—within the limits of the town of Levuka.

It is very clear therefore that it was not the intention of the Legislature that lands reclaimed on the foreshores of towns—proclaimed

under the Towns Ordinances of 1883 and 1885 and the Town Boundaries Ordinance of 1884—should be included within the limits of the town for rating purposes except by resolution of the Legislative Council and by Proclamation under the hand of the Governor.

It was contended by the learned counsel for the plaintiffs that the certificate of title under which the defendants are the registered proprietors of the "Reclamation" states that this land is in Suva; but I cannot take the mere description of the locality of land, mentioned in the preamble to a certificate of title, to override the distinct action of the Legislature in construing the powers given to a Town Board to levy rates within a prescribed district limited to certain boundaries under a resolution of the Legislative Council and proclaimed in accordance with Ordinance X. of 1884.

I must therefore hold, in the absence of any proclamation according to law bringing the reclamation in question within the limits of the town of Suva, that the rates now sued for are illegal and void, and I give judgment for the defendants with costs.

On 11th May the matter came on for re-argument and review before his Honour the Chief Justice, the points relied on being substantially the same as those raised in the Commissioner's Court.

Mr. Solomon, Q.C., for the plaintiffs.

Mr. Garrick for the defendants.

H. S. BERKELEY, C. J. This case, which was originally heard before the Chief Police Magistrate, sitting as a Commissioner of the Supreme Court in its summary jurisdiction, was for the recovery of 12*l.* 10*s.* claimed to be due by the defendants for rates. The case arose out of a dispute between the defendants and the Town Board of Suva as to the seaward boundary of the town of Suva, the plaintiffs contending that some land, recently reclaimed by the defendants on the Suva foreshore, was within the town of Suva and so rateable; the defendants insisting that the lands were outside of the town boundaries and consequently not rateable.

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The case now comes before me to be reviewed under rule 12 of the Summary Procedure Rules 1876.

The Commissioner has given judgment for the defendants on the ground that the land in respect of which the rates are claimed is not within the limits of the town of Suva, and so not liable to be rated; he holding that the seaward boundary of the town remains fixed at the line of high-water existing at the date of the Proclamation of the 26th November, 1886, by which the limits and boundaries of the town of Suva were defined and declared.

The words of the proclamation referred to, so far as material, are those which declare and define the seaward boundary of the town which is declared and defined to be "the sea-coast along high-water mark." It is conceded that the reclaimed portion of foreshore, the rates upon which are now sued for, is, and was, when the rates were imposed above the present high-water mark, and is, therefore, as a fact, within the line which at present follows the sea-coast along high-water mark.

It is contended, however, that the present line of sea-coast along high-water is not the true and legal seaward boundary of the town, but that the line of sea-coast along high-water mark, as it existed at the date of the Proclamation of the 26th November, 1886, now an imaginary line, is the true and legal boundary; and that so it must remain until it be otherwise declared by proclamation; and in support of this contention it was argued by the defendants that the seaward boundary of the town of Levuka, which is likewise along high-water mark, had, on more than one occasion, been altered by proclamation so as to bring reclaimed foreshore within the town boundaries.

It is evident from the very careful written judgment of the Commissioner that this contention, apparently supported by precedent in the case of the town of Levuka, had great weight with his Honour in coming to the conclusion at which he arrived.

I, however, disagree with that conclusion, and I do not think any weight need be attached to the proclamations referred to; first, because they were, in my opinion, unnecessary for the object they were designed to effect; and, secondly, because they did not in anyway alter the seaward boundary of Levuka as it is contended they did.

It is said that, after the seaward boundary of Levuka was fixed as being along high-water mark, certain land was reclaimed on the foreshore, and, in order to bring the reclamation within the limits of the town, a special proclamation was issued on two separate occasions in 1884 and 1889. Now, bearing in mind that at the time when these proclamations were issued the seaward boundary of Levuka was along high-water mark, and bearing in mind the contention that the seaward boundary was altered by a proclamation on two separate occasions, I look at the proclamations themselves and I find that by neither the one nor the other was the seaward boundary of Levuka altered in any way whatever. Those proclamations merely declare that certain portions of reclaimed foreshore shall be included within the town boundaries. It is no doubt true, speaking generally, that where it is desired or becomes necessary to alter the boundaries of a proclaimed town, a resolution of the Legislative Council, followed by a proclamation by the Governor, is necessary; but, in the instances referred to as a precedent, "in the case of Levuka," from the nature of the seaward boundary along high-water mark the necessity

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for alteration of that boundary did not arise, nor was it ever desired that such seaward boundary should be changed, nor as a matter of fact did the proclamation change it. Before the proclamations, the seaward boundary was along high-water mark and so it remained afterwards. All the proclamations did was to declare that some reclaimed land which was inside the line running along high-water mark was to be deemed to be included within the town boundary,—which was unnecessary. I hold that the expression "high-water mark" as used in the Proclamation of the 26th November by which the boundaries of the town of Suva are defined, is not to be taken as limited in its meaning to the line of high-water mark as it then existed, but that it means the line of high-water mark for the time being. I regard the expression "by the sea-coast along high-water mark" which appears in the Proclamation of the 26th November, 1886, as the definition of the seaward boundary of Suva, as an elastic expression and as including not only land above high-water mark at the date of the proclamation but all lands which might from whatever cause from time to time become above high-water mark. Being above high-water mark they are, *ipso facto*, within the seaward boundary of the town which extends seaward to a line following the sea-coast along high-water mark. I see nothing in the expression "along high-water mark" to induce me to give it the limited interpretation contended for by the defendants. No good result would follow such an interpretation and this much public inconvenience would result therefrom that, in each instance of reclamation of the town foreshore, however insignificant, it would be necessary to invoke the assistance of the Legislature and Executive in order to bring such reclamation within the town boundaries.

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The judgment of the Commissioner must, therefore, be reversed, and judgment be entered for the plaintiffs for the amount claimed with costs generally.

*Judgment for plaintiffs with costs.**

[CIVIL JURISDICTION.]

June 15.

WILSON *v.* BANK OF NEW ZEALAND.

Real Property Ordinance 1876, *s.* 93, *sub-ss.* 4, 5—*Removal of Caveat—Insufficiency of Summons—Costs.*

On an application by summons under sub-s. 5 of s. 93 of the Real Property Ordinance 1876 for the removal of a caveat lodged by an equitable mortgagee the Court held that the creditor had no right to put a caveat upon the register unless he was prepared at once to enforce his lien; and ordered the removal of the caveat, but, under the circumstances, without compensation and without costs.

Semble, the grounds of the application should be stated in the summons itself, and not in the affidavit filed in support.

This was an application by summons under s. 93, sub-s. 4, of the Real Property Ordinance 1876, by William Wilson, of Melbourne, Victoria, claiming as the owner of the Deuba Estate, Serua, and calling on the Bank of New Zealand to remove a caveat lodged by it on the 30th January, 1888, in respect of the above lands, and for compensation for the Bank having put the caveat upon the said land and having continued it up to the present time, wrongfully and without reasonable cause.

The Attorney-General (Mr. Udal) and *Mr. Scott* for the applicant, William Wilson.

Mr. Garrick for the Bank of New Zealand.

* Affirmed on appeal to the Privy Council. L. R. [1893] App. Cas. 301.