Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Smart and Company v. *The Town Board of Suva, from the Supreme Court of Fiji; delivered the 28th April* 1893.

Present:

LORD WATSON.
LORD MORRIS.
SIR RICHARD COUCH.
HON. GEORGE DENMAN.

[*Delivered by the Honble. George Denman.*]

This was an appeal against a decision of the Supreme Court of Fiji, pronounced by the Chief Justice, which reversed a judgment in favour of the present Appellants in an action in which the Respondents sued for 12*l.* 10*s.*, the amount of rates assessed in respect of lands recently reclaimed by the Appellants on what had previously been foreshore on the seaward side of the town of Suva.

The Respondents were not represented before their Lordships, but the case was fully argued on behalf of the Appellants.

The case for the Appellants states that "the "only question in this appeal is whether the "land on which the rates have been imposed is "within the boundaries of the town of Suva"; and, looking at the reasons given at the end of the Appellants' case, and at the statement at page 11, line 15, of the Record their

74952. 100.—5/93.

Lordships can entertain no doubt that the only ground upon which this appeal can be supported is, if the Appellants can establish that the Chief Justice was wrong in holding that the lands in question, being within high-water mark as it now exists, are rateable, notwithstanding that they are outside of the high-water line as it existed in 1886.

In order to understand the point raised it is necessary to refer to a few documents only.

By an Ordinance of the 13th April 1877, enacted by the Governor of the Colony of Fiji, with the advice and consent of the Legislative Council, called the "Towns Ordinance, 1877," it was enacted in Section 2 that "It shall be lawful for "the Governor by Proclamation under his hand "and the Seal of the Colony to constitute a "Town in any suitable locality and by such Pro- "clamation to define the limits and boundary of "such Town."

By a proclamation dated the 2nd July 1881 the town of Suva was proclaimed to be a town within the meaning of the above-mentioned Ordinance, and the limits and boundaries were thereby defined. It is unnecessary to set out all these boundaries. It is sufficient to mention that they were altered by a subsequent proclamation, and that the one to seaward was described as "from "a point on the sea-coast, by the sea," to the point of commencement which was at a point "on the sea-coast," without any allusion to high or low-water mark.

By an Ordinance of the 21st August 1884 it was enacted that the Governor might, in accordance with any resolution from time to time passed by the Legislative Council, by proclamation extend or alter the limits and boundaries of any town constituted or to be constituted, and by such proclamation define such extended or altered limits and boundaries, and that the town specified

in any such proclamation should within the limits and boundaries so proclaimed and defined be deemed to have been proclaimed within the meaning and for the purposes of Ordinance No. 16 of 1883.

This last-mentioned Ordinance was, so far as Suva was concerned, a mere re-enactment of the Ordinance of 1877.

By an Ordinance of 1885, which is to be read and construed together with that of 1883, and the two to be cited as "The Towns Ordinance, "1883–1885," the power to bring an action for rates is given.

On the 26th November 1886 a new proclamation was made which is still in force, and the effect of which is in question in this case.

By this proclamation, after reciting the Ordinance of 1884, it is proclaimed that from the 1st January 1887 the Limits and Boundaries of the town of Suva shall be as defined and set forth in a resolution of the Legislative Council of the previous November, which was as follows, viz., "Commencing at a point on the sea-coast *at* "*high-water mark* on the southern side of "Cakobau Road; thence by the southern side of "Cakobau Road bearing 100° 05′, distance "79·00 chains"; (the southern boundary) thence "bearing 10° 05′, distance 89·40 chains"; (the eastern boundary) "thence bearing 280° 05′, "distance 51·82 chains to a point on the sea-"coast *at high-water mark* in Walou Bay"; (the northern boundary) "thence *by the sea coast* "*along high-water mark* in a south-westerly and "southerly direction to the point of commence-"ment"; (the boundary to seaward on the west).

The Court of First Instance held that the rates in question were invalid on the ground that the words "high-water mark" meant high-water mark as it existed at the time of the proclamation of 1886. The Chief Justice reversed that

decision, on the ground that the land rated, being, as was conceded, above the high-water mark, as it existed at the time when the rate was made, was within the line of high-water mark, and so within the limits and boundaries of the town according to the true construction of the proclamation of 1886.

Their Lordships are of opinion that this view is correct.

Bearing in mind the almost universally variable character of such a boundary as that described, viz., by the sea-coast from a point on the coast at high-water mark to another point on the coast at high-water mark, (both points being themselves necessarily liable to obliteration, either by accretion or encroachment of the sea or other causes, and the intermediate line of coast being in its nature alterable from similar causes), it appears to their Lordships that it cannot have been the intention of the proclamation to create a boundary which should have the effect of requiring a fresh proclamation to bring within the town any land which from time to time might from any cause become within the continuous high-water line on the seaward side. Their Lordships do not desire to express any opinion as to what might be the case with regard to any land reclaimed on the foreshore which is altogether outside of the continuous line of high-water; but they do not understand this to be such a case, nor is any such question raised by the Appellants in their reasons, nor is it consistent with the statement referred to in the judgment appealed from.

The ground upon which the Judge of the Court of First Instance held that the line as it existed in 1886 was still to be considered to be the western boundary of the town, was that in the case of another town in Fiji called Levuka, when certain lands upon the foreshore had been

granted to certain persons by the Crown, a proclamation had been made bringing those lands within the boundaries of the town.

Their Lordships have had before them all the proclamations relating to the limits of Levuka, and they find nothing in those proclamations, nor in the facts stated in the Record, to show that the lands brought within the limits of Levuka were lands within either the original high-water mark, or a new high-water mark, caused either by natural or artificial alteration.

The last proclamation in force in the case of Levuka up to the 5th December 1884 was one of the 10th October 1884, which described the seaward boundary of Levuka as "by the sea-"coast along high-water mark." The proclamation of the 5th December was relied upon as showing that the Colonial Legislature must have considered this to be a fixed unalterable line as it existed in October, otherwise there would have been no necessity for a fresh proclamation.

But on careful consideration of the terms of the proclamation of the 5th December, their Lordships find that no alteration of the original boundaries is thereby made, but that the proclamation merely adds to the town certain specific portions of foreshore, of which grants had been made by the Crown to individuals, not stating that these were within any line of high-water mark outside of an original line; nor even that they adjoined the line of high-water as it existed in October.

In the present case, on the contrary, it appears from the language of the Chief Justice, at page 11, lines 15—19 of the Record of Proceedings, that it was 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 this statement, so far as the fact is con-

cerned, is not challenged in the reasons of the Appellants.

Their Lordships therefore see no ground for thinking that the case of Levuka affords any reason for holding that the Local Legislature intended that the proclamation should fix the then existing line of high-water mark as the seaward boundary of the town as contended by the Appellants.

The chief difficulty suggested in the way of holding according to the view of the Chief Justice, was that if the high-water mark, as it exists from time to time, is held to be the western boundary, and the high-water line, by accretion or otherwise, becomes shifted further to the west, then, inasmuch as the southern and northern boundaries are fixed as commencing and terminating respectively at points at high-water mark, and as being of a specified length, the town would lose on the east that which it would gain on the west by the amount of the addition of land on the west caused by the shifting of the high-water mark to westward. Moreover, it was observed, that if the original points at high-water mark are to be regarded as the points of commencement and termination of the southern and northern boundaries described, it would be physically impossible to follow the western boundary, as described in the proclamation, by merely following the new high-water line; for it would be necessary to reach those points in a totally different direction from that of the new high-water line, so as to complete the boundaries of the town.

Their Lordships are however of opinion that, while it was the intention of the proclamation, and while its true construction is, that the western boundary of the town should be the sea-coast at high-water mark as it should exist from time to time, it was not intended that the eastern

boundary should be varied by any change of the high-water mark, or that the southern and northern boundaries should be invariably of the same length as the lines described in the proclamation. In order to fix the eastern boundary it was necessary to define the length of the lines commencing and terminating respectively at the northern and southern points chosen on the then line of high water; but when the eastern boundary was once fixed their Lordships are of opinion that it became the boundary of the town, not liable to be altered, except by fresh proclamation, and that the northern and southern boundaries were also sufficiently fixed by the two straight lines laid down in the proclamation, both merely requiring to be prolonged in a straight line as the high-water mark moves to the west, or shortened as it moves to the east, so as always to touch the high-water mark for the time being at their western extremity.

For these reasons their Lordships are of opinion that the judgment of the Chief Justice was right, and should be affirmed, and they will humbly advise Her Majesty to that effect.